No: 201804680/B4-201804694/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2019] EWCA Crim 2170

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 14 November 2019

B e f o r e:

LORD JUSTICE HICKINBOTTOM

MRS JUSTICE ELISABETH LAING DBE
and
MR JUSTICE WILLIAM DAVIS

R E G I N A
v
(1) MUHAMMAD BABAR BASHIR
(2) KOTESWAWA NALLAMOTHU

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Mr Mark Harries QC appeared on behalf of the **Applicant Bashir**
The Applicant Nallamothu was not present and was not represented

J U D G M E N T
(APPROVED)

LORD JUSTICE HICKINBOTTOM:

1. On 16 October 2018, in the Crown Court at Manchester before Her Honour Judge Nicholl and a jury, the Applicant Muhammad Babar Bashir was convicted on two counts of conspiracy to facilitate the commission of a breach of United Kingdom immigration law, and the Applicant Koteswana Nallamothu, who was jointly charged on one of those counts, was convicted on that count.

2. On 22 March 2019, Judge Nicholls sentenced Babar Bashir, who at that time had absconded, to a total of 6 years' imprisonment in his absence; and sentenced Nallamothu to 24 months suspended for 2 years. A co-accused, Tehshina Nayyar, had pleaded guilty to a separate count of conspiracy to facilitate the commission of a breach of UK immigration law, and was sentenced to 27 months' imprisonment.

3. On 6 June 2019, on a reference under section 36 of the Criminal Justice Act 1988, this court (Fulford LJ, May J and Swift J) increased Babar Bashir's sentence to one of 8 years; that of Nallamothu to 3 years 11 months' immediate imprisonment; and that of Nayyar to 4 years (now reported as [2019] EWCA Crim 1229).

4. Having been refused by the single judge, Babar Bashir and Nallamothu now seek permission to apply for permission to appeal against conviction. Mr Mark Harries QC has appeared today on behalf of Babar Bashir. Nallamothu has not appeared before us, but has made written submissions through counsel. We thank Counsel, as ever, for their assistance.

5. The background facts are set out in some detail in the judgment of Fulford LJ on the Attorney General's Reference. For the purposes of this application, we can be briefer.

6. The charges against the Applicants, Nayyar and their co-defendants Mohammad Sajid Bashir (Babar Bashir's brother), Fazan Nayyar (Tehshina Nayyar's son) and Ayaz Ahmed arose out of an alleged abuse of the Home Office Tier 4 Migrant Scheme which allows students from outside the EU to obtain permission to enter the UK for the purposes of study at an approved educational establishment. Such an establishment must first obtain a Sponsor's Licence from the Home Office which involves, amongst other things, an inspection by officers attending the relevant premises to satisfy themselves that they are appropriate, the teaching staff are adequate and they have appropriate systems to monitor attendance and progress of their students. If approved, the Sponsor's Licence enables the college to obtain a quota of Confirmations of Acceptance of Study ("CASs") for a nominal application fee of £14 per CAS. Each CAS has a unique reference number which is allocated to a student once accepted by the college for a course of study, and which enables that student to obtain leave to enter (or, if already here, leave to remain in) the UK for the period covered by the course. A CAS is thus a prerequisite for a student visa.

7. Once a college has its Sponsor's Licence and CAS quota, it is obliged to enter data about

its Tier 4 students (including the fees its charging and has collected from each student) onto a Home Office online database, the Sponsorship Management System ("SMS"). Management of that input is by a number of key personnel whom the college is required to have in place, namely an Authorised Officer, a Key Contact and Users at Level 1 and (for some colleges) also Level 2.

8. It was the prosecution case that the Applicants and their co-defendants were abusing this system by obtaining CASs through the names of various colleges and then selling them to foreign nationals without any intention of giving them any genuine education. It was alleged that Babar Bashir and his brother were at the heart of this criminality which involved three colleges. It was said they conspired with Nallamothu through St John College, Ashton-under-Lyne; with Ahmed through Vernon College, Nottingham, and with the Nayyars through Kinnaird College Manchester.

