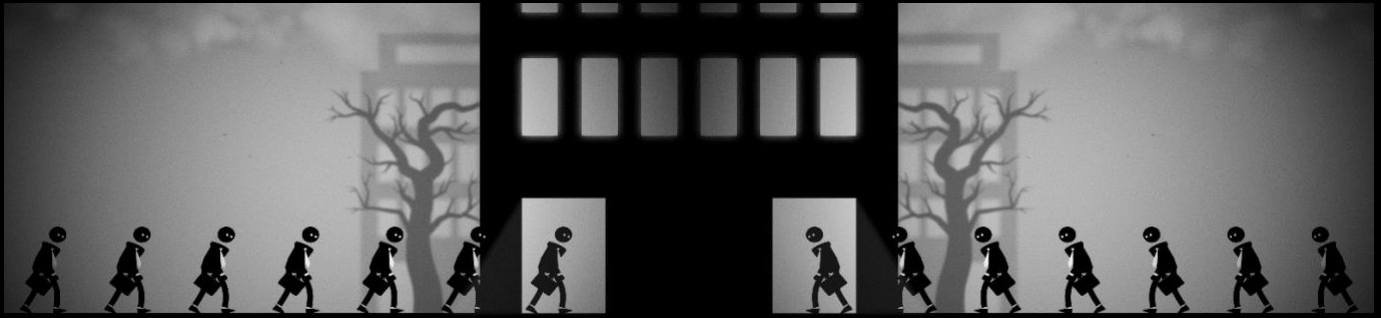


A Slave to the Facts? Modern Slavery Determinations and the Appeal of BTT -v- Regina [2021] EWCA Crim 4

Peter Saville, (Pupil) 2 Harcourt Buildings



This case is one of a growing number of authorities which suggest that the courts will look sceptically on the use of Single Competent Authority (“SCA”)¹ decisions which are raised only after a conviction and which contradict the defence at trial.

The BTT Appeal

The Court dismissed an application for leave to appeal against conviction for producing a Class B drug (Cannabis).

The Applicant (“BTT”), a Vietnamese national, did not raise a defence under modern slavery legislation at his trial but appealed his conviction relying on new evidence; namely subsequent findings by the Upper Tier Tribunal (“UTT”)² and National Referral Mechanism (“NRM”) that BTT was a trafficked person, and his own live evidence on appeal. The Court concluded on the facts that these were not sufficient to amount to a modern slavery defence which would make his conviction unsafe.

BTT first raised his account of being a victim of modern slavery after the Home Office served notice that it intended to deport him after his conviction and whilst in prison. He sought to assert a modern slavery defence, substantiating it by engaging a psychotherapist and using a favourable SCA decision and a ruling of the UTT judge. The latter two had considered the matters on the papers alone.

At the Appeal, BTT gave live evidence contradicting his account before the SCA and UTT. He admitted that he was free to leave the address where he farmed cannabis and did not discover that his family had been kidnapped, which formed the sole cause of his compulsion, until after his conviction.

The case fell into the category of an appeal based on an account which was different from the one the applicant put forward at trial. The Court held there would need to be “exceptional circumstances” to accept the new account but as a precondition it would have to be credible and demonstrate a defence which would quite probably have succeeded (per *R v Boal* [1992] QB 591 cited in *R v A* [2020] EWCA Crim 1611 at [19]).

The court concluded that the applicant could not satisfy the test because his new account effectively disintegrated during live evidence. Further, the conclusions of third-party tribunals through the UTT and NRM were of little weight after being decided on the papers and untested by cross-examination which had moved the applicant’s evidence so decisively in the witness box.

¹ The Single Competent Authority (“SCA”) was previously known as the National Referral Mechanism (“NRM”) until April 2019 when it became part of the Home Office. The SCA is responsible for making determinations whether an individual is a victim of slavery or exploitation which go on to inform the government’s response.

² The Upper Tier Tribunal functions as an appellate court for First Tier Immigration and Asylum chamber cases.

The Modern Slavery Defence and SCA

Section 45 of the Modern Slavery Act 2015 created a complete defence for those over 18 who commit a criminal act, under compulsion which is attributable to slavery or relevant exploitation, and that a reasonable person with the defendant's relevant characteristics would have no realistic alternative to doing the same.

When relying on s.45, the Defence must adduce sufficient evidence to raise the defence in respect of each of its elements in s.45(1)(b)-(d) and 'pass the judge' in establishing a prima facie case. It is then for the prosecution to disprove one of the elements contained within the section to the criminal standard.

To assist in cases where s.45 might arise the SCA exists to provide first a 'reasonable grounds' decision (where it concludes whether there is *suspicion* of trafficking) and later a 'conclusive grounds decision' (where it considers if exploitation can be proved to the balance of probabilities). These determinations assist prosecuting authorities in their duty to exclude victims of trafficking from the criminal process where their criminality arises from exploitation.

The result of the decisions will be a necessary consideration when making a charging decision and when considering the Full Code test. Prosecutors have an obligation to make SCA referrals where cogent evidence of exploitation exists, however clear and sufficient evidence to the contrary removes this duty.³ Referrals can be made through any law enforcement officer as well as a number of NGOs.⁴ A prosecution may proceed despite a positive conclusive grounds decision where it has grounds to do so, notwithstanding the careful regard that must be afforded these determinations.⁵

However, where a referral to the SCA comes only after conviction and in contradiction to the conclusions of a criminal court it may well be of little importance, as in *BTT*.

Arguably, the Court of Appeal is becoming more sceptical towards SCA decisions and the trend amongst some defence advocates to seek a second bite of the cherry by adducing evidence from the referral systems at appeal. The case of *A* [2020] EWCA Crim 1611 confirmed that decisions by the SCA to the civil standard and which do not rely on live evidence are not themselves conclusive. In that appeal discrepancies between initial accounts given to officers, the account given to the SCA and at trial were decisive. The court again placed emphasis on the importance of live evidence in Appeals concerning a retrospective SCA referral.

The Court of Appeal expects SCA referrals to be made at the outset of proceedings. Such referrals would arise as a result of the CPS adhering to their own detailed guidance on trafficking and the s.45 defence before trial. The dismissed appeals of *BTT* and *A* illustrate that early decisions about modern slavery are important for both the prosecution and defence. In brief, counsel on both sides should be alive to the importance of identifying potential victims of trafficking and exploitation at the earliest possible stage in the process and should encourage a referral to the SCA if they believe grounds to do so exist.

³ *Joseph* [2017] EWCA Crim 36; [2017] 1 W.L.R. 3153 [21(viii)]

⁴ The CPS have produced a clear guide for Crown Prosecutors which will also assist defence counsel: "Legal Guidance: Human Trafficking, Smuggling and Slavery", <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> cf. Suspects in a Criminal Case who might be Victims of Trafficking or Slavery

⁵ Cf. *DS* [2020] EWCA Crim 285