IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 2003

Royal Courts of Justice

Tuesday, 21 December 2021

Before:

LORD JUSTICE EDIS
MR JUSTICE HILLIARD
HIS HONOUR JUDGE DEAN QC
(sitting as a judge of the Court of Appeal Criminal Division)

REGINA
V

AB
CD
EF
GH

REPORTING RESTRICTIONS APPLY
SECTION 4(2) OF THE CONTEMPT OF COURT ACT 1981 APPLY

The Court has quashed the convictions in this case and directed a retrial. A reporting restriction has been imposed in respect of the full judgment on the References of the Sentences and on the full judgment on the appeals under the Contempt of Court Act 1981. This anonymised judgment on the conviction appeals can be published now and the order is varied to permit that.

Mr. J Hipkin QC appeared on behalf of AB.
Mr. P. Hobson appeared on behalf of CD.
Ms. N. Powell appeared on behalf of EF.
Mr. L. Davies appeared on behalf of GH.
Mr. B. Lloyd appeared on behalf of HM Solicitor General.

J U D G M E N T

LORD JUSTICE EDIS:

Introduction

1 These are applications for leave to appeal against conviction following guilty pleas entered in in the circumstances fully set out in the judgment handed down today in the Attorney General's reference in this case (the reference judgment) which arose out of the sentences imposed. The neutral citation number of the reference judgment is [2021] EWCA Crim 1959. We give leave and grant any necessary extensions of time.

2 We will not repeat the facts of the case, nor the analysis of the types of indication as to sentence which may lawfully be given and of the procedural requirements which must be complied with when a judge is giving an indication as to the sentence which will be imposed if a defendant enters a guilty plea at the stage in the proceedings when the indication is given. These two judgments should be read together.

3 The grounds of appeal and submissions are simple. It is said that the convictions are unsafe because the judge's indication was so generous that the offer was irresistible to any defendant, whether guilty or not, or at least it operated to apply inappropriate pressure so that the pleas should not be regarded as truly voluntary. This is in part because of the failure to follow the procedure in *R v. Goodyear* [2005] EWCA Crim 888, 2005 1 WLR 2532, but only in part. It is also submitted that even if *Goodyear* had been properly complied with the indication given was so lenient that the pressure it applied should still have the same effect.

4 The defence submissions are summarised by the prosecution's skeleton argument, which says that in essence each applicant now submits that their pleas of guilty should be set aside as their freedom of choice was improperly narrowed in that they contend that:-

> (1) the judge gave an unsolicited indication as to sentence;
>
> (2) prosecuting counsel acquiesced in or lent support to the indication;
>
> (3) defence counsel did not advise their clients that there was a possibility that any sentence passed might be referred to the Court of Appeal; and
>
> (4) prosecuting counsel did not remind the judge or defence counsel as to that possibility.

5 The prosecution accepts that the proper procedure was not followed and says:-

> "The key question then is whether the applicants were subject to inappropriate additional pressures which narrowed the proper ambit of their freedom of choice in entering the pleas of guilty. On that issue the respondent respectfully remains neutral."

The law

6 The starting point is *R v Turner* (1970) 54 Cr App R 72, [1970] 2 QB 321 which represented a change in practice and which sought to regulate the way in which judges could give indications as to sentence and to restrict the kinds of indication they could give. It represented the law for 35 years until *Goodyear* introduced a variation by allowing an additional kind of indication to be given in strictly defined conditions. Those conditions included the indication being given in open court and in the presence of the defendant.

Subject to these variations, *Turner* still does represent the law.

7 In *Turner* the defendant had been given the impression that the judge had indicated that if he pleaded guilty he would not be sent to prison whereas if he was convicted by the jury he would. This resulted in the Court of Appeal Criminal Division deciding to

> "treat the plea that was made as a nullity with the result that the trial that had taken pleas is a mis-trial and that there should be an order for a *venire de novo.*"

8 The court did not explain why the appropriate course was to treat the plea as a nullity rather than to quash the conviction and direct a retrial under section 7 of the Criminal Appeal Act 1968, which was then in force. It may be because in 1970 the circumstances in which a conviction might be quashed after a guilty plea had not been an as fully explored as they have been since. In *R v Boal* [1992] 1 QB 591 Mr Justice Simon Brown, giving the judgment of the court, said:

