[2023] EWCA Crim 405

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202300955/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 5 April 2023

Before:

LADY JUSTICE CARR DBE

MR JUSTICE JOHNSON

REX
V
DANIELLE ESTABROOK

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MR K WAITT appeared on behalf of the Applicant

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. This is an application for leave to appeal against sentence which has been referred to the full court by the Registrar.

2. In June 2022 the appellant pleaded guilty to conspiracy to facilitate the commission of a breach of UK immigration law between 1 and 9 January 2020, contrary to section 1(1) of the Criminal Law Act 1977. On 16 March 2023 she was sentenced by His Honour Judge Moore ("the judge") sitting in the Crown Court at Canterbury to three years' imprisonment. Her two co-defendants, Jamie Estabrook ("Jamie") and Kenan Parlakyildiz ("Kenan") also pleaded guilty to the same offence. Each was sentenced to four years' imprisonment.

3. The applicant is now 33 years old and has a child who is now two-and-a-half years old. She is due imminently to give birth to a second child following a pregnancy that has been complicated by her Crohn's disease. She is presently not in prison but rather in hospital where, subject to the outcome of today's appeal, she would remain until after her baby has been born. We grant leave.

The facts

4. The appellant and Jamie are cousins. On 8 January 2020 they were intercepted at the UK Border Force tourist controls at the French end of the Channel Tunnel. The appellant was driving a British registered Peugeot hire vehicle, Jamie being in the front passenger seat. When they were stopped and questioned, they told officers that they had been away for two days viewing wedding venues. They said that they had spent one night in Paris and one in Dunkirk. They were able to produce a Euro Tunnel ticket showing that they had left the United Kingdom two days earlier.

5. The officers asked Jamie to open the boot of the vehicle; upon the boot being opened, they discovered an adult male underneath some bags. The officers then opened the offside rear door and noticed jackets hanging over the front driver and passenger seats, covering the rear footwell. They removed the jackets to find an adult female and a five-year old female child. All three of the persons so discovered were Turkish nationals who had no lawful right to enter the UK. They were detained and served with Home Office forms which notified them that they were liable to detention.

6. The Border Force officers seized a number of items, including the appellant's mobile telephone. There were exchanges of messages between the appellant and Jamie relating to the hire of the car, the passage on a ferry, the planning of the trip and the exchange of final reward for the appellant for her services in the sum of £2,500. Jamie had explained to the appellant that he "needed a woman" next to him for the journey. On Jamie's phone was a number for Kenan who had been born in Turkey and whose number was on the Turkish woman's phone. There was contact between Jamie and Kenan between January 2019 and 8 January 2020. On 7 January 2020 Kenan had texted Jamie a set of coordinates in the same area of Paris as a map sent to Kenan's telephone on the previous evening by the Turkish

woman. Kenan had travelled from Dover to Dunkirk on 3 January 2020 with a third man. There had been WhatsApp calls between the third man and Jamie during this period.

7. The appellant was interviewed on the day of her arrest. She provided a full comment interview in which she denied commission of the offence. In a further interview on 1 June 2021 she maintained that she did not know the three Turkish migrants who were found to be inside the vehicle that she had been driving. She went on however to plead guilty at the PTPH on 20 June 2022.

8. She was of previous good character. The court sentenced her without a pre-sentence report despite several requests made on her behalf for such a report to be obtained. Her plea of guilty was entered on a basis, namely that she did not know and had no dealings with Kenan, that Jamie was a distant cousin, that she had had no involvement in making the arrangements but had been recruited as a decoy and to hire a vehicle, since Jamie did not hold a driving licence. She had been given the cash with which to hire the vehicle.

The sentence

9. The judge afforded the appellant 25% credit for her guilty plea. He described the offending as a well-organised conspiracy involving the collection of a mother and her child in Paris and another man around the Dunkirk area. All defendants had been involved for financial gain, the appellant in the sum of £2,500. He recognised her mitigation but said the fact of the matter was that she knew what she was getting herself into.

10. He took what he described as a "starting point" of five years' imprisonment for each defendant. Jamie was granted full credit for his guilty plea but had an appalling record of previous offending. Kenan on the other hand was of previous good character and equally culpable but only afforded 10% credit for what was his very late guilty plea. The judge referred to the appellant's then current pregnancy, her existing child and her Crohn's disease. He commented she had been involved to a lesser degree but had still been heavily involved. She was in his words "the soft face of the criminal act". The group had needed a woman to avoid search if possible. The judge said that he was truly sorry for the children involved, but each defendant had known what they were doing.

Grounds of appeal

11. In focused and forceful submissions for the appellant, Mr Waitt submits that the judge did not adequately explain his sentencing process, and in any event the sentence at which he arrived for the appellant was excessive. His approach ought to have been, first, to determine the appropriate sentence for the offence itself; secondly, to reduce the sentence taking into account the appellant's subservient role, and, thirdly, to take on board the appellant's personal mitigation - which he describes as being “exceptional”. He points to her positive good character, the loss of her medical career and the three-year delay in coming to sentence, none of which factors the judge had adequately reflected in his sentence. Mr Waitt points to the fact that the appellant had managed to separate herself from her previous abusive partner and had a tenancy still available to her, to which accommodation she could be released today. He repeats that the fact that the appellant is pregnant is not

said to be in any way a passport to a lenient sentence; but he says that her Crohn's Disease of itself is impactful; and whilst the fact that the appellant has a child and is pregnant is in no way a shield, it is nevertheless very significant mitigation. He outlines the chronology in relation to the requests made on behalf of the appellant for a pre-sentence report, one having been ordered originally. The direction for a pre-sentence report was then revoked by the judge and two subsequent oral applications for a pre-sentence report were also declined. The result was, says Mr Waitt, that the court was not adequately informed as to the consequences of immediate custody on the appellant's child and unborn child.