9. So far as St John College is concerned, it was granted a Tier 4 Sponsor's Licence in July 2011, when the Key Contact and Level 1 User was Babar Bashir and the authorising officer was his sister-in-law, Sajid Bashir's wife. The licence was suspended in July 2012; and the Crown accepted that, in this first period during which it issued 338 CASs, the college was operating legitimately.

10. However, it was the prosecution case that, once its licence was restored in September 2012, the college's business model changed to one that was dishonest, CASs being fraudulently sold without any intention – or, indeed, facilities – to educate those who purchased them. Furthermore, in October 2012, a Level 2 User was set up in the name of Galla Venkata Rao who, two months later, replaced Babar Bashir as Key Contact and his sister-in-law as Authorised Officer and Level 1 User. Additionally, two new Level 2 Users were set up, Hussain Ghassan and Amin Qamar. It was the prosecution case that the identity of these three individuals had been stolen for the purposes of the criminal activity of Babar Bashir through St John College.

11. During this period, it was alleged that Nallamothu (who had earlier been involved in another college which had come to the attention of the police) was purchasing St John College CASs from Babar Bashir and selling them on.

12. 955 St John College CASs were allocated within three months of the starting point for the conspiracy in September 2012, at a rate very much greater than when the allocation was made legitimately. The college was then purportedly sold by Babar Bashir to Rao – the prosecution said in an attempt to hide or distance himself from his crime involving the college's CASs – before, in February 2013, the Home Office revoked the Sponsor's Licence for the college on the basis that the visa refusal rate for its student was unacceptably high.

13. However, it was the Crown's case that Babar Bashir's criminal activities involving CASs did not end there. In March 2013, with his brother, he set up Multi Associates Limited, through which CASs for the two further colleges, Kinnaird College and Vernon College, were purchased and then sold on. Tehshina Nayyar was the sole proprietor and principal

of the former, and it was said that her son was also involved in the purchase and sale of Kinnaird College CASs. Ahmed was employed by Vernon College, eventually in key roles, and it was said that he had purchased and sold on most of that college's CASs, many to Babar Bashir.

14. The prosecution case against the Applicants was that, at the time of the sale of CASs through St John College from September 2012 and later through the other two colleges, the courses offered – and, indeed, the colleges – were entirely bogus.

15. Babar Bashir's case was that St John College was a genuine and legitimately run college throughout its existence. Its Sponsor's Licence was wrongly suspended in 2012 over crucial recruiting months; and that led to an increase in the visa refusal rate above that allowed under the licence scheme, with the result that immediate action had to be taken in terms of recruiting students quickly in late 2012 when the licence was restored. Furthermore, Babar Bashir said that those problems were exacerbated by his ill-health. He suffered a heart attack in May 2012 – and the fact that he was being blackmailed by a local businessman who had previously lent him money in connection with the operation of St John College, to the extent that he had paid his blackmailers £140,000 in 2012. He had therefore retained Nallamothu and other agents with a view to recruiting students, heavily and for greatly reduced fees, in the period September to December 2012. He had no reason to believe that these agents were not disposing of CASs to genuine students. He denied hijacking identities as it was alleged he had.

16. Once the Sponsor's Licence for St John College had been revoked in February 2013, he said that he and his brother had decided to become agents and as such, through their company, Multi Associates, they had recruited students for Vernon College and Kinnaird College in 2014. He had believed that both colleges were genuine educational establishments. It was his case that he had conducted himself properly throughout, and at all times thought that those recruited on behalf of St John College and those he later recruited for the other two colleges were genuine students intent on attending genuine courses at genuine colleges.

17. Babar Bashir gave evidence at trial. Nallamothu did not; but the thrust of his defence (as made, for example, through cross-examination of Crown witnesses) appears to be essentially to the same effect. He too denied any wrongdoing.