> "But putting *Reg. v. Ensor* [1989] 1 W.L.R. 497 aside, there are, we conclude, two other bases upon which this court can entertain this appeal against conviction even despite the unequivocal pleas of guilty to three of the counts. First - see the judgment of this court in *Rex v. Forde* [1923] 2 K.B. 400 - because it appears that the appellant did not appreciate the nature of the charge. Second, however, and perhaps more tellingly, for the reason stated by Ackner L.J. in this court in *Reg.v. Lee (Bruce)* [1984] 1 W.L.R. 578, 583:
>
> > 'The fact that [Lee] was fit to plead; knew what he was doing; intended to make the pleas he did; pleaded guilty without equivocation after receiving expert advice; although factors highly relevant to whether the convictions on any of them were either unsafe or unsatisfactory, cannot of themselves deprive the court of the jurisdiction to hear the applications.'
>
> In short, this court is not merely empowered but, by virtue of section 2(l)(a) of the Criminal Appeal Act 1968, duty bound to allow an appeal against conviction if in all the circumstances we think such conviction unsafe or unsatisfactory. Accepting, as we do, that the appellant without fault on his part was deprived of what was in all likelihood a good defence in law, that indeed is our conclusion in this case. It follows that we allow this appeal."

9 *Boal* has been followed on a number of occasions and is now well established.

10 In *R v. Nightingale (Danny)* [2013] EWCA Crim 405; [2013] 2 Cr. App. R. 7 the present issue was considered by a court presided over by the Lord Chief Justice, who had drafted the judgment of the Court of Appeal in *Goodyear* at the time when he was Deputy Chief Justice. In *Nightingale* the judge had given an indication of sentence without having been invited to do so. He had appeared to indicate that, if the defendant pleaded not guilty and was convicted, he would be looking at a sentence of, or close to, five years' imprisonment, whereas, if he pleaded guilty, he would be looking at a maximum sentence of two years' imprisonment, which would mean that he could serve his sentence in military detention rather than a civilian prison and that his military career could possibly continue. After a conference between the defendant and his legal representatives, at which his wife and father both suggested that he could not risk five years in a civilian prison, the defendant pleaded guilty. He appealed against conviction. His appeal was allowed. The judgment of the court is clear and emphatic:-

"10. Against those facts we must consider the relevant principles of law. It is axiomatic in our criminal justice system that a defendant charged with an offence is personally responsible for entering his plea, and that in exercising his personal responsibility he must be free to choose whether to plead guilty or not guilty. Ample authority, from *Turner* to *Goodyear*, which amends and brings *Turner* up to date, underlines this immutable principle. The principle applies whether or not the court or counsel on either side think that the case against the defendant is a weak one or even if it is apparently unanswerable. In view of the conclusion that we have reached, we shall express no opinion whatever of our view of the strength of the case against the appellant.

11. What the principle does not mean and cannot mean is that the defendant, making his decision, must be free from the pressure of the circumstances in which he is forced to make his choice. He has, after all, been charged with a criminal offence. There will be evidence to support the contention that he is guilty. If he is convicted, whether he has pleaded guilty or been found guilty at the conclusion of a trial in which he has denied his guilt, he will face the consequences. The very fact of his conviction may have a significant impact on his life and indeed for the lives of members of his family. He will be sentenced-often to a term of imprisonment. Those are all circumstances which always apply for every defendant facing a criminal charge.

12. In addition to the inevitable pressure created by considerations like these, the defendant will also be advised by his lawyers about his prospects of successfully contesting the charge and the implications for the sentencing decision if the contest is unsuccessful. It is the duty of the advocate at the Crown Court or the magistrates' court to point out to the defendant the possible advantages in sentencing terms of tendering a guilty plea to the charge. So even if the defendant has indicated or instructed his lawyers that he intends to plead not guilty, in his own interests he is entitled to be given, and should receive, realistic, forthright advice on these and similar questions. These necessary forensic pressures add to the pressures which arise from the circumstances in which the defendant inevitably finds himself. Such forensic pressures and clear and unequivocal advice from his lawyers do not deprive the defendant of his freedom to choose whether to plead guilty or not guilty; rather, the provision of realistic advice about his prospects helps to inform his choice.

13. In marked distinction, unlike the defendant's lawyers who are obliged to offer dispassionate, even if unwelcome, advice, the judge, subject only to express exceptions, must maintain his distance from and remain outside this confidential process. The decided cases, Turner and Goodyear, identify specific exceptions to this rule. They include the discretion in the judge, if invited to do so, to provide the defendant with a 'Goodyear indication'. It is worth underlining that one of the reasons for the amendment of the Turner principle in Goodyear was based, at least in part, on the additional impact provided when an indication is given by the judge, rather than leaving the defendant to the advice of counsel. As Goodyear explains, this 'substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself'. Thus we must never minimise the effect of any observation about these issues when it is made by the judge. If the judge chooses to respond to such a request, that would not constitute inappropriate judicial pressure just because the judge agrees to respond to a request by or on behalf of the defendant. It is also open, and perhaps as far as the judge can ever go, to remind the defence advocate that he is entitled, if the defendant wishes, to seek a Goodyear indication. But if he chooses not to do so, it remains wholly inappropriate for the judge to give, or to insist on giving, any indication of sentence. Goodyear underlines that 'the judge should not give

an advance indication of sentence unless one has been sought by the defendant'.

