

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 15

MAMADOU BA,

Appellant.

20 Eagle Street
Albany, New York
February 8, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

LAUREN E. JONES, ESQ.
THE LEGAL AID SOCIETY
Attorney for Appellant
199 Water St Fl 5
New York, NY, 10038

MEGