IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BRADFORD

and ST ALBANS

HHJ COLIN BURN/HHJ RICHARD FOSTER

T20180059/T20210378

CASE NOS 202401994/B2, 202402004/B2 & 202402008/B3

Neutral Citation: [2024] EWCA Crim 1653

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 13 December 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE McGOWAN DBE
SIR ROBIN SPENCER

REX
V
AEU

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MISS K JONES appeared on behalf of the Appellant/Applicant
MR J MARSLAND appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: We have two applications before us. One relates to a conviction for being concerned in the supply of cannabis. The applicant pleaded guilty to that count on 23 July 2018 in the Crown Court at Bradford. He asserts that his conviction is unsafe. In particular his case is that he pleaded guilty because of an improper comment by the judge in relation to sentence before he tendered the plea.
2. The second application concerns the conviction of the applicant on 12 April 2022 in the Crown Court at St. Albans. He was convicted on his plea of guilty of producing a controlled drug, namely cannabis. He was sentenced to three years six months' imprisonment. He applies for leave to appeal against that conviction. He also appeals against sentence to which we may have to come in due course.
3. Both applications were made out of time. In relation to the 2018 conviction the application is approaching six years out of time. Application is made for an extension of time in each case.
4. The issue common to both applications is an alleged background of trafficking. The applicant is a Vietnamese national. He claims that in 2018 he had a viable defence pursuant to the Modern Slavery Act 2015. He says he was not advised about that defence. It is also asserted that, had the prosecution been made aware of his trafficked status, it might well not have prosecuted him at all.
5. In relation to his conviction in 2022 the applicant's case is that, had the prosecution known then what is known now about him, he might well not have been prosecuted.

6. In view of his potential status it is in our view necessary and appropriate for his identity to be withheld, therefore he will be anonymised for the purpose of these proceedings. He will be known as AEU.

7. We can deal with the application in relation to the conviction in 2018 very shortly. The applicant was one of a number of men prosecuted for offending in relation to a substantial cannabis farm at a house in Bradford. The applicant was not the only man who pleaded guilty to an offence arising out of the activity at that house.

8. In June of 2022 one of the applicant's co-defendants was given leave by this court to appeal against his conviction and his appeal was allowed. The judgment of the court is reported as BWM [2022] EWCA Crim 921. The critical factual feature of the case for our purposes appears at paragraph 12 of that judgment. In short form what happened was that, on the day the case was listed for trial, the judge made an unsolicited observation that the sentence for the defendants would be of the order of 12 months were they to plead guilty. According to the judge this meant that they would have served all or at least nearly all of the custodial element of the sentence. This observation acted as an indication as to sentence. It was not given in the appropriate manner. It did not conform to the Goodyear procedure. It should not have been given. In BWM's case that indication as to sentence was found to have been decisive in leading him to plead guilty. The plea was vitiated by the improper pressure that had been placed on him. His conviction was quashed.

9. The respondent to the application by AEU concedes that the same conclusion inevitably must be reached in the applicant's case. This concession is rightly made. In Moore [2023] EWCA Crim 1685, at paragraphs 22 and 23, this court reviewed the authorities on

pleas of guilty being vitiated by things said prior to plea by the judge.

10. As a general rule, to which there are some exceptions but none relevant to this case, it is wholly inappropriate for a judge to give an unsolicited indication of sentence. It follows that in relation to the conviction in 2018 we extend time, we give leave to appeal against conviction and we allow that appeal. In those circumstances it is unnecessary for us to consider the substantive merits of any argument in relation to that conviction concerning trafficking and a possible defence under the Modern Slavery Act 2015.

11. We move then to the later conviction. The appellant was released from prison in 2018. On 15 October 2021 he was at a house in Ware in Hertfordshire. He was the only person at the house. He had a bedroom there. The kitchen apparently was stocked with food and alcohol. Various areas of the house were being used to cultivate cannabis plants. There were over 400 plants of different sizes growing. The yield from the crop then growing would have been at least £130,000 and very possibly a great deal more. There was the means to grow three to four crops per year.