14. There is one further exception to the general principle which we must mention. There is one situation in which the judge is entitled to use his own initiative to give an indication of sentence. It is where he decides to let the defendant know that the sentence or type of sentence will be the same whether the case proceeds as a guilty plea or, following a trial, results in a conviction. The principle adopted in Goodyear derives from the final observations in Turner that 'it should be permissible for a judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, eg a probation order or a fine or a custodial sentence'. The basis upon which that principle is enunciated is that if the sentence is to be the same whether the defendant pleads guilty or not guilty, there is no extraneous additional pressure upon him. He can make his mind up free of any worry about the level of sentence being affected by his plea. The observation in Turner was made in the context of a judge who indicated that the question whether the sentence would be custodial or non-custodial would depend on whether the defendant pleaded guilty.

15. The observations do not, however, mean that in a case where imprisonment is inevitable it is permissible for the judge on his own initiative, uninvited, to give an indication to the defendant that a very long sentence of imprisonment will be the consequence of conviction by the jury or by the court martial, and a relatively short one will follow if the defendant decides to plead guilty.

16. In the final analysis, the question is not whether the Judge Advocate here contravened the principles which govern the giving of sentence indications. Of itself that would not be decisive. The question is whether the uninvited indication given by the judge, and its consequent impact on the defendant after considering the advice given to him by his legal advisers on the basis of their professional understanding of the effect of what the judge has said, had created inappropriate additional pressures on the defendant and narrowed the proper ambit of his freedom of choice.

17. Having reflected on the facts in this case, we conclude that the appellant's freedom of choice was indeed improperly narrowed. Accordingly, the plea of guilty is in effect a nullity. It will be set aside. The conviction based on the plea will be quashed."

11 We have set out so much of that judgment because it applies precisely in this case, and we cannot improve on it. We are uncertain about the decision of the court to declare the plea a nullity, but suspect that the court followed *Turner* in this respect. The prosecution submits that we should not follow these cases in this respect. They draw our attention to the fact that the Court of Appeal, in the context of indictments, has observed that the highly technical law in relation to 'nullity' is an outdated concept that should no longer prevail, see *R v Malachi Williams* [2017] EWCA Crim 281, [2017] 4 WLR 93, at [33].

Discussion and decision

12 We refer to paragraph [16] of *Nightingale* quoted above. We formulate the question in exactly the same way. This means that the question is not only whether the principles governing the giving of sentence indications were contravened because that would not be decisive. The question concerns the effect on the appellants of the uninvited indication given by the judge.

13 The grounds of appeal focus on the undoubted failures to follow the *Goodyear* process, and to a lesser extent the effect of the indication, however given, on the appellant's freedom of

choice. We are bound to point out that the authors of these grounds were fully complicit in these failures in that no-one appears to have sought to protect their client from any injustice by insisting that the *Goodyear* process be followed and fulfilling their own responsibilities to that process.

14 *Goodyear* at paragraph 65 says this:

> "65. The advocate is personally responsible for ensuring that:
>
> (a) he should not plead guilty unless he is guilty;
>
> (b) any sentence indication given by the judge remains subject to the entitlement of the Attorney-General (where it arises) to refer an unduly lenient sentence to the Court of Appeal;"

15 The purpose of the first of these obligations is to require counsel to do everything possible to ensure that the client is aware of the freedom of choice which continues to exist after a sentence indication. The purpose of the second is to warn the client that if they enter a plea they may end up with a higher sentence than that indicated by the judge. These are both very important obligations. It is accepted by all advocates that they gave no warning of the possibility of an increase in sentence following a reference to this court. That has placed this court in the difficult position of being required in its public duty to increase these sentences to a level far above that which these appellants had been promised by the judge before they pleaded guilty. It is most unfortunate that that has happened in this case without any of the appellants having been aware that it might happen before they entered their pleas.

16 It is, we think, relevant to the safety of the convictions that the appellants were not aware, when they entered their pleas, that they were liable to an increase in sentence if the cases were referred to this court by the law officers. It is also relevant that the impetus for the indication appears to have come from the judge, and we are aware of no request for an indication ever having been made personally by any defendant. All parties had attended on 10 September at the instigation of the judge, or at least with his endorsement, so that the possibility of guilty pleas could be discussed. No doubt any appellant who was resolute could have refused to take part in discussions, but their attendance at this pre-trial review was not dispensed with and they had no choice but to be present. Moreover, it is worth pointing out that this was a family and the mother was unwell and was the defendant who was in the most serious trouble.

