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[2021] EWCA Crim 1790

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/00793/B3, 2021/00470/B3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 23rd November 2021

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(Dame Victoria Sharp DBE)

MRS JUSTICE CUTTS

SIR NIGEL DAVIS

REGINA

- v -

GHEORGHE NICA
RONAN HUGHES

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Mr A Jafferjee QC and Mr R Keene appeared on behalf of the Applicant Gheorghe Nica

Mr T Moloney QC appeared on behalf of the Applicant Ronan Hughes

J U D G M E N T

Tuesday 23rd November 2021

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION:

1. There are before the court two renewed applications. The first is by Gheorghe Nica, who renews his application for leave to appeal against conviction. The second is by Ronan Hughes, who renews his application for leave to appeal against sentence. Both applicants apply for short extensions of time in which to renew their applications, following a refusal of leave in each case by the single judge.

2. Nica is represented before us by Mr Jafferjee QC and Mr Keene, both of whom appeared for him at the trial. Hughes is represented by Mr Moloney QC, who also appeared for him below.

3. Between 22nd and 23rd October 2019, 39 Vietnamese nationals – men and women between the ages of 15 and 44 – lost their lives in tragic circumstances during transit in a sealed trailer container transported from Belgium to the United Kingdom. They had been attempting to gain illegal entry to the United Kingdom, for which they or their families were expected to pay up to £13,000 per person.

4. Following these events, the applicant and six others were charged with various offences. Hughes pleaded guilty before trial, on 28th August 2020, to 39 counts of manslaughter (counts 1 to 39) and to one count (count 40) of conspiracy to assist unlawful immigration. The conspiracy under count 40 related to two occasions only between 1st May 2018 and 24th October 2019, and did not include the fatal journey. Prior to the trial, Nica had pleaded guilty to count 40 on the same basis.

5. On 21st December 2020, following a trial in the Central Criminal Court before Sweeney J and a jury, Nica was convicted of the 39 counts of manslaughter and of an additional count (count 40A) of conspiracy to assist unlawful immigration in relation to the transportation that led to the 39 fatalities.

6. On 22nd January 2021, following a two-day sentencing hearing that had taken place on 7th and 8th January 2021, the applicants and five of their six co-accused were each sentenced as follows. Nica was sentenced to a total of 27 years' imprisonment (less six days served pending extradition), comprising concurrent terms of 27 years on each count of manslaughter, and concurrent terms of 11½ years' imprisonment on each of the two conspiracy counts. Hughes was sentenced to a total of 20 years' imprisonment (less 63 days served pending extradition), comprising 20 years' imprisonment on each count of manslaughter and a concurrent term of 104 months' imprisonment on the count of conspiracy (count 40).

7. There were a number of co-accused. Maurice Robinson had pleaded guilty to counts 1 to 39, count 40 and count 42 (acquiring criminal property, contrary to section 329(1)(a) of the Proceeds of Crime Act 2002). He was sentenced to a total of 160 months' (13 years and four months) imprisonment, comprising 160 months on each of counts 1 to 39, six years' imprisonment on count 41, and two years' imprisonment on count 42, all concurrent. Eamonn Harrison was convicted on counts 1 to 39 and count 40. He was sentenced to a total of 18 years' imprisonment (less 270 days pending extradition). The sentence comprised 18 years' imprisonment on each of counts 1 to 39, and eight years' imprisonment on count 40, all concurrent. Alexandru-Ovidiu Hanga changed his plea to guilty on count 40 before the jury were sworn. He was sentenced to three years' imprisonment (less time served on remand). Valentin Calota was convicted on count 40 and sentenced to four and a half years' imprisonment (less time served on remand). Christopher Kennedy was convicted on count 40 and sentenced to seven years' imprisonment (less time served on remand). Gazmir Nuzi was

alone charged on count 43, a single incident of assisting unlawful immigration on 11th October 2019, contrary to section 25(1) of the Immigration Act 1971. He pleaded guilty and was sentenced on a separate occasion to ten months' imprisonment (less time served on remand).

The Facts

8. The bodies of the victims were discovered just after midnight on 23rd October 2019, shortly after the trailer containing them arrived in Purfleet. They had been inside that container for at least 11½ hours. The evidence indicated that they died of asphyxia (suffocation due to lack of oxygen), with hyperthermia (increased body temperature in an enclosed place).

