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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 11 June 2019

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE DOVE

MRS JUSTICE COCKERILL DBE

R E G I N A

v

FRANK NGWA

NIAZ KHAN

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Mr S Kumar appeared on behalf of the **Appellant Ngwa**

Mr S Sidhu appeared on behalf of the **Appellant Khan**

J U D G M E N T

(Approved)

MRS JUSTICE COCKERILL:

1. The appellants, Frank Ngwa and Niaz Khan, were sentenced by Her Honour Judge Karu at Inner London Crown Court on 23 August 2018 for their involvement in a large scale and sophisticated fraud, operating between 2014 and September 2016, that is for a period of nearly two-and-a-half years.

2. They both pleaded guilty to count 1, conspiracy to defraud, contrary to common law. Mr Ngwa received a sentence of 1 year and 9 months' imprisonment and Mr Khan received a sentence of 1 year 6 months' imprisonment. They both also pleaded guilty to count 2, conspiracy to defraud contrary to common law. For this Mr Ngwa received a concurrent sentence of 1 year 6 months' imprisonment. Mr Khan received a concurrent sentence of 11 months.

3. Each of them faced a separate charge. Count 5 (against Mr Ngwa) was supplying articles for use in frauds, contrary to section 7(1) of the Fraud Act 1986. For this he was sentenced to a consecutive term of 2 years 7 months' imprisonment. Mr Khan's separate charge was count 6, possessing articles for use in frauds, contrary to section 6(1) of the Fraud Act 2006, for which he received a consecutive sentence of 1 years 6 months. Finally, Mr Ngwa was also sentenced for a Bail Act offence of failing to surrender.

4. Their co-accused, Ryan Thomas, had already pleaded guilty on a separate indictment to supplying articles for use in frauds, possession of articles for use in frauds and fraud by false representation. He was sentenced to a total of 5 years' imprisonment at Aylesbury Crown Court by His Honour Judge Lamb on 16 August 2016.

5. Count 1 against these appellants related to a large number of railway tickets running into the many hundreds, fraudulently obtained between April 2014 and September 2016 from companies who provided tickets for train operating companies via their own booking companies. The total value of these tickets was over £55,000.

6. Count 2 covered the same period and related to fraudulent credit card transactions for goods and services other than train tickets. These had a total value of just under £15,000.

7. Count 5 (against Mr Ngwa) related to 23 i-messages sending credit card and other personal details and a Skype chat sending further card and login details in which he gave advice on to how to carry out credit card fraud.

8. Count 6 (against Mr Khan) related to the discovery of a number of cloned cards and the necessary equipment for making clone cards and evidence connecting him to them as well as evidence from online chats in which he openly discussed fraud, forged bank statements and the use of credit cards.

9. Mr Ngwa and Mr Khan each appeal against sentence on the basis that the sentence imposed was manifestly excessive. They do so with leave of the single judge.

10. Through counsel Mr Ngwa says that the judge adopted too high a starting point; that his sentence exhibited too great a disparity with that of his co-conspirator, Ryan Thomas, and due regard to totality was not paid, in that the sentences on counts 1, 3, and 5 should all have been concurrent, ie a sentence of count 5 should not have been consecutive.

11. On the first point we do not consider there is merit in this contention. Mr Ngwa rightly does not take real issue with the categorisation of the offences (inaudible) category 3, culpability B (or B/C borderline). He accepts, despite a number of points on which Mr Kumar has relied before us as indicating perhaps the lower end, that the judge was entitled to be starting within the range of 26 weeks to 3 years because he positively says at paragraph 37 of the grounds that the starting point before credit or basis of plea were taken into account would be 18 months.

12. It is said that the judge erred in taking 24 months as the starting point and that "even on the basis of his other offending and antecedents that would be far too great a leap in the starting point and it was a manner not explained by Her Honour Judge Karu".

13. However, we consider that this argument is based on a misreading of the sentencing remarks. On any fair reading of the sentencing remarks it is absolutely apparent that the judge, when referring to 2 years, is referring to the appropriate sentence after a contested trial, bearing in mind basis of plea and aggravating and mitigating factors.

14. Bearing in mind the range of sentences for this level of offence, the seriousness of the offence and the serious aggravating factor in this case of a previous relevant conviction, it cannot be said that the uplift applied was excessive - let alone manifestly so. The fact that the judge might have reached a different, lower, conclusion does not mean that the sentence was faulty.

15. As to the question of disparity, the law which we have to apply is absolutely clear. This court in *R v Pitson* (1972) 56 Cr App R(S) 391, has said that the test where disparity of sentence is complained of is "whether right-thinking members of the public would consider that something had gone wrong with the administration of justice".

16. This court has made clear that in general apparent leniency to one offender is no ground for reducing a proper sentence on another and that successful appeals on this ground would be highly unusual.

17. The sentence at which the judge arrived, looked at by itself, was plainly a reasonable and appropriate one for this crime and was certainly not manifestly excessive for a conviction for an offence of

this type and seriousness. The disparity between the sentence and that of Ryan Thomas was plainly not such that right-thinking members of the public would think that something had gone wrong with the administration of justice. Ryan Thomas was sentenced separately, in a different court and by a different judge. That sentence also related to a different portfolio of offences. In particular, he received a 5-year sentence for the index offence within his portfolio. The crime which he committed with Mr Ngwa was sentenced concurrently and with regard to totality, bearing that in mind. The sentence he received for that offence was therefore in a sense academic, since it was likely to be shorter, bearing in mind the principle of totality in the context of that fully concurrent sentencing exercise.