17 Mr Hipkin QC for AB opened the discussion in court by saying this:

> "**Mr Hipkin**: And secondly delay in the case. These defendants were interviewed in 2015. The position is, I make it clear, I don't yet have a formal application for a *Goodyear* indication but it is highly likely that there will be one, but it needs some, I think, fine tuning between defendants to make sure that it is either that it seems to me a joint application or not an application at all."

18 This situation is full of pressure. Any of the sons faced with an indication that his mother would not be sent to prison if he pleaded guilty along with the others was placed in a very difficult position. The court did not create this situation but should have been careful not to become complicit in it. The court cannot control what discussions may take place between the parties, but confronted with that observation by leading counsel for one of the four defendants, it was especially important to ensure that each defendant was actually seeking an indication of a sentence before giving one. It may be that if the request was not

unanimous, the right course would have been to give no indication to anyone, but that would have been for the judge to decide.

19 By becoming actively involved in this situation without any request from each defendant the judge became active in a process which clearly had the potential for unfairness. In the end the role of the court is to conduct a fair trial of all those who have pleaded not guilty and not to become involved actively in negotiations of this kind.

20 The failures to follow the *Goodyear* procedure in the respects we have identified were significant. The failure to deal with the matter in open court with the defendants present meant that the court could not speak directly to them to ensure that they understood exactly what the position was, in particular, in relation to a possible reference. The real problem, though, was that the indication that there would be no immediate custodial sentence in the event of guilty pleas on that day was so far below the proper level of sentencing that however it was given it would impose real pressure on the defendant, especially in the family situation we have described above. We do not say that this will be the case whenever a judge indicates that there will be no immediate custodial sentence and thereby indicates an unduly lenient sentence. It is a matter of degree.

21 In the reference judgment we assessed starting points before discounts for matters of mitigation, delay and the late plea of five, six and seven years. We then made very significant discounts from those starting points for those matters. By this process we have in our judgment imposed the shortest possible sentences as all sentencers are required to do by section 231 of the Sentencing Act 2020. We have followed the guideline, as we are required to do. The great chasm in their impact between these sentences and those imposed by the judge speaks for itself.

22 The point may be illustrated in this way: in the reference judgment we expressed some uncertainty about the exact basis on which GH was said to be guilty of count 1. The evidence against him on counts 14 and 15 is strong, but we could not identify any evidence that he was aware that the investors were being persuaded to invest by dishonest misrepresentations. He is not alleged to have made any such misrepresentations himself. We therefore asked yesterday for an agreed statement of the case against him on count 1 and we are extremely grateful to the relevant trial advocates who collaborated to produce such a statement at speed.

23 It says this:

> "[factual statement of case against GH omitted]"

24 We are not of course in a position to decide whether or not in law this amounts to a case to answer on count 1 against GH. However, it is relevant for our purposes to observe that this is not a case of such strength that the objective and informed reader would necessarily expect a guilty plea. Whatever GH's reasons for pleading guilty were, they probably did not include a sudden realisation that he had no prospect of acquittal on this count. This increases our concern that these appellants were subject to inappropriate pressure to plead guilty. We emphasise that we are quite sure that the judge did not act as he did with this intention. On the contrary, we are sure that he was attempting to do justice in difficult circumstances. We are, however, driven to the conclusion that he did not succeed in that endeavour.

25 In these circumstances we consider that the approach of the judge and of counsel in the case was such as to place inappropriate pressure on the appellants and to deprive them of their free choice as to whether to plead guilty or not. These convictions are unsafe and we will

direct that they are quashed at the time when we have determined any application for a retrial.

L A T E R

26 The appeals are allowed. The convictions on all fifteen counts on the trial indictment are quashed. We direct further to section 7 of the Criminal Appeal Act 1968 that there shall be a retrial in relation to those fifteen counts. We direct that a fresh indictment is to be served on the crown court, not more than 28 days after this order. We direct that the appellants are to be re-arraigned on the fresh indictment within two months. We direct that [directions as to venue given]. Those and any other possibilities which exist should be considered by the presiding judge.

27 We direct that the appellants shall be released on bail, subject to the conditions which applied in the crown court proceedings, if any, prior to sentence.

28 We make an order under section 4(2) of the Contempt of Court Act 1981 restricting reporting of these proceedings until after the conclusion of the retrial. The crown court is to notify the Court of Appeal office when the crown court proceedings have concluded, and the judgments will be fully published at that date, and we invite through Mr Lloyd, the prosecution to assist in confirming that that has been done.

29 The court will prepare an anonymised version of these judgments in summary which can be published now because the point involved is, we think, a matter of significance in the present circumstances in which judges all over the country are doing their level best to deal with a long backlog of cases and where perhaps things may be happening which would not normally be contemplated.

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CERTIFICATE

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