18. The history of the charges faced by the Applicant and their co-defendants is far from satisfactory. The original indictment contained a single count of conspiracy to facilitate a breach of UK immigration law by a non-EU citizen, contrary to section 1(1) of the Criminal Law Act 1977 which concerns criminal conspiracies, and section 25(1) of the Immigration Act 1971 which provides, under the heading "Assisting unlawful immigration to Member State"

> "A person commits an offence if he—
>
> (a) does an act which facilitates the commission of a breach… of

immigration law by an individual who is not a citizen of the European Union,

(b) knows or has reasonable cause for believing that the act facilitates the commission of a breach… of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union."

The offence is therefore committed by a person, A, if he facilitates the commission of a breach of immigration law by a non EU-citizen, B

19. "Immigration law", as used in section 25(1), is defined in section 25(2):

> "In subsection (1) 'immigration law' means a law which has effect in a Member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to—
>
> (a) enter the State,
> (b) transit across the State, or
> (c) be in the State."

It is to be noted that the breach of immigration law referred to in section 25(1) does not have to amount to a criminal offence.

20. The particulars of the conspiracy as initially drafted were in general terms, namely that the Applicants, Sajid Bashir, Tehshina Nayyar and her son, and Ahmed conspired together to purchase and onward sell CASs in direct contravention of the Tier 4 scheme, which facilitated the commission of breach of immigration law "namely section 24(1)(a) Immigration Act 1971" by persons who are not citizens of the EU, knowing that the acts facilitated the commission of breaches of immigration by those persons and that those persons were not EU citizens. Section 24(1)(a), which makes entering the UK when the subject of a deportation order or otherwise without leave a criminal offence, was clearly an inappropriate reference.

21. On the first day of the trial, the defence invited the Crown to consider prosecuting the defendants, not on the basis of a conspiracy to facilitate count, but for conspiracy to commit fraud namely that the Home Office and/or students were deceived by the colleges' false representations that they intended to provide an education. The Crown declined, one reason apparently being that the students were the knowing beneficiaries of this criminal activity – they were "in on it as well" – because the purchase of the CASs enabled them to remain in the UK as Tier 4 Migrants although they were not genuine students.

22. In addition, the counts as against Sajid Bashir were severed, because of his ill health. The Crown appealed against severance which resulted in a hiatus in the trial; but, on 5 July 2018, that appeal was withdrawn.

23. On 9 July 2018, Tehshina Nayyar pleaded guilty to Count 1, and she played no further part in the trial. The prosecution did not proceed against her son.

24. Consequently, on 10 July 2018, the trial was ready to commence against the remaining defendants, including the Applicants.

25. However, before the jury were sworn, the Crown successfully applied to amend the indictment to add the further counts. Count 2 was a charge against the same six defendants of a conspiracy to acquire, use and possess criminal property contrary to section 1(1) of the 1977 Act and section 329 of the Proceeds of Crime Act 2002. The prosecution offered no evidence in relation to that count at trial, and we need say nothing further about it. Counts 3-5 broke down the Count 1 conspiracy into three conspiracies, each relating to one of the three colleges. These charges were in similar form to the original general count, which remained as Count 1: in the particulars of each, there was still a reference to section 24(1)(a).

26. The trial therefore began, on the basis of that new indictment, that day. The Crown's case concluded on 5 September 2018. Each of the defendants made a submission of no case to answer, initially in writing with the Crown responding in writing. In its response, the Crown applied to amend the particulars of the indicted facilitated breach from section 24(1)(a) to section 24A(1)(a), which provides:

> "A person who is not a British citizen is guilty of an offence if, by means which include deception by him... he obtains or seeks to obtain leave to enter or remain in the United Kingdom...".

27. The Crown said that the earlier statutory reference had been a simple mistake for this provision. It was always intended to refer to section 24A(1)(a); and the Crown's substantive case had thus never changed. It accepted that, to succeed in proving a facilitation conspiracy by the Applicants ("A" in our summary of the provision), it was required to prove that students ("B" in that summary) were parties to the criminal agreement knowing that the colleges were bogus, because it was they who were the non-EU citizens whose commission of an immigration breach they had facilitated. The prosecution had no evidence from students themselves to that effect; but it maintained that it had sufficient evidence to permit a jury to find, by inference, student complicity; and that that case had always been clear to the defence and so no injustice to the defendants arose as a result of the proposed amendment.