12. The appellant's son is cared for by three members of the appellant's family: the child's father and his paternal and maternal grandmothers. However, there are considerable travelling distances involved in the arrangements. There are also concerns about the son's health. Whilst he has now been given the all-clear following the removal of a tumour, he still has to undergo regular screening tests, something which the appellant worries about and is not able to assist with from custody. In terms of the unborn child, it is said that there will be additional complications post-birth for contact between the appellant and the unborn child arising out of the need for the appellant to receive ongoing treatment for her Crohn's Disease.

13. Finally, Mr Waitt submits that in the event that we were to arrive at a custodial term that would allow suspension to be considered as an option, we should take into account the fact that the appellant has now spent time in custody; even in hospital there have been limitations on her access to visitors and difficulties in exercise. There has in effect already been significant punishment.

Discussion

14. As set out above, the judge concluded that he did not need the benefit of a pre-sentence report in order to sentence the appellant, despite repeated requests by her representatives for such a report. This was unfortunate: it was clearly important for the court to be properly appraised of the appellant's personal circumstances, including the circumstances of her child and as yet unborn child. Whilst there is no pre-sentence report now before us, we do have the benefit of significant updated material from Mr Waitt, including as to child arrangements, which we consider to be adequate for our purposes. Mr Waitt confirmed that he did not seek an adjournment in order for further material to be obtained.

15. There is no Sentencing Council Guideline for this type of offending. However, the decision in *R v Le and Stark* [1999] 1 Cr.App.R (S) 422 provides general guidance on sentencing in cases of facilitating illegal entry. The court emphasised the strong policy reasons in favour of deterrent sentences in this context, given the increase in problems of illegal entry. Those comments case apply with equal, if not greater, force today.

16. The relevant sentencing factors were also identified in *Attorney General References Nos 49 and 50 of 2015 (R v Bakht)* [2015] EWCA Crim 1402, [2016] 1 Cr.App.R (S) 4. By reference to those factors, the material points to note on the facts here are as follows:

    i) this was a single isolated trip lasting seven days;

ii) the appellant was of previous good character;

iii) she had a strong commercial motivation;

iv) the offending involved three strangers;

v) the appellant was involved in the hiring and the driving of the car;

vi) she was not involved in any active recruitment herself;

vii) she played a lesser role than Jamie; and

viii) she was not engaged in any exploitation or the application of pressure on others.

17. Our attention has also been drawn to the decision in *R v Roman* [2017] EWCA Crim 6 where there are some factual similarities to be drawn, the case there also involving a young, pregnant female defendant with a child. But as with all cases, each case turns on its own facts, and the offending there involved only a single entrant and there was no payment of significant sums of money.

18. We do not consider that it was appropriate as a matter of principle for the judge to have taken a "single starting point" for all three defendants. The appropriate course for the judge was to identify an appropriate individual term for each defendant by reference to culpability and harm, before considering aggravating and mitigating factors. We consider that such a term for the appellant to have been four years' imprisonment. She played an essential, if lesser, role for significant financial reward.

19. The real question for us is whether a term of four years before credit for guilty plea was manifestly excessive in all the circumstances. There is force in the criticism that it is not clear from the judge's sentencing remarks what weight he gave to the appellant's mitigation.

20. There was, as Mr Waitt submits, substantial mitigation available to the appellant. She was of previous positive good character. She had been diagnosed with Crohn's Disease in 2002 for which she had undergone a colectomy and is now required to use an ostomy bag. This has an adverse effect on her daily life. She suffers from mouth ulcers and sore joints. She has suffered domestic violence in the past and had been homeless. She had now found permanent accommodation. As a trained phlebotomist she had worked in health care since 2009. There were multiple character references attesting to her remorse, her general good character and her hard working nature. A recent prison report confirms that there have been no issues relating to poor behaviour or attitudes in custody. There was also the delay in the matter coming to the court for sentence.

21. We have further to consider the appellant's personal circumstances arising out of her motherhood and the potentially disproportionate impact of any custodial sentence on her very young children. As set out above, she has a young son who is currently cared for by a combination of grandparents and his father. The son has had medical problems. Her next child is due to be born in three weeks by planned Caesarean section, following what has

been a high risk pregnancy. The comments in *R v Petherick* [2012] EWCA Crim 2214, [2013] 1 WLR 1102 apply. We must ask ourselves what a proportionate sentence would be, taking into account both the legitimate aims of sentencing and its effect on the family life of others, especially children.

22. In our judgment the mitigation available to the appellant, which we have outlined, justified a substantial reduction of 25%, that is to say a year, to reflect the appellant's mitigation and family circumstances.

23. We cannot see a justification for any greater reduction. The appellant's son is being well cared for by the appellant's family. The appellant can keep her new baby with her in prison. We are not persuaded that the possibility of future hospital appointments, either by way of outpatient appointments or short-term admissions arising out of the appellant's Crohn's Disease, would have a material effect on the contact arrangements between the appellant and her expected baby. There is no material to suggest that such contact would be materially adversely affected by a custodial sentence.

24. After 25% credit for guilty plea, one arrives at a final term of 27 months' custody. Set against this, it can be seen that the sentence arrived at by the judge, namely three years' custody, was manifestly excessive and requires correction.

Conclusion

25. For these reasons and to this extent, we allow the appeal. We quash the sentence of three years' imprisonment and substitute in its place a sentence of 27 months' imprisonment. As before, the appellant will serve up to half of that term in custody before being released to serve the remainder on licence. All other aspects of the sentence imposed remain unchanged.

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