12. On his arrest the appellant was interviewed. He told the police that he had got into debt of about £130,000 in Vietnam because of a failed to attempt to start a business. He had met some people who offered to traffic him. Eventually he got to the United Kingdom. He had been placed in a cannabis farm in 2018 from where he had been arrested. After his release the same people had tracked him down. They had forced him to work at the cannabis farm in Ware. He had been there for about four months before his arrest. He was responsible for the care of the cannabis plants. He had a front door key. He could have physically left if he had wanted to. He did not so because he feared he would be harmed.

13. The appellant was charged with producing a controlled drug of class B. He was sent to

the Crown Court for trial. On sending, the relevant form recorded his defence as "potential Modern Slavery defence".

14. The plea and trial preparation hearing was on 15 November 2021. At this point it was said by the prosecution that AEU had been referred under the National Referral Mechanism, commonly known as the "NRM". No decision had been made. AEU pleaded not guilty and the case was adjourned for trial.

15. The Referral made at that time to the NRM appears not to have been processed for some reason. There was a further Referral made on 22 February 2022. Within three days a positive reasonable grounds decision was made. That is a preliminary step in the NRM process. Whether that decision was communicated to, amongst others, the CPS is, on the evidence, not clear.

16. The trial was listed for 11 April 2022. There was a flurry of activity in the prosecution camp in the period leading up to the trial date. On 8 April 2022 a police officer emailed the CPS to inform them that a conclusive grounds decision would not be available prior to the trial. Prosecution counsel advised that the Crown Prosecution Service needed the conclusive grounds decision in order to carry out a review of the decision to prosecute. Although counsel did not refer in terms to the well-known four-stage test applied by the Crown Prosecution Service, that clearly was what he was talking about.

17. That four-stage test requires four questions to be posed. First, is there reason to believe that the defendant is a victim of Modern Slavery? Second, if the answer to that is "yes", is there clear evidence of the defence of duress? If so, the case should not proceed. Third, if there is no clear evidence of duress is there nonetheless clear evidence satisfying the defence under section 45 of the 2015 Act? If there is, again the case should not proceed. Fourth, even if the answer to that is "no", taking into account all the

circumstances is it in the public interest to proceed?

18. The Crown Prosecution Service in writing expressed the view that the outstanding NRM decision did not affect the position. Regardless of the final decision the case would proceed because it was said there was evidence negating the defence under section 45.

19. On the day the case was listed for trial, AEU was not produced. Counsel was able to speak to him over a video link. Counsel was able to explain the options given that the conclusive grounds decision was not available. It would have been known that even if it had been positive that such a decision would not have been admissible in evidence. Rather, it would have been persuasive in terms of inviting the Crown Prosecution Service to decide on whether to prosecute at all.

20. Counsel advised that there were three options:

    1. To continue with the trial based on a defence under section 45 of the 2015 Act, relying on the evidence of AEU alone.
    2. To apply for an adjournment in order to await the conclusive grounds decision with which to try to persuade the CPS not to prosecute.
    3. To plead guilty.

21. All of that was explained to him. We know that because it was set out in a letter sent to AEU after the sentence had been imposed. Moreover, he signed an endorsement the following day to that effect. The full implications of a plea of guilty were explained to him. We have set out the sentence that in due course was imposed.

22. We have evidence by way of two witness statements from AEU in which he gives a rather different account of the events surrounding his plea of guilty. In his statement dated March 2023 he said that his solicitors advised him to plead guilty to get a shorter sentence with no reference of any defence of being forced to do it being mentioned. In

May 2024 he said that he was not told about his defence by his lawyers. Those are assertions made by the appellant which we reject. It is quite clear that his lawyers in 2022 dealt with the matter entirely appropriately. In our judgment counsel who appeared for the appellant before us very properly made no criticism of the trial lawyers who represented him during those proceedings.

23. What counsel does say is that the CPS did not apply the four-stage test. What they said in response to counsel's advice shows that their approach was misconceived. The failures in April 2022 are accepted by the respondent to this appeal. What is not accepted is that a proper review would have led the prosecution to discontinue the case. It is said that the case would have been prosecuted to trial. It is implicit in the respondent's argument that the appellant would have been convicted by the jury. Thus, his conviction is not unsafe.

24. It is clear from the copious authority that there is on this subject in this court that, even where there are plain procedural failures at the time of the original proceedings, this court can and must take a view as to what would have happened in the light of all the available material. What matters in cases such as this is what the evidence is about the particular individual.