28. During oral submissions it was contended on behalf of the Applicants there was no evidence upon which the jury could properly conclude that individuals to whom CASs had been supplied as "students" had been complicit in the provision of CASs for bogus colleges.

29. The judge rejected the Crown's application to amend the particulars to refer to section 24A; and, instead, she used her power under section 5(1) of the Indictments Act 1915 to amend the indictment to exclude any reference to any provision of the Immigration Acts so

far as the breach of immigration law is concerned. In her written ruling, she said:

> "I am aware that under s 24 at (1) [which appears to be a typographical error for "s 24A(1)"] (which of course would have been amendment in itself) requires the prosecution to prove some evidence of the students' complicity in this offence, and had I permitted the amendment as sought by the Crown it may have enabled a submission of 'no case to answer'. But such a verdict would have been on an inappropriate technicality, and would offend the stated aim of the Criminal Procedure Rules [to deal with cases justly]**....**
>
> The amended indictment not only reflects the case that was opened to the jury, but also reflects the evidence that has been called. And I am satisfied that the defence have not been subject to prejudice by its amendment."

30. We pause there merely to note that, although it is right (so far as it goes) to say that section 24A(1)(a) would require proof of "students' complicity", section 25 (which had always featured in the indictment, and continued at all future times to do so) does not itself require that the individuals whose breach of the immigration law is facilitated ("B" in our summary of the offence) to have or may have committed a criminal offence, merely that a breach of the immigration law is facilitated.

31. In the circumstances of this case, if, when the CASs were issued, the colleges had indeed been bogus without any intention on the Applicants' part to provide any education from them, that would inevitably have led to a breach of immigration law by the students who purchased the CASs even if that purchase was, so far as the students themselves were concerned, entirely innocent of the bogus nature of the colleges. The students under those circumstances would have been in the UK unlawfully. However, section 24A(1)(a) is a section under which, if the particulars of it were proved, the students would be committing a criminal offence which required deception on their part.

32. Of the new indictment, in her ruling on the application of no case to answer the, judge said this:

> **"**As the indictment now stands before a Jury could convict the prosecution must prove the following;
>
> i. That an agreement existed to sell CAS's to non-EU citizens, for which there was either no educational foundation, or intention for education to be provided, and that the CAS would be used in support of a Tier 4 Visa application
> ii. That the defendant joined in that agreement.
> iii. That when the defendant joined that agreement he knew what he was agreeing to, namely the supply of CAS which had no

educational foundation and would be used in support of a Tier 4 Visa application.

iv. And that when he joined the agreement the defendant knew or had reasonable cause to believe that the issue of the CAS in these circumstances would commission a breach/attempt breach of the immigration law in that it would be used by non-EU citizens to apply for student visas to which they would not be entitled."

33. She concluded that, in the case of St John College and Kinnaird College, there was sufficient evidence upon which the jury could infer that they were bogus colleges, which was a matter in issue, and she dismissed the application in respect of the count involving those colleges; but, in her view, there was insufficient evidence in relation to Vernon College, and she allowed the application in respect of the count for that college. Ahmed, who was only implicated in that college, therefore then ceased being a defendant.

34. We note that the issues for the jury identified by the judge did not include any reference to the Crown proving anything in respect of any complicity by any students. Mr Harries submits that that omission is telling, because (i) in its response to the application, the Crown appeared to accept that to prove the facilitation charges against the defendants they had to prove that the "CAS allocates were... complicit" which was the burden which the Crown undertook to discharge from the outset of the trial; (ii) in their submissions, defence counsel had submitted that there was no evidence of such complicity; and (iii) the judge's ruling which we have quoted suggested that she considered that there was indeed force in that point.

35. However, immediately following the judge's ruling, the Applicants indicated that they proposed to make an abuse of process application, which was made the following day. In the course of that, the judge agreed that the prosecution did need to prove student complicity – despite her ruling the previous day, it was a required element of the offence – and that application was, as we understand it, thereupon abandoned, and the trial continued.