9. The events that led to their death were as follows. Early on the morning of 22nd October 2019, the 39 victims, who had variously been at safe houses in Paris, Brussels and Dunkirk, were taken by taxi to a rural location close to an industrial estate in Bierne, Northern France. There, later that morning they were picked up by Eamonn Harrison using an otherwise empty and airtight refrigerated container. The refrigerator unit was and remained switched off. The immigrants were sealed inside. The container could only be opened from the outside.

10. After a short stop in Lissewege in Belgium, Harrison delivered the trailer to the port at Zeebrugge at around 2pm. By 3pm it had been loaded onto a freighter which sailed at around 4pm. The presence of the 39 migrants inside the sealed container was a fact unknown to all ship personnel.

11. From the time of the pick-up, the temperature inside the trailer began to rise and continued to rise, whilst at the same time the amount of oxygen in the air began to decrease and the carbon dioxide in it began to increase. The temperature eventually rose to around 40 degrees whilst they were at sea, forcing the removal by the victims of their outer clothing in an attempt to cope. There were desperate attempts to contact the outside world by phone and to break through the roof of the container to get fresh air. All were to no avail. Before the ship reached Purfleet they had all died in what the judge was later to describe as an "excruciating, slow death".

12. Maurice Robinson was the one to collect the trailer from Purfleet port on its arrival. Earlier that evening he had been shown by Nica where he was to drive them so that Nica could manage their onward transit, as he had done on the occasion of previous successful incidents of people smuggling.

13. The trailer unit had been delivered to the port at Zeebrugge by Harrison and the unaccompanied sea crossing to Purfleet had been booked by Hughes. Robinson collected the trailer at Purfleet at 1.05am. He was instructed by Hughes to "give them air quickly, but don't let them out". He opened the container and discovered the bodies at 1.13am, but did not report the matter to the emergency services until 1.36am. During the intervening period he used his mobile phone to speak with Hughes and Nica. On the night before the fatal events, Hughes had been waiting at a farm in Orsett from 9pm and was in regular communication with Robinson. It was the prosecution case that he was making plans for the intended onward journey of the 39 immigrants.

14. There was no dispute at trial that there existed a sophisticated, long-running and profitable conspiracy to smuggle mainly Vietnamese migrants into the United Kingdom in the back of lorries, using transportation in sealed containers, in deliberate and intentional breach of border control. Put briefly, the migrants would contact a man called Fong, who was based in London. Arrangements would be made to assemble them in safe houses inland at a remote location. They would then board a trailer hauled by a lorry to the United Kingdom via the Eurotunnel terminal, or to the port of Zeebrugge in Belgium, where it would be put on a freighter,

transported to the port at Purfleet, and collected by another lorry.

15. There was evidence of four such importations: on 9th May 2018, 11th October 2019, 14th October 2019 and 18th October 2019. On 9th May 2018, Harrison was stopped at the Eurotunnel terminal and 18 Vietnamese immigrants were discovered sitting on boxes in his trailer. On 10th and 11th October 2019, Harrison used a trailer to collect 15 illegal immigrants. This container was delivered to Zeebrugge, shipped to Purfleet, and collected the next day by Kennedy. He drove it onwards to an isolated farm in Orsett, where the immigrants were unloaded and driven away by Nica, Hanga, Nuzi and Calota. On 14th October 2019, Harrison collected 14 Vietnamese immigrants and transferred them to Kennedy, who was transporting a trailer of alcohol. Thereafter, Kennedy was stopped and the 20 immigrants were removed. On 17th and 18th October 2019, Robinson used an airtight refrigerated trailer to collect foodstuffs in France, and then swapped trailers with Harrison, who collected and transported 15 Vietnamese nationals to Zeebrugge. The trailer was shipped to Purfleet and taken by Kennedy to the remote farm, where again the immigrants were unloaded and driven away by Calota and Nica.

16. Hughes was said to be in charge of organising the transportations across the Channel, the collection of the trailers at Purfleet, and taking the unlawful immigrants to the safe place nearby at Collingwood Farm in Orsett. He used trusted drivers who were either employed by him (Robinson and Harrison), or with whom he was indirectly connected (Kennedy). Nica was said to be an organiser who recruited and marshalled the drivers for the journey from Collingwood Farm to areas in London, as well as being physically present to supervise and assist with the unloading of the unlawful immigrants at the farm.

