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Case Numbers: 201804249
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT AYLESBURY
(HIS HONOUR JUDGE TULK)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 21 February 2020

Before:

LORD JUSTICE GREEN
MRS JUSTICE CHEEMA-GRUBB DBE
and
HIS HONOUR JUDGE FLEWITT QC

- -

Between:

MIKLOVAN BAZEGURORE **FATION SHUTI**	**Appellants**
- and -	
REGINA	**Respondent**

- -
- -

MR MOLONEY QC (instructed by **Carson Kaye**) for the **Appellants**
MR RENVOIZE (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 21 February 2020

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Approved Judgment

Lord Justice Green:

A. The issue: Totality and the relevance of sentences imposed by foreign courts

1. The issue in these appeals concerns the obligation, if any, upon a court under the Sentencing Council Guidelines, or otherwise, when sentencing a defendant, to take account of sentences imposed by foreign courts for similar offences.

2. On 23rd March 2018 in the Crown at Aylesbury the Appellants pleaded guilty on re-arraignment to counts of conspiracy to do an act to facilitate the commission of a breach of UK immigration law by a non-EU person under section 1 Criminal Law Act 1977. On 19th September 2018 the Appellants were both sentenced to terms of imprisonment of nine years.

3. The offences related to an incident on 14th June 2016 when a lorry containing 11 illegal immigrants was stopped in Bedford. At the time the Appellants were not apprehended. They were arrested some months later. In the interim, in August 2016, both Appellants were involved in another episode involving the illegal trafficking of immigrants, upon this occasion in Belgium. They were arrested at the scene and in due course convicted in the Belgian Courts. Such evidence as we have about this incident, which we glean from the judgment of the Court of Appeal Ghent, Belgium, suggests that it was of comparable scale and complexity to the offences committed in this jurisdiction.

4. Following sentencing in this jurisdiction the Appellants sought permission to appeal. They were substantially refused by the single judge. Their renewed applications for permission to appeal were refused by this Court on 18th October 2019. However, the Court did grant permission to the Appellants to appeal upon one point. The Court recorded that when the Appellants had served their sentences in this jurisdiction they stood to be removed to Belgium where they would then serve the sentences imposed upon them there for the separate offending. It appears that in the Crown Court, when the Appellants were sentenced, there was some confusion as to the nature of the sentences to be served in Belgium. This was because the suspended sentences imposed at first instance had been upon appeal. In March 2018 the regional Court of Appeal in Ghent increased the Appellant's sentences to six years in the case of Shuti, and five years in the case of Bazegurore. It is common ground that the Judge was unaware of this increase in sentence. We are informed that the prosecuting authorities in this jurisdiction provided information to the Court of Appeal in Ghent, which took there into account as an aggravating factor that the Appellants had been engaged in similar offending in the United Kingdom.

5. The short issue arising upon this appeal is whether the judge properly applied the totality principle and, in particular, whether she failed to give due weight to the fact that the Appellants had been subjected to substantial terms of imprisonment in Belgium which would in due course have to be served.

6. The judge below did not refer to the sentences imposed in Belgium but did refer to the proceedings in Belgium as evidence that the Appellants were engaged in broad international criminality. The judge observed the following:

> "Mr Bazegurore and Mr Shuti, whilst not having previous convictions, a little over two months later were involved in an identical offence in Belgium, and I agree with the court in Ghent, that clearly shows that at that time they were heavily involved in a criminal organisation engaged in people smuggling."

B. The position in Belgium

7. We have received detailed submissions for the Crown. These include information provided to it by the Advocate General in Belgium who had conduct of the prosecution there. He has clarified the position. The sentences imposed by the Court of Appeal in Ghent are definitive. They will be unaffected by the sentences imposed in this jurisdiction. It is possible that the Appellants could be transferred to custody in England to serve their Belgian sentences here. Time spent in Belgium on remand counts towards the sentence imposed there. The Appellants are eligible for early release at the one third point of their sentences. There is, however, no absolute guarantee of early release, which depends upon the application of a variety of different factors and considerations.

C. Submission of the Crown on the Merits

8. The Crown in their submissions to this Court make the following points about the merits of the appeal. First, the judge did not appear to have been aware that the sentences initially imposed in Belgium had been increased upon appeal. Second, it is accepted that had the Appellants been sentenced here for two conspiracies (in the UK and Belgium) in the same court the judge would have had regard to totality and would not have imposed two consecutive sentences of nine years duration in each case, i.e. 18 years for each Appellant. The total would have been significantly less. Third, on the facts, the judge was not however required to sentence for two sets of offences. The Belgian offending was in a different jurisdiction. The judge was aware of the close connection in time between the two criminal incidents and treated this, to some degree, as an aggravating factor. Fourth, a total sentence of 15 years for Shuti and 14 years for Bazegurore, reflecting a combination of the domestic and the Belgium sentences, would have been warranted for the two incidents had they (hypothetically) fallen to be sentenced at the same time in this jurisdiction. Fifth, the Appellants were involved in widespread, international, offending of a sophisticated nature and were part of a major trafficking organisation. Whenever offending spanned frontiers the parties must be taken to accept the risk of criminal penalties being imposed in different jurisdictions. Sixth, there was therefore no reason to reduce the sentences imposed here to take account of the foreign convictions and sentences, the totality of the combination of the two sets of sentences was not excessive, and nor therefore were the individual sentences imposed in this jurisdiction.

