EXPERT EVIDENCE, HEARSAY AND VICTIMS OF TRAFFICKING

R v Brecani [2021] EWCA Crim 731

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On 26 March 2020, the appellant ('B'), aged 17, was one of 14 defendants convicted of conspiracy to supply cocaine and was sentenced to three years' imprisonment. The trial concerned the activities of an organised crime group which, over the course of about six months between February and August 2019, was involved in the supply of over £660,000 worth of cocaine in Southend, Essex.

B relied upon the two limb statutory defence under the Modern Slavery Act (MSA) 2015, s 45(4), contending that: (i) he was a child who had been trafficked from Albania and that his involvement in a conspiracy to supply cocaine was a direct consequence of his having been a victim of slavery or relevant exploitation; and that a reasonable person in the same situation as he was and having his relevant characteristics would have acted as he did.

The Court rejected the appellant's application to sever his case off from the trial of the other defendants while he awaited the Conclusive Grounds Decision (CG decision) of the Single Competent Authority (SCA).

On 03 March 2020, a CG decision was reached by the SCA which, despite a number of inconsistencies in his account, found forced criminality in Albania and in the UK had occurred between 2016 and 2019 and that he was a victim of modern slavery. He had been recruited in Albania and transported to the UK during 2019 for the specific purpose of forced criminality. He was kept in houses in both Birmingham and Southend/Dartford. It was also accepted that he was forced into criminality against his will and was not paid.

In his evidence at trial, B explained that whilst he was attending school in Albania he had been first groomed and then coerced by two young males, who had initially offered him cannabis and then subsequently beaten him up and forced him to sell cannabis. In order to escape the situation, he had fled to the UK illegally. Upon arrival he was told that he owed his traffickers £15,000 for the cost of his travel to the UK and would have to work it off, cultivating cannabis in a property in Birmingham. From there he was subsequently taken to Dartford and was told to take cocaine to Southend and bring the money back to Dartford.

During cross-examination, the Crown highlighted a number of inconsistencies in B's account, and relied on mobile phone and cell-site evidence (that was not been before the SCA) which, taken together, 'completely undermined his defence under section 45 of the 2015 Act' (at [48]).

The CPS declined to make any admissions and the court rejected B's application to admit the CG decision as expert evidence.

B appealed the decision, posing the following questions for consideration:

i. Is a CG decision by the SCA that a person is a victim of trafficking (VOT) admissible as expert evidence (as was held by the Divisional Court in *DPP v M* [2020] EWHC 3422 (Admin)) in a criminal trial?

ii. Whether expert evidence of an independent forensic social worker and criminologist, commissioned by B should have been admitted at trial?

iii. Whether the judge should have severed the indictment and delayed B's trial?

HELD, dismissing the appeal. Respectfully disagreeing with the decision of the Divisional Court in *M*, Lord Burnett CJ stated that 'we do not consider that case workers in the Competent Authority are experts in human trafficking or modern slavery (whether generally or in respect of specified countries) and for that fundamental reason cannot give opinion evidence in a trial on whether an individual was

trafficked or exploited' (at [54]). The Court clarified that, save for limited purposes, non-expert opinion evidence is not admissible in a criminal trial. Having regard to the criteria for determining the admissibility of expert evidence delineated in *Turner* [1975] QB 834 ((i) it was relevant to a matter in issue in the proceedings; (ii) the witness was competent to give that opinion; and (iii) it was needed to provide the court with information likely to be outside the court's own knowledge and experience), the opinion of the SCA case worker was not admissible.

In relation to the first criterion, the Court concluded that the opinion would be relevant to the decision the jury had to make (at [51]). In relation to the second criterion, however, the Court was 'unable to agree [with the Divisional Court in *M*] that expertise for the purpose of being accepted as an expert in criminal proceedings can be inferred from the fact that a person holds the job of case worker' (at [59]). Case workers in the Competent Authority are junior civil servants performing an administrative function which includes making reasonable grounds and CG decisions; they were not experts in human trafficking or modern slavery (at [53-54]). Further, none of the requirements of Crim PR r19, designed to ensure that the person giving evidence understood that he or she was acting as such and understood the obligations of an expert to the court, were complied with (at [54]). It was for that fundamental reason that they could not give opinion evidence in a trial on the question whether an individual was trafficked or exploited (at [54]). Further, it was not sufficient to assume that, because administrators are likely to gain experience in the type of decision-making they routinely undertake, simply by virtue of that fact, they can be treated as experts in criminal proceedings (at [54]).