17. The prosecution case at trial was that the method of transportation in sealed containers was blatantly and unavoidably an inherently risky and dangerous thing to do, and that, in consequence, the applicants were guilty of manslaughter. In his closing speech, Mr Emlyn Jones QC, who appeared for the prosecution, put the matter in this way:

"You take a person, seal them inside a trailer with no way of getting out, no light, no means of contacting or communicating with the outside world, no seats, no seatbelts, no fire exit, no safety measures. They are to travel by land and sea, for much of the time unaccompanied, so that no one would know they were there, or would know how to alert them or rescue them in any kind of emergency. They are going to be in there, on any view, for many hours. There are a range of risks and they are not limited to the risks of having a finite supply of air available for the duration of the journey."

18. Nica's primary case was that he was not involved in the events of 23rd October. His secondary case related to the risk of transporting immigrants in the manner used. He relied on evidence that smaller numbers had been in sealed containers in the earlier incidents of people smuggling to support a case that if the jury were sure he was involved in the fatal events, he would only have expected a smaller number to be on board. Further, absent the large number of immigrants, there was no risk of harm posed to the immigrants by the method of transportation deployed. The prosecution and the defence each called evidence on this issue.

19. The prosecution expert, Ms Martin, gave evidence on oxygen depletion in a sealed container. With 39 passengers, the CO₂ levels would reach a level to cause death in eight and

a half to nine hours after the container was sealed. If there had been 15 to 20 people, the CO2 would have not reached a fatal level before the intended time at pick-up. The defence expert, Dr Vince, agreed. In Ms Martin's opinion, if the numbers were 15 or even 20, she would have expected symptoms such as headaches, dizziness or confusion, but these were transitory effects which would dissipate once the individuals received fresh air. Dr Vince agreed, save that with 20 people there, in his opinion there would be no such transitory effects.

20. The judge directed the jury that in order for the defendant to be guilty of manslaughter, they had to be sure of each of the following four elements: (1) that he carried out an unlawful act or series of unlawful acts, or was a party to the carrying out of an unlawful act or series of unlawful acts, which amounted to a crime; (2) that when he did so he had the state of mind necessary for guilt of that crime; (3) that all sober and reasonable people would have inevitably recognised that the unlawful act or series of unlawful acts would expose the person who was killed to the risk of some physical harm resulting; and (4) that the unlawful acts or series of acts caused the death, in the sense that the act or the series of acts made a more than minimal contribution to it. The judge went on to say that the prosecution did not have to prove that the defendant knew that the act or series of acts was or were unlawful; nor to prove that he intended harm; nor to prove that he realised that the unlawful act or acts would subject the victim to the risk of some physical harm resulting, let alone that the type of harm was that which the victim actually suffered.

21. The judge then identified the unlawful acts or series of acts which amounted to the offence of facilitating a breach or attempted breach of immigration law to which the prosecution alleged that Nica was a party. These included: (a) in the period between 9.44am and 10.39am on Tuesday 22nd October 2019, in Bierne, collating and loading the 39 immigrants into the airtight trailer, which was otherwise empty, had no lighting and could not be opened from the inside; (b) transporting the immigrants in the airtight trailer by road, with a short stop at Lissewege to the port of Zeebrugge, where that day the trailer was left for onward transportation by ship without any warning as to the nature of its content; (c) the loading of the trailer onto the ship; (d) the voyage from Zeebrugge to Purfleet, which began at around 4pm that afternoon and ended up at 12.16am on Wednesday 23rd October 2019, and during which the immigrants had no viable means by which to seek help; and (e) the arrangements for the collection of the trailer from Purfleet and the ultimate collection of it between 12.59am and 1.08am – that is over 14 hours after the loading at Bierne, and some eleven and a half hours after the stop at Lissewege.

22. The gravamen of the application made on behalf of Nica concerns the third element, namely whether all sober and reasonable people would inevitably recognise that the unlawful act or series of unlawful acts would expose the person or persons killed to the risk of some physical harm resulting. As to that, the judge said that this was an objective test dependent on the view of sober and reasonable people, such as the jury, who are bystanders to the events, as to whether the series of unlawful acts would expose the person or persons killed to the risk of some physical harm resulting. It concentrated on the risk of some physical harm resulting. There was no requirement that the risk should be of serious physical harm, nor of permanent physical harm, nor of the harm that actually resulted. The risk of some, even short-lived physical harm was sufficient.