D. Submissions of the Appellants on the merits

9. The Appellants argue that the judge sentenced upon an incomplete or false basis. She was unaware of the full nature and extent of the sentences imposed upon the Appellants by the Court of Appeal in Ghent. Had the judge been aware of the full extent of the foreign sentences she would have been required, in order to comply with the principle of totality, to take them into account. In such circumstances she would

not have imposed a sentence of nine years for each Appellant. The Crown concedes that had the judge been sentencing for both conspiracies at the same time she would not have imposed sentences of 9 x 2, i.e. 18 years. A much lower sentence should have been imposed because, w2hen viewed globally, the two episodes should be viewed as in substance a single conspiracy. There were factual similarities between the 2 sets of offending. It could even be argued that there was a single overarching conspiracy. When taking account of totality, the judge was required to take account of the total, headline, sentence imposed in Belgium, and no assumption should be made about early release which was therefore not to be factored into the analysis. The Appellant's cite, in this regard, a series of cases concerning the relevance of release dates generally when sentencing, in which it was held that generally they are irrelevant.: *R (Robinson) v Secretary of State for Justice* [2010] EWCA Civ 848; *R v Bright* [2008] EWCA Crim 462; and, *R (Abedin) v Secretary of State for Justice* [2015] EWHC 782.

E. Conclusion

10. We turn to our conclusions.

11. The starting point is that the Appellants were properly sentenced both in this jurisdiction and in Belgium for two quiet separate offences. Their appeals in both jurisdictions have been completed. The sole issue is whether the sentences in Belgium should have resulted in some incremental discount to those imposed here, based upon totality. As to this a number of points arise.

12. The Sentencing Council Definitive Guideline on *"Offences Taken into Consideration and Totality*", states that the principle of totality comprises two elements. The first is that courts, when sentencing for more than a single offence, should pass a total sentence which:

> "… reflects *all* the offending behaviour *before it* and is just and proportionate."
>
> (Emphasis added)

13. The second element is that it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address offending behaviour together with the factors personal to the defender "*as a whole*". On its face the Guidelines do not apply where a defendant is being sentenced for two different offences in two different courts in two different jurisdictions. We would, however, stop short of concluding that in every case what occurs in relation to separate offences being dealt with in separate courts in separate jurisdictions abroad is *always* irrelevant.

14. The Guidelines reflect broader principles of justice and proportionality the application of which does not, inevitably, stop at a border or frontier. There might be unusual or exceptional circumstances where an international overview is required. An example might be where two sets of offending overlap in their facts such that there is a risk of double jeopardy if the defendants are sentenced without reference to the overlap. In such a case, to avoid a breach of fundamental rights such as are set out in Article 6, a broader prospective might be required.

15. Neither counsel was able to identify an authority squarely on point, but we have identified the judgment of this Court in *R v Prenga* [2017] EWCA 2149 (Crim) ("*Prenga*") as roughly analogous. In that case the issue was whether there was a discretion to take into account time spent on qualifying bail or on remand awaiting possible extradition to a third country for unrelated offences, which were therefore outside of the circumstances where credit was required to be accorded as set out in the CJA 2003. In that case the court, having reviewed the earlier authorities, concluded that there was a discretion on the part of a court to adjust an otherwise lawful sentence in order to do "*justice on the particular facts*" (ibid paragraphs [26] and [37] - [43]). In that case the court also observed that in all processes, including criminal sentencing processes, there was a requirement for "*finality*" (paragraph [48]) and this was a relevant consideration is evaluating the overall justice of a case. This is particularly the case where parties choose not to place information before a sentencing court but, subsequently, seek to advance the argument that it was unfair for the court not to have had and acted upon full knowledge of the facts (see eg *Prenga* paragraph [47]). The theme running through the judgment is the need to balance justice and proportionality, on the one hand, with legal certainty and finality on the other.

16. However, be all of that as it may, *in general* a court will sentence upon the basis of the facts "*before it*", to use the language of the Guidelines (see paragraph [12] above) Any other solution risks encouraging arbitrary and random results and could give rise to potentially insuperable practical problems.

17. For example, if the foreign offending occurred some significant point in time before the offending which is the subject matter of the domestic sentencing exercise, it might be treated as part of the antecedents and viewed as a substantial aggravating factor leading to an increase in the sentence that would otherwise be imposed upon a person of good character[1]. But if the foreign offences materially post-date the domestic sentencing exercise, or are not known about, they will be irrelevant and neither aggravate nor mitigate. It is only if it happens, perchance, that the two sentencing exercises are in temporal proximity to each other – as here – that the issue of a possible argument about a reduction in sentence might arise. There is an element of arbitrariness about this.