In relation to the third criterion, the Court acknowledged that a suitably qualified expert might be able to give evidence relevant to the questions arising under the 2015 Act that were outside the knowledge of the jury, particularly to provide testimony regarding methods used by traffickers in certain countries to control their victims. The Court stipulated, however, that 'the evidence would have to be truly expert and not a vehicle to enable the expert to stray into the territory of the jury by expressing their personal opinion about whether an account was credible or inconsistencies immaterial' (at [58]). On the facts of the instant case, the Court (at [75]) was 'unpersuaded that [an independent forensic social worker and criminologist] had demonstrated sufficient knowledge of modern slavery in the context of the present case or that he had considered the range of facts necessary for reaching an informed opinion', and that his conclusions were based on factual material suffering from the same deficits as that relied on in the CG decision. First, the accounts (given by B) relied on were hearsay which had not been the subject of an application to admit (and would not have been successful had there been), and, in B's case, were produced without the benefit of further evidence available at first instance (and so were, in *Turner* terms, based on misinformation and were therefore 'valueless and inadmissible' even if relevant expertise had been established (at [61]). Nothing in the Strasbourg jurisprudence contradicted these conclusions (noting *VCL and AN v United Kingdom*, App. Nos 77587 and 74603/12, 16 February 2021).

Fundamentally, the decision of the jury as to whether the prosecution had negatived the s.45 defence required its members to be sure that the account given by B in his evidence in chief (and thus the core account on which the caseworker had proceeded) was not true (at [62]). That was not an issue on which the evidence of the caseworker could give them any assistance (at [62]). They were well placed to form their own conclusions without help from the caseworker given the nature of the evidence in the instant case (at [62]). The Court concluded by stating not only that the judge was right to exclude the CG decision, but that there was no question as to the safety of the conviction as the s.45 defence 'was comprehensively demolished by the prosecution' (at [76]).

When addressing the issue of severance, although it would have been desirable for the trial to await the CG decision, competing factors might reach a different conclusion. The Court was of the opinion that the judge had balanced the range of factors and his decision not to sever was completely understandable (at [11]).

Commentary

The following commentary draws on an article published just before the Court's decision: T. Ward and S. Fouladvand, 'Bodies of Knowledge and Robes of Expertise: Expert Evidence about Drugs, Gangs and Human Trafficking' [2021] Crim LR 442.

The decision of the Divisional Court in *DPP v M* represented a significant milestone for defendants seeking to rely upon the s 45 statutory defence. By treating a CG decision as a form of hearsay evidence of expert opinion, it allowed defendants to rely on it to meet the evidential burden of raising an issue as to whether the s. 45 defence applied. On the facts of the instant case it would have been open to the Court of Appeal to distinguish *M* on the ground that both expert reports relied almost entirely on hearsay evidence from the defendant who was also a witness in the case. None of the exceptions to the hearsay rule applied and it is hard to argue that the interests of justice demanded its admission, because all that the reports could contribute, even if their authors were recognised as experts, was an opinion that the defendant's evidence was credible. It is well established that expert evidence supporting the credibility of a witness is not generally admissible (*R v Robinson* [1994] 3 All ER 346).

It is regrettable that instead of confining itself to these sound reasons for dismissing the appeal the Court of Appeal has taken it upon itself to overrule *DPP v M.* This has the potential to create grave injustice in cases where VOTs are inhibited by fear or misplaced loyalty from testifying in their own defence. Despite the Court's efforts to reconcile the decision with the landmark ruling of the European Court of Human Rights in *VCL and AN*, we submit that this decision is incompatible with the UK's international obligations.