36. In her summing-up, the judge was very clear as to that requirement. At pages 9D-10B, she directed the jury as follows:

> "The conspiracy alleged in this case was an agreement to facilitate the breach of immigration law, and it is the Crown's case that the mechanism by which they sought to achieve this was to sell CASs for which there was no educational foundation to non-EU citizens, thereby allowing those persons to apply for students visas to which they would not be entitled and which that person knew that they would not be entitled.
>
> It follows, therefore, does it not, that for this agreement to exist, the recipients of the CAS, in other words the students or the person

> receiving the CAS must be aware of what they were purchasing, namely a CAS without the requisite educational background or foundation.
>
> So if you conclude on the evidence that there was an agreement to sell CASs to students, but you think that the students were or may have been unaware that there was no legitimate college; in other words, those selling the CAS were simply scamming the students, then the prosecution would have failed to prove the conspiracy that is on this indictment and that you are considering, and that for the purpose of the agreement that is alleged in this indictment... I am sorry, let me try that again, and that is because the purpose of... I am sorry, that is because the agreement alleged in this indictment is the same of a CAS for the purpose of facilitating or bringing about a breach of immigration law, and that breach is that a non-EU citizen applies for a student visa to which they are not entitled and knew they were not entitled. So you must be sure in this particular case, this particular conspiracy that the students who were receiving the CAS knew what they were receiving, namely a CAS that had no educational foundation and knew that if they applied for a visa using that CAS, they would be breaching immigration laws."

37. As we have indicated, the jury found Babar Bashir guilty of both of the counts concerning St John College and Kinnaird College; and Nallamothu guilty of the former alone.

38. Mr Harries now relies upon two grounds of appeal against conviction.

39. As Ground 1, he submits that the judge was wrong to reject the Crown's application at the close of its case to amend each indicted count to specify section 24A(1)(a) of the 1971 Act as the immigration law, the facilitation of the breach of which was the objective of the conspiracy; and she was wrong to amend the particulars of the counts of her own volition, and contrary to the wishes of all parties, to remove the specification of that immigration law. In doing so, he submits, she wrongly took over the role of the prosecutor in formulating counts upon which any defendant stands trial.

40. As Ground 2, Mr Harries submits that the judge was wrong to reject the Applicant's application of no case to answer because there was no (alternatively, no sufficient) evidence of the students' knowledge that the course and college for which they had sought and obtained a CAS were bogus. For the purposes of this appeal, he does not challenge the judge's conclusion on the application that, on the evidence, the jury could properly conclude that St John College and Kinnaird College were, at the relevant time, bogus colleges. In particular, this morning he emphasised the words of the particulars of offence in the count in the final indictment that Babar Bashir, his brother and (in the case of St John College) Nallamothu, between certain dates, conspired together "and with others" to do an act facilitating the commission of a breach of immigration law. He says that those words were intended to cover students and that all others included in the relevant

conspiracies were specifically identified in the particulars of the offence itself. Consequently, he submits there could not have been a proper conviction without the jury accepting that the students were complicit in the conspiracy as, he submits, the judge and the prosecution accepted during the course of the trial.

41. Nallamothu relies upon essentially the same grounds, with two further grounds of his own. As Ground 3, he submits that if, as the Crown suggested in opening (paragraph 26 of the written opening), Nallamothu and his co-conspirators were indifferent as to intentions of students, they could not be guilty of the indicted conspiracies. As Ground 4, he submits that, although the prosecution evidence taken at its highest might have established frauds simpliciter, it was insufficient to make out the offence of facilitation.

42. We first consider ground 2. We see force in the prosecution observations at trial to the effect that the case against the Applicants, that the colleges in which they were involved were at the relevant time bogus, was strong. But it was, by the end of the trial, apparently common ground that the prosecution had to prove that the students were "in on it", i.e. that they (or at least some of them) were aware that the CAS they were purchasing did not in fact offer them any education but were only a means of entering or remaining in the United Kingdom. To support that proposition, Mr Harries relies upon not only the summing-up but also to the written route of verdict. In respect of the application in relation to the application of no case to answer, he submits that it is at least arguable that the judge failed to deal with that matter; and it is at least arguable that there was insufficient evidence to go to the jury on that issue.