18. From a practical perspective in the present case this Court now has full information from the authorities in Belgium which clarifies the position. But the Crown Court did not and the Appellants, who would have known the true position, did not place such information before the Judge. They might have considered that there were forensically advantageous reasons for not providing this information, we do not know. And in another case where the foreign court is further afield or less cooperative, equivalent information might not be available. Indeed it is predictable that in many cases the facts relevant to the foreign offending might be difficult to determine to a sufficient probative standard to make the subsequent sentencing exercise accurate, objective and fair, if it is the case that it must be taken into consideration. If there was an obligation upon courts to dig out evidence about such proceedings this could trigger all sorts of satellite disputes and litigation about the facts underlying a foreign conviction and as

[1] There is a framework at the EU level which covers inter-court cooperation in relation to the exchange of information between Member States about previous convictions: See Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (24th July 2008).

to what did or did not occur and as to the role of the defendant in those underlying facts. The logistical difficulties of a rule requiring foreign sentences to be taken into account as part of totality are legion.

19. We also see force in the argument advanced by the Crown that when criminals engage in criminality spanning frontiers, they must be taken to accept the risk of criminal sanctions in multiple jurisdictions of potentially variable severity being imposed upon them. It is neither unjust nor disproportionate to require those engaged in international criminality to bear this risk.

20. For all these reasons, *prima facie*, there was no reason for the judge to adjust the sentences upon the basis of totality to take into account the sentences imposed in Belgium.

21. But what, however, if we are wrong in this conclusion? One way to test our general conclusion is to ask whether the judge, had she taken the Belgian sentences into account and considered the position from the perceptive of overall totality, would have come to a different conclusion. In our view she would not.

22. When this exercise is performed the sum of the sentences imposed by the Belgian and domestic courts is *lower* than a notional sentence that might have been imposed by a Crown Court judge sentencing for both offences in this jurisdiction. This is in our view strong and indeed compelling evidence that the sentences of 9 years actually imposed are not excessive when taking account of the Belgian sentences for the purpose of justice or proportionality.

23. First, as to this, as already explained above, the Appellants argue that when comparing the Belgian with the domestic sentences any question of early release (in Belgium – at the one third point) should be ignored and that the relevant comparisons should therefore be, on the facts of this case, 15 years in the case of Shuti (i.e. 9 plus 6 years) and 14 years in the case of Bazegurore (9 plus 5 years). We disagree. To adopt the Appellants' approach of treating the Belgium sentences of 5 and 6 years as legally and functionally equivalent to the domestic sentences of 9 years elevates form over substances and ignores reality. Any exercise in assessing totality is intended to be based on reality and fairness. We do not consider that the cases cited by the Appellants are on point or assist. To the extent that they are relevant they would support the proposition that sentences should be taken into account upon a basis which is properly comparable, and in this case that means that an adjustment must be made to the Belgium sentences for the purpose of any totality exercise to be performed in this jurisdiction.

24. Second, in order therefore to make the Belgian and the domestic sentences comparable an adjustment of the Belgian sentences is needed. The Belgian sentence of 6 years is the equivalent of a 4 year sentence in this jurisdiction. This is calculated by taking 1/3 of 6 years (to reflect the different early release points here and in Belgium) and then doubling it. The same calculation in relation to the 5 year sentence leads to a domestic equivalent of 3 years and 4 months[2]. We recognise that there is some degree of uncertainty here. We do not know whether in fact the Appellants will

[2] 5 years = 60 months. One third of 60 months is 20 months. Doubling the 20 months leads to a determinate sentence of 40 months ie 3 years and 4 months.

be released at the 1/3 point when serving their sentences in Belgium. But it is not suggested that, all things being equal, early release at the 1/3 point would be inappropriate. Combining the domestic and the Belgian sentences leads therefore to a total of 13 years (i.e. 9 plus 4 years) and 12 years 4 months (i.e. 9 years plus 3 years and 4 months) for Shuti and Bazegurore respectively.

25. Third, in our view sentences of this level would have been perfectly reasonable from the perspective of totality. The Crown submits that sentences in this country reflecting two counts indicting the two conspiracies of circa 15 years could not have been criticised. We agree. The Appellants have not materially taken issue with this analysis. In any event notional sentences of 13 years, and 12 years and 4 months, are well below this level. And even taking the Appellants' most optimistic case (of 14 and 15 years – see paragraph [23] above) the total is on a par with the sort of sentence which a judge might have imposed in this jurisdiction for totality. On this basis the sentences of 9 years imposed in this jurisdiction for the single offending here do not offend any principle of justice or proportionality or totality.

26. For all these reasons we refuse these appeals.