25. That there are serious problems with trafficking Vietnamese citizens is clear beyond any reasonable doubt. We have in this case a lengthy statement from a Mr Garrett, who calls himself an expert on this issue. Irrespective of his evidence the court knows from widely available material, particularly US State Department information, that trafficking of Vietnamese citizens is a genuine phenomenon. It is not necessary for us in this case to review all the independent material which is available.

26. The Crown Prosecution Service in any decision about a Vietnamese citizen in these

circumstances will take account of that material. But it is the circumstances of the individual that are far more important.

27. We have heard evidence from the appellant. That of course is not something that would be available to the Crown Prosecution Service in the course of taking the decision. It seems to us that the appropriate step is first of all to consider the matters that the Crown Prosecution Service would have had available to them in order for us to assess the outcome had the review been carried out by reference to documentary material.

28. What the Crown Prosecution Service would have had first would have been a conclusive grounds decision of the competent authority dating from 2018. That was a negative decision. It related to events in 2018. However, it did set out an account of how the appellant came to be involved in a drugs enterprise. The Authority set out what it termed the salient points of the case as follows:

> "You travelled from Vietnam of your own accord in order to send money back to your family as they owed a debt. You worked many jobs as a labourer before coming to Bradford on the promise of paid work. You knew the plants you were watering were an illegal drug. You were only at the house for a week or so. You suffered no physical abuse. When you rang the owners and asked to leave you were told you would have to wait."

29. Later in the decision this appears:

> "You do not claim to have been trafficked to the UK. You claim to have come here illegally of your own free will and to have been able to work illegally and earn money in the UK. You agreed to go to Bradford on the promise of more paid work. Your claim to have been subject to modern slavery at the house in Bradford is considered to be inconsistent with your account of illegal work."

30. We interpose to say that counsel who appears today for the appellant attacks that decision

as being based on insufficient material. Nonetheless, it was something that would have been properly considered by the Crown Prosecution Service.

31. In 2023 the competent authority made a conclusive grounds decision which was favourable to the appellant. It set out first of all in the minute of the decision what the appellant had said at various points about how he came to be in this country. The first account was that he had started a business and borrowed money in Vietnam. He was unable to repay that money. In 2013 those from whom he had borrowed the money had come to his house and beaten him, his wife and his children. At the end of 2014 or at the beginning of 2015 they had said that the appellant would have to go to Europe for the debt to be paid off and that they had a lot of people working for them who would be violent towards anyone who did not pay their debts off quickly enough. The second account that had been given was that the appellant had met some people who had offered to traffic him to the United Kingdom. A gang had organised the travel. The appellant had travelled from Vietnam to China on his own. Then he had gone from China to Poland by aeroplane and thereafter from Poland to France by car. Once in France he had been told that he would be travelling to the United Kingdom but it took two years to get to the United Kingdom. In the intervening period he had worked in France doing various jobs. His family had been threatened if he did not work.
32. The final account recorded in the Decision is that an agent arranged the appellant's travel. He had travelled to China not by aeroplane but in the back of a lorry. In July of 2016 he had travelled to the Ukraine in the back of a lorry where he had stayed for 4-5 months. He then had gone to Poland where he stayed for a week before moving on to France. He stayed in France for four months before travelling to the United Kingdom again by lorry.
33. The account given to the Single Competent Authority via various documentary sources it

had available to it of what had happened thereafter was that, in the United Kingdom, the appellant had first been taken to a house where he had stayed for several months. He was never allowed out. He did no work. He then was placed in the cannabis factory in Bradford. He had only been there for 10 days before his arrest. He had found construction work after his release from prison until the traffickers had found him again. They had threatened the appellant with violence and forced them once again to work for them. He told one of the sources relied on by the Single Competent Authority that he had been scared to leave the house from where he was arrested in 2021. He had tried on one occasion to escape but had been found in the area. He had been subjected to physical violence.