23. The judge went on to set out the parties' respective cases on both risk and knowledge. For the prosecution, it was submitted that Nica must have known at least: (a) that the unlawful immigrants were to be transported in a sealed shipping container from which there was no internal means of securing egress; (b) that those inside the container had no or no reliable method of summoning help; (c) that there would be a long journey by road and sea which would last a number of hours, for many of which the trailer would be unaccompanied; (d) that the trailer would be transported on the ship as if it contained sturdy goods with no special

handling instructions being provided; (e) that travel over such a distance and via two modes of transport imported the high likelihood of delay due to any number of circumstances; and (f) as the organiser of onward transportation and as the fee would have depended on it, he would have been aware that 39 immigrants.

24. On behalf of Nica, the judge said that it was submitted that, looking at the whole of the evidence: (a) the risk emanated exclusively from the large numbers; (b) whatever the position at the time of loading, there is nothing to suggest that Nica knew of such numbers; (c) the fact of a sealed container and the duration of the journey cannot be considered separately from the number of migrants involved; (d) from the previous history, there could be no reason to think that the numbers exceeded 15; (e) a witness (Witness X) who underwent a similar journey spoke of no ill-effect either to himself or to any others; and (f) any risks, absent the numbers, were remote.

25. On behalf of Nica, the central question raised by Mr Jafferjee QC in respect of the judge's direction on the objective test for unlawful act manslaughter is: whether it was sufficient for the prosecution to prove in applying the objective test that the relevant circumstances known to the defendant demonstrating the risk of some physical harm resulting, included the risk of any harm, even if the harm was wholly unrelated to the actual cause of death, namely the number of migrants; or whether, as the defence contended, the risk of harm depended upon proof of Nica's knowledge of significantly larger numbers on the occasion of the fateful journey.

26. Mr Jafferjee submits that the judge's direction was wrong in law and that the correct direction was the one for which the defence contended, so that where the underlying unlawful act is not an inherently dangerous one, as in this case, where the act was assisting in an unlawful immigration, the prosecution are required to prove that the circumstances known to the defendant made it dangerous, before engaging the objective risk of harm. Here, this was knowledge of the sort of numbers that were involved on the night of 22nd October, albeit not necessarily the exact numbers.

27. In our view, this central submission is misconceived and contrary to authority. It is sufficient for these purposes to refer to the observations of the court in *R v F(J) and E(N)* [2015] EWCA Crim 351 at [33]; in *R v Jogee* [2016] UKSC8; [2017] AC 297 at [96]; and more recently in *R v Long* [2020] EWCA Crim 1729 at [23] to [26] and [35] to [37], where the law on this issue was reviewed. In *Long* the court said as follows:

"25. The prosecution put the case on the basis of unlawful act manslaughter. The modern foundation of the offence is the decision of the Court of Criminal Appeal in *R v Church* [1966] 1 QB 59. *Church* established that the prosecution cannot succeed simply by proving that the accused committed an unlawful act and that death resulted from that act. The formulation provided by the Court of Criminal Appeal [at page 70] was that:

'... an unlawful act causing the death of another cannot simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not

serious harm."

26. This formulation holds good today. It was approved by the Supreme Court in *R v Jogee* ... In the context of considering joint liability in cases of homicide Lord Hughes [and Lord Toulson] said [at [96]]:

'... if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: *R v Church* ... approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F (J) & E (N)* [2015] EWCA Crim 351; [2015] 2 Cr App R 5."

28. We do not consider it to be arguable, as Mr Jafferjee suggests, that it is open to this court to re-cast the law to achieve the objective of reform. Nor do we consider it to be right to give leave to Mr Jafferjee to appeal against conviction to enable him to pursue his case on reform through this court, which would inevitably, as it is bound by authority, have to refuse any application for leave to appeal further to the Supreme Court. As the court observed in *F(J) and E(N)*, it is for Parliament to decide whether the long-established law on unlawful act manslaughter needs to be changed.

29. We also take the view that the existence and nature of the harm to the deceased caused by Nica's unlawful act, perpetrated jointly with his co-conspirators, were questions of fact for the jury and do not give rise to an arguable ground of appeal. As the respondent, in its helpful Respondent's Notice, points out, although Nica's argument focuses upon the number of immigrants in the sealed container, this was but one of the factual circumstances that the jury were entitled to consider in determining whether or not there was an obvious risk of harm to the deceased in the circumstances known to Nica. We consider that these matters were clearly and fairly – indeed impeccably – placed before the jury by the judge, as was the opposing case for Nica on the facts.

30. It follows from what we have said that we are satisfied that Nica's conviction is safe, and in agreement with the single judge we refuse the renewed application for leave to appeal.