Compatibility with ECHR arts 4 and 6

The 'non-punishment principle' set out in the Council of Europe Convention on Action Against Trafficking in Human Beings art 26, and also considered to be implicit in ECHR art 4, requires States to 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'. B would be a VOT in the sense defined by the Convention if he was recruited by the 'abuse of a position of vulnerability' for the purposes of exploitation. The 'minimum' definition of exploitation in art 4 includes 'forced labour or services, slavery or practices similar to slavery, [or] servitude'.

In *VCL and AN* the ECtHR held (at [161]) that 'given that an individual's status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – insofar as possible – only be taken once a trafficking assessment has been made by a qualified person'. The Court of Appeal interprets this paragraph of *VCL* as recognising that there may be 'competing factors' which drive a decision to proceed with a prosecution without waiting for qualified person's decision. The basis for this interpretation is unclear, but presumably the Court had in mind that the importance attached by the ECtHR to the effective deterrence of trafficking pointed to a speedy trial for all the conspirators. Nevertheless the words 'insofar as possible' suggest that as severance was clearly possible in this case, it ought to have occurred. If CG decisions cannot in future be admitted in evidence, it becomes all the more important that they be considered by the prosecution prior to any trial.

While a finding that a person is a VOT does not confer blanket immunity from prosecution, it does require the state to consider whether the prosecution is consistent with its duty to protect the VOT (at [158—159]). Where the SCA has determined that a defendant is a VOT, it is open to the prosecution to show that they were mistaken, or that there was no 'nexus' between the trafficking and the offence charged; but it must so in terms consistent with the CoE Convention and the Palermo Protocol to the UN Convention on Transnational Organised Crime, rather than with domestic legislation alone (at [162] and [172]). In the case of a young victim like B, whose alleged offence is not one excluded from the s 45 defence by MSA 2015 schedule 4, the statutory defence is if anything more generous that the ECHR requires. The 'exploitation' of young people is broadly defined by s 3(6) as including any situation where

they are used to provide services, having been chosen on the ground that they were a child and that an adult would be likely to refuse to be used for that purpose. The non-punishment principle applies only where VOT is 'compelled' to commit the offence. The question under s.45 whether a 'reasonable person' of the victim's age and in the same situation would have acted difficulty is not easy to apply, but appears broad enough to cover any case of 'compulsion'.

A more difficult question is whether an alleged VOT can have a fair trial if the official determination that they are a victim is not permitted to be used in court. In *VCL* the ECtHR states that 'Evidence concerning an accused's status as a victim of trafficking is … a "fundamental aspect" of the defence which he or she should be able to secure without restriction' (at [161]). By a 'status' the Court seems to mean the status of having been determined to be a VOT by the competent authority. The passage is concerned with what must be available to the defence rather than what should be admitted in court, but there is little point in providing the defence with evidence that cannot be used. In a case where the defendant is unable or unwilling to give evidence that they are a VOT, and their unwillingness may itself be a result of their victimisation, it is in our submission impossible for the state either to provide a fair trial or to comply with its obligations under art 4 if it prevents the court from taking account of the competent authority's determination. The instant case was not of this nature, since B gave evidence which was rejected by the jury. Given that once he had raised an issue as to whether the s 45 defence applied to him, the onus was on the prosecution to disprove it to the criminal standard, it is difficult to argue that the exclusion of the CG decision rendered the trial unfair. Arguably, however, the 'status' of having been recognised as a VOT is one which the court must take into account in order to comply with ECHR art 4. This issue will perhaps be clarified if *VCL* is considered by the Grand Chamber.

CG decisions as expert evidence

The Court was understandably sceptical about whether junior civil servants are 'experts' on human trafficking. However, the bar for someone who deals with crime in an official capacity to qualify as an expert is a low one. It is commonplace for junior police officers to give evidence based on their 'expert knowledge' of local gang activities, patterns of drug dealing and the like. Unlike police officers, civil servants do not have 'hands on' experience of investigating human trafficking but rely on investigations carried out by others; but the SCA, like a specialised police unit, is an organisation that accumulates a body of information about particular types and patterns of crime, and it is individual officials' access to this shared body of knowledge that largely justifies their claim to expertise. The test is whether they can draw upon 'a balanced body of specialised knowledge which would not be available to the tribunal of fact' (*Myers v R* [2015] UKPC 40 at [48]). Although such information is largely hearsay it is admissible as part of the 'body of expertise in the field' under the eighth common law rule preserved by the Criminal Justice Act 2003 s 118. This does *not* render admissible hearsay evidence about the facts of the particular case (see *Myers* at [66]).