34. The Decision concluded that the appellant had given a generally thorough, plausible and relatively consistent account. Some inconsistencies were noted relating to the journey to the United Kingdom but only limited weighting had been applied to that inconsistency. Overall there were no significant credibility issues within the account. That was the conclusion of the Single Competent Authority. We have drawn out the various inconsistencies there were in that decision. The Crown Prosecution Service would have been wholly entitled to take those into account. There were three very different accounts of the journey to the United Kingdom and the reason for it. Moreover, the description of events at the house in Ware in the Decision was to be contrasted with what the appellant had told the police.

35. We heard the evidence of the appellant. This concentrated on the events which led him to be in the house in Hertfordshire. He told us that between 2018 and 2021 he had had no contact with his traffickers. During that time he had been in regular contact with his wife and children, who had been the potential victims of any threatened violence. They had

moved from their previous address and, in the regular conversations he had with his family, there had never been any suggestion that they had been threatened again. His account was that quite by chance he met his traffickers who then placed him in the house in Ware. He agreed that he had the keys to that house, he had a telephone, he had access to food and alcoholic drink and he had £120 in cash in his possession. Yet he said he had no choice but to work in the house in Ware because of his wife and children, albeit that his wife and children had not been threatened for three years and lived at a different address to the one known to the alleged traffickers.

36. Nothing in what the appellant said to us gave any support to the proposition that the Crown Prosecution Service, had they known what he could have said, would have taken a different view of his willing participation in producing cannabis. Rather, they would have been fortified in their view that it was appropriate to prosecute. We apply the approach that was set out by this court in A [2020] EWCA Crim. 1408 and Henkoma [2023] EWCA Crim 808. We are quite satisfied that, notwithstanding the procedural errors that were made by the Crown Prosecution Service, they did not cause any injustice. There is no merit in the proposed appeal against conviction. It follows therefore that in that case we refuse to extend time and refuse leave to appeal against the 2022 conviction.

37. We turn then to the appeal against sentence. There are three grounds upon which the appellant appeals against the sentence that was imposed, namely one of three years and six months. First, it is said that he should have been sentenced on the basis that he played a lesser role rather than a significant role. Second, the judge did not give sufficient weight to the fact that the appellant had been exploited. Third, there was insufficient credit for his plea of guilty.

38. We will deal first with the argument about the plea of guilty. It is suggested that, because

the NRM process was incomplete, he should have been given more credit for the fact that he pleaded guilty despite the fact that a decision was still awaited. In our judgment the NRM decision was not a matter which played any legitimate part in delaying the plea until the day of trial. This was a man who pleaded guilty only on the day of trial and who was therefore only permitted a reduction of 10 per cent from the otherwise appropriate sentence.

39. In relation to his role, we consider that there were elements of a significant role in his participation in this offence. He was on the face of it at the time of his arrest the only person in charge of this very substantial cannabis growing enterprise. He was somebody who had money in his pocket. He tells us that this was from savings. It is nonetheless the case that in our judgment the judge was right to conclude that there was some financial benefit to him.

40. Equally, there is no suggestion that he had any concept of the nature of this enterprise in terms of its wider significance. Whilst he was an important cog in the machine, he was nonetheless that, rather than any kind of manager in the true sense.

41. In our judgment the judge could and should have reduced the starting point, that is the sentence after a trial, from the figure of four years which appears in the guideline. The range is two-and-a-half to five years. When applying the drugs guideline, a sliding scale has to be adopted. In this appellant's case that sliding scale should have been downwards rather than upwards. That is particularly the case where, as was acknowledged in the course of the sentencing hearing, there was some element of exploitation of the appellant. He was, as the judge acknowledged, acting upon the instructions of others.

42. The judge in his sentence merely identified the starting point in the guideline of four years and reduced the sentence to allow for the plea of guilty. In our judgment had

he applied his mind to the particular circumstances of this appellant, the judge would have reduced the appropriate sentence after a trial to one of around three years. By providing a reduction of 10 per cent for the plea of guilty that would have led to a sentence of two years and eight months. In our judgment the distinction between three years and six months and two years and eight months is substantial. It means that the sentence imposed was manifestly excessive. Therefore we quash that sentence and impose a sentence of two years and eight months' imprisonment in substitution for it. The immediate effect upon the appellant is non-existent because he has served the custodial part of the sentence and is currently at liberty. What the future will hold for him in terms of his presence in this country is not a matter for us.

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