43. We see that there is some force in those submissions. We appreciate that an amendment to the indictment had taken place – and also the fact that section 25(1) does not require the individual ("B" in the offence summary we have given) to be involved in a criminal offence but only a breach of the immigration law. We also appreciate that the judge directed the jury properly on the requirement for them to find student complicity, and that direction appears to have been entirely appropriate. But if there was no evidence upon which the jury could properly conclude that there was such connivance, and such connivance was in fact required to prove the offences as particularised in the indictment, then, at least arguably, the issue should not have been left to the jury and, there being no obvious further evidence arising out of the defence case, the jury could not properly have convicted. For those reasons, we consider that Ground 2 is arguable.

44. We find more difficulties with ground 1. However, having given leave on Ground 2, we propose to give leave on Ground 1 to enable Mr Harries to elaborate upon that ground at the substantive hearing. We do so in particular because, as we have indicated, on any view, the history of the indictment and the counts on the indictment in this case was far from optimal.

45. We can deal with Nallamothu's Grounds 3 and 4 very shortly. As to Ground 3, whatever the Crown may have suggested in opening, the judge's summing-up correctly set out the elements of the offence which the jury had to find proved to conclude that a defendant was guilty of the offence. It is not suggested on Nallamothu's behalf otherwise. As to

Ground 4, we do not consider that it adds anything to Ground 2, of which it is just one strand. We refuse permission on each of those grounds.

46. However we do give leave to appeal to both Applicants on Grounds 1 and 2.

LORD JUSTICE HICKINBOTTOM: Mr Harries, having given you leave, we propose to do a number of things. First, we would propose to set down the appeal before as many members of this constitution as can be constituted on 13 December. We know that at least two of us will be sitting together that day in the Court of Appeal (Criminal Division). The substantive appeal will be set down for that day. Two hours?

MR HARRIES: Yes please.

LORD JUSTICE HICKINBOTTOM: With a time estimate of 2 hours. The prosecution obviously should attend. We propose directing the Crown to submit a skeleton argument on all matters, but certainly including the evidence that they say was available to show that the students were complicit. The judge said at the abuse hearing that there was sufficient evidence to go to the jury. We would like the prosecution to outline what the evidence relied on was. That skeleton argument can be served and filed by 4 pm on 29 November. You, Mr Harries, please file a skeleton in reply by 4 pm on 6 December. The substantive hearing is set down for 13 December, 2 hours. Representation order? He is privately funded?
MR HARRIES: He is funded so far privately even though he is on his toes somewhere. I am not sure where. My Lord, I would ask nonetheless for a representation order please.

(The Bench Conferred)

LORD JUSTICE HICKINBOTTOM: In respect of Babar Bashir, no representation order; certainly not without some evidence of means.

MR HARRIES: Thank you. I ought to ask in so far as Nallamothu is concerned; I did not represent him at trial. It is not the sort of case where my Lord's colleagues will be assisted by Mr Shafi who represented him at trial. If so, I imagine if he were here he would ask for a representation order.

LORD JUSTICE HICKINBOTTOM: Just before we consider that. There is no reason why you could not represent each of the (now) Appellants?

MR HARRIES: There does not seem to be a reason.

LORD JUSTICE HICKINBOTTOM: There is no conflict. You were at the trial; and Grounds 1 and 2 for each of the Appellants are more or less identical.

MR HARRIES: They are.

(The Bench Conferred)

LORD JUSTICE HICKINBOTTOM: So, for both Appellants, just you Mr Harries; and, as my Lord said, that means you get a representation order.

MR HARRIES: For Mr Nallamothu. Thank you very much indeed. I am very grateful to my Lord.

LORD JUSTICE HICKINBOTTOM: Is there anything else that you need?

MR HARRIES: No, thank you.

LORD JUSTICE HICKINBOTTOM: Thank you very much, Mr Harries.

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