The Court of Appeal rightly treats the guidance on the reliability of expert evidence in CrimPR PD 19A as applicable to evidence about human trafficking. Although the quotation within the Practice Direction from *Dlugosz* [2013] 1 Cr. App. R. 32 about the need for a 'sufficiently reliable scientific basis' does not appear apposite to this type of evidence, the criteria set out in CrimPD 19A could equally well be considered as amplifying the 'balanced body of specialised knowledge' test in *Myers.* The Court pointed out that had the SCA decision-maker been cross-examined, a few questions about his reliance on B's account and the fact that he had not taken account of data recovered from B's phone would have sufficed to show that little reliance could be placed upon his evidence [50]. On the facts of this particular case this seems a reasonable conclusion, but it does not justify blanket exclusion of CG decisions.

While CrimPR PD 19A affirms that expert evidence must be sufficiently reliable to be admitted, it does not spell out what level of reliability is 'sufficient'. From the Law Commission report on which PD 19A is based (*Expert Evidence in Criminal Proceedings,* 2011, para. 3.113) it is clear that what was envisaged was a variable standard that reflected the burden and standard of proof. We submit that defence evidence where the burden of proof lies on the prosecution must be sufficiently reliable to raise an issue

as to whether the defence applies. In a case such as the present where the issue has been raised by the defendant's own evidence, it must be sufficiently reliable to be helpful to the jury under the *Turner* rule. It need not reach the same level of reliability that should be required for prosecution evidence. CG decisions which are demonstrably based on a range of information beyond the defendant's own account, including both case-specific evidence and the SCA's accumulated knowledge of patterns of trafficking, may well be sufficiently reliable to be admitted.

The Court of Appeal describes the position of SCA decision makers as being 'far removed' from that of experts who prepare reports on air crashes [54]. Nevertheless, an SCA minute which demonstrated genuine expertise would be sufficiently analogous to air accident investigators' reports to suggest that as such reports are admissible as hearsay evidence of expert opinion in civil proceedings (*Rogers v Hoyle* [2014] EWCA Civ 257), so should the SCA minute be. Admissibility of such hearsay evidence would be 'in the interests of justice' where it was necessary in order to raise the issue whether the defendant was a VOT and thereby ensure a fair trial.

Conclusion

On the particular facts of the case there were strong grounds for excluding both the SCA decision and the evidence of an 'independent forensic social worker and criminologist' [67], both of which relied heavily on the defendant's own account and were not needed to help the jury decide whether that account was true. Unfortunately the broad formulation of the *ratio* – 'case workers in the Competent Authority are [not] experts in human trafficking or modern slavery (whether generally or in respect of specified countries) and for that fundamental reason cannot give opinion evidence in a trial on the question whether an individual was trafficked or exploited' [54] – has the potential to cause injustice in other cases and put the UK in breach of its international obligations. The judgment states that counsel for the appellant 'did not suggest that there was anything in the recent decision of the Strasbourg Court in *VCL and AN* which compelled a different answer' [63], implying that the Court did not have the benefit of full argument on the question of the compatibility of blanket exclusion of CG decisions with ECHR arts 4 and 6. The Criminal Division of the Court of Appeal is sometimes willing to reconsider its own decisions on a point that was not fully argued (see for example *C* [2011] EWCA Crim 1872 and commentary by Vanessa Bettinson (2011) 75 J Crim L 448). There is at least a faint hope that the Court will take this course in a future case, especially if the ECtHR Grand Chamber reaffirms and clarifies its view in *VCL*. Otherwise, this is an issue that will need to be considered at some point by the Supreme Court.

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