31. We turn next to the renewed application for leave to appeal against sentence made on behalf of the applicant Hughes. In his sentencing remarks the judge said that the defendants have variously pleaded guilty to, or been convicted of, participation in a conspiracy to facilitate unlawful immigration. The judge had no doubt that this was a sophisticated, long-running and profitable conspiracy to smuggle mainly Vietnamese nationals across the Channel. The conspiracy amounted to professional, organised crime, with the use largely of unregistered phones, committed to make a profit, which significantly undermined the United Kingdom's attempts to regulate and control immigration. He observed that for many years the Court of Appeal had underlined that offences of facilitating illegal immigration called for deterrent sentences.

32. In addition, Hughes and Robinson had pleaded guilty to, and Nica and Harrison had been convicted of, 39 counts of manslaughter relating to the deaths of the 39 immigrants who had

died excruciating deaths during transit in a sealed container. The evidence and admissions compelled the conclusion that the conspiracy commenced in 2018, and that there were more events of unlawful immigration than those detected. Nonetheless, the judge underlined the fact that this was a conspiracy to smuggle, rather than "people trafficking", which carries a much higher maximum penalty.

33. There were no sentencing guidelines for people smuggling, but in addition to the need for a deterrent sentence the judge identified the following aggravating features: the fact that the conspiracy continued for a significant period of time; the high degree of planning, organisation and sophistication; the large number of illegal immigrants involved; that the offending involved strangers, rather than spouses and family members; and that the crimes were committed largely for financial gain.

34. The judge said that the applicant Hughes had admitted playing a leading role which was at the invitation of the co-applicant Nica. Although not at the top of the conspiracy, Hughes had played a pivotal role in that he ran a haulage business and supplied the trailers and drivers used to transport the migrants, both on the continent and in the United Kingdom. He received £3,000 in cash per migrant successfully transported, and paid his drivers from this sum. His involvement was aggravated by his conviction in 2009 for smuggling six million cigarettes, to which he pleaded guilty, and for which he was sentenced to 30 months' imprisonment. In mitigation it was asserted that he was fully remorseful. The judge accepted that by virtue of his guilty pleas he was entitled to the full discount available.

35. We are grateful to Mr Moloney QC for his succinct submissions, both written and oral. The single point raised in this renewed application relates to disparity. The central point made is that the sentence imposed on Hughes was wrong in principle and that parity was not achieved because of the way in which the judge calculated the individual sentences. In particular, the multiplier for the 39 deaths created a position where Harrison, for example, had a starting point of two-thirds of the sentence of that of the applicant, but that his final sentence was only three-fifths of that of the applicant. Mr Moloney submits that there was no reasonable basis for the disparity of the multiplier that the judge used, and thus the ultimate sentence as between the applicant and other defendants was wrong in principle.

36. With deference to those arguments and the careful way they have been advanced, we do not consider this point to be arguable for the detailed reasons given by the single judge. In short, it is not submitted that the sentence was manifestly excessive, and we do not think in the circumstances that there is any ground for complaint about the sentence that the judge passed.

37. In refusing leave, the single judge gave the following reasons:

"The length of your sentence, at 20 years (reduced from 30 years for your early [guilty] plea), cannot in any sense be described as excessive... The judge, who heard all the evidence over the course of a long trial, found that you were a senior member of a professionally planned and well-organised ring of people smugglers, arranging and delivering regular consignments of illegal immigrants from the continent of Europe ...

The general principle set out in the Totality Guideline is that the court 'should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate'.

In your case the overall sentence needed to reflect the fact that

39 deaths resulted from your criminal activity, taken together with the length and sophistication of the underlying conspiracy giving rise to that activity, appropriately reflecting your particular role within it. The judge's sentencing remarks demonstrate the very considerable care with which he approached this exercise.

His general approach was consistent as between you and your co-defendants, first identifying where a single offence of manslaughter would fall within the Guideline and then applying an uplift.

... The judge did not seek to identify a single multiplier to be applied to you and to each of your co-defendants; there was no obligation on him to do so, nor would it have been appropriate in circumstances where adjusting for totality is not a mathematical exercise and where there were a number of different factors in play as between you and each of the other defendants (such as role in conspiracy/duration of involvement, age, history of offending or other individual aggravating or mitigating features).

..."

38. We agree with the observations of the single judge. It follows from what we have said that both renewed applications are refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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