GENERAL CRIME: CASE COMMENT

R V DS – MODERN SLAVERY AND ABUSE OF PROCESS

Date: 21.04.20

Legislation: The Modern Slavery Act 2015

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Introduction

The Modern Slavery Act 2015 ("MSA 2015") has been hailed as "an important milestone in the fight against slavery and for social justice";[1] whilst one may take issue with its effectiveness in certain areas, this is no doubt true. This is perhaps best demonstrated by the regular stream of case law emanating from the Court of Appeal on the subject as the CPS and police have got to grips with their duties and defence practitioners have got to grips with the new weapons in their arsenal. In respect of the latter, the most notable are the defence open to victims of trafficking under s.45 MSA 2015 and abuse of process arguments arising from the CPS allegedly not following their own guidance on the (non-)prosecution of victims. The recent case of **R v DS [2020] EWCA Crim 285**, which this article will focus on, is no exception.

R v DS

In **R. v DS [2020] EWCA Crim 285**[2] the Court of Appeal (with the Lord Chief Justice giving judgment) ruled that as a result of s.45 MSA 2015 providing a defence to victims of trafficking, the issue of a defendant's victimhood is "*unquestionably*" a matter for the jury. The knock-on effect is that whilst previously the continued prosecution of victims of trafficking would be vulnerable to an abuse of process application:

> *"that is no longer necessary, and cases to which the 2015 Act applies should proceed on the basis that they will be stayed if, but only if, an abuse of process as conventionally defined is found. By way of summary only, this involves two categories of abuse, as is well known. The first is that a fair trial is not possible and the second is that it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution. Neither of these species of abuse affected this case, and it should not therefore have been stayed."*

[1] See the foreword to the Modern Slavery Act 2015 review (2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf

[2] https://www.bailii.org/ew/cases/EWCA/Crim/2020/285.html

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The facts of the case are at this point unknown due to reporting restrictions. The case came to the Court of Appeal following a ruling by His Honour Judge Griffith-Jones QC at Maidstone Crown Court that the prosecution was an abuse of process (presumably on the grounds that the Defendant was a victim of trafficking). The Crown appealed that ruling under s.58 Criminal Justice Act 2003 and the Court of Appeal had no hesitation in finding that abuse of process was not made out and allowing the appeal. At paragraph 47 it was noted in conclusion that the appeal was allowed because "*there was no room in the light of section 45 of the Modern Slavery Act 2015 for the abuse of process jurisdiction to immunise the respondent from prosecution*".

Commentary

At first blush this may seem to be simply re-stating the law on abuse of process in victims of trafficking cases; however, the conclusion that there was "*no room*" for abuse of process because of the existence of s.45 MSA 2015, suggests something far greater. Taken to its logical conclusion the judgment can be used to support the proposition that irrespective of whether a prosecutor has had regard to the public interest factors of prosecuting a victim of trafficking, there is no abuse of process as the Defendant can always fall back on s.45 MSA 2015. Instead, there would need to be something more, something that would render any case susceptible to an abuse of process application. This marks a notable change of course by the Court of Appeal and perhaps represents a shift back in favour of the prosecuting authorities as the Courts become more familiar with MSA 2015.

One of the leading pre-MSA 2015 cases concerning abuse of process was **R v N [2012] EWCA Crim 189**. The Lord Chief Justice referenced the United Kingdom's obligation arising from Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"), which requires that each Contracting party "*provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so*". In **N** the Lord Chief Justice went on to state at paragraph 21:

> *"Summarising the essential principles, the implementation of the United Kingdom's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the Crown Prosecution Service, however strong the evidence may be, to decide that it would be inappropriate to proceed or to continue with the prosecution of a defendant who is unable to advance duress as a defence but who falls within the protective ambit of Article 26. This requires a judgment to be made by the CPS in the individual case in the light of all the available evidence. That responsibility is vested not in the court but in the prosecuting authority. The court may intervene in an individual case if its process is abused by using the "ultimate sanction" of a stay of the proceedings. The burden of showing that the process is being or has been abused on the basis of the improper exercise of the prosecutorial discretion rests on the defendant."* (Emphasis added).

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The Court in effect stated that the UK complies with its obligations under Art 26 ECAT through the appropriate use of prosecutorial discretion, and where that fails there may be circumstances where the Court intervenes and stays proceedings as an abuse of process.

The principles were further summarised post the implementation of MSA 2015 in **R v Joseph (Verna Sermanfure) [2017] EWCA Crim 36** where the Lord Chief Justice stated that:

> *"The court's power to stay is a power to ensure that the State complied with its international obligations and properly applied its mind to the possibility of not imposing penalties on victims. If proper consideration had not been given, then a stay should be granted, but where proper consideration had been given, the court should not substitute its own judgment for that of the prosecutor."* (Emphasis added.)

Since these cases, the numbers of victims of trafficking have grown exponentially. In 2019, 10,627 potential victims of modern slavery were referred through the National Referral Mechanism so that their victimhood could be determined; a 52% increase from 2018.[3] One assumes that similarly the number of abuse of process applications have also increased and so, taking a pessimistic view, it is perhaps not surprising that the Court of Appeal has changed tack somewhat on what will amount to abuse of process. More charitably, one could say that abuse of process was and remains an exceptional course, as was noted in **N**, and so once the scope of s.45 MSA 2015 was properly carved out it was inevitable that abuse of process arguments would become surplus to requirements. Indeed, when the MSA 2015 was passed Theresa May, then the Home Secretary, issued the following statement:

> *"This landmark legislation sends the strongest possible signal to criminals that if you are involved in this vile trade you will be arrested, you will be prosecuted and you will be locked up. And it says to victims, you are not alone - we are here to help you."*

With this in mind, the Court of Appeal in **DS** were arguably fulfilling Theresa May's words, that the MSA 2015 (through s.45) is the correct route to assist victims of trafficking, rather than the abuse of process regime. It seems that the "we" that Theresa May referred to as being there to help victims is not the Government or Judges, but the jury.

There is nothing wrong in and of itself with the jury determining the issue of victimhood; the jury have been (and remain) a trusted pillar of our criminal justice system. However, what it does mean is that these cases have to go trial, whereas a successful abuse of process application would have prevented this. It therefore risks victims of trafficking having to go through another hardship that they need not have endured. Ultimately, it is hoped that the restriction of abuse of process outlined in **DS** will not result in victims of trafficking being convicted where otherwise they would not have faced a trial; unfortunately, only time will tell.

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3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876646/national-referral-mechanism-statistics-uk-end-of-year-summary-2019.pdf

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