18. As to the issue of concurrency, the argument deployed errs again by proceeding by reference to the sentence of Mr Thomas. The question is not whether these offences could have been sentenced concurrently, but whether the judge erred in sentencing consecutively. The guidelines for totality make clear that the structuring of a sentence in terms of concurrency and consecutiveness is not a bright-line decision. The structure may be adjusted appropriately in a number of ways to arrive at a sentence which is just and which proportionately and sufficiently reflects the overall criminality involved.

19. The judge's approach to totality was careful and well considered and the decision to make some of the sentences consecutive was not arguably wrong given both the different natures of the two sets of offences and the need to reflect the overall criminality in the context of prolonged and serious offending of this nature. It is firmly within the appropriate approach to the use of consecutive sentences as set out in the guideline. There is no need for the judge to have specifically given a reason for sentencing one of the offences consecutively.

20. The result arrived at overall does, in our firm view, reflect the totality of offending being sentenced. It is not manifestly excessive. It follows that despite Mr Kumar's best efforts Mr Ngwa's appeal must be dismissed.

21. Turning to Mr Khan, he says through counsel that the judge took too high a starting point, failed to reflect his mitigation in the sentence she imposed and failed properly to take account of the principle of totality, particularly bearing in mind that this was his first ever sentence of imprisonment and that he entered guilty pleas.

22. As to the first issue, the starting point adopted by the judge where grounds of appeal say that:

"... that starting point is, in all the circumstances of this case, manifestly excessive and far too severe and has failed to have regard to the circumstances of the offences, the basis of plea, the Applicant's lesser involvement, the pressure of financial strain he was under and the other good mitigation that is available to him."

23. That however fails to engage with the relevant guideline or to set out why it is said that the starting point was excessive. In our judgment, the judge was plainly right to find that counts 1 and 2 were categories 3 and 4 respectively, and the contrary is not arguable. As to culpability on those counts, the learned judge's conclusion that they fell into culpability B cannot sensibly be criticised. While not the ringleader, there was ample evidence for the judge to conclude, as she did, that Mr Khan was involved at a significant level in credit card fraud. That being the case she was plainly correct to conclude that the appropriate culpability band was B "insignificant role where offending is part of a group activity".

24. It also cannot be said that her starting point based on that was manifestly excessive by the time that the available mitigation was balanced by such factors and Mr Khan's boasting of the frauds and instructing others how to enter into such scheme. We do not accept that it cannot be said that there were no aggravating factors, or that it cannot be said that there were factors which gave a basis for starting towards the top end of the band, based on the circumstances of the offending. There was also the fact that two offences were being sentenced concurrently and the guideline for totality makes clear that concurrent sentences will ordinarily be longer than a single sentence for a single offence.

25. Similarly as regards count 6, it cannot credibly be said that the judge's conclusion that this was greater harm, culpability A was erroneous. This was a case involving a sophisticated, well-planned series of offences over a sustained period of time. Again, her conclusion that the appropriate sentence after trial would have been 2 years cannot be said to have been wrong in law or the period manifestly excessive, even allowing for the mitigation given the circumstances of the case.

26. It is, by the way, quite clear that the judge had well in mind that mitigation and reflected it in the sentence which she passed. So much is clear from pages 8F to 9C of the transcript which shows that it was carefully considered and reflected in the sentencing remarks.

27. As for totality, it was unclear in the grounds of appeal as to whether it was argued that it was not open to the judge to sentence count 6 consecutively. Paragraph 21 of the grounds appear to concede that it was and in oral argument the argument was not strongly pressed. To the extent it was an issue, it plainly was open to the judge to sentence this count consecutively both because there is a separation between the factual background to count 6 and the other offences and also adequately to reflect totality.

28. Nor need there be a specific reduction for totality. What matters, as the guideline makes clear, is that the court when sentencing for more than a single offence pass a total sentence which reflects all the offending of the behaviour before it and is just and proportionate. That is so whether the sentences are structured as concurrent or consecutive. One way of doing this, as the guideline makes clear, is to sentence all or some of the offences concurrently or to sentence them consecutively in full or in part. It cannot be said, bearing in mind the extent and seriousness of the criminality involved, that a total sentence of 3 years was manifestly excessive. Again therefore, although we have been much assisted by Mr Sidhu's careful submissions, we are firmly of the view that the appeal must be dismissed.

29. We add one point of detail. The memoranda of conviction for the offence of failing to surrender, that is charge 4, reports that the offence was committed under section 6 of the Powers of Criminal Courts (Sentencing) Act 2000. It would appear that this power was not available to the Magistrates' Court as the appellant had not been committed under any of the provisions set out in section 6(4). However, the offence could perfectly well have been committed pursuant to section 6(6) of the Bail Act 1976. Therefore, since the Magistrates' Court could lawfully have committed the appellant to the Crown Court for sentence, we consider that any error in recording the relevant statutory power did not affect the validity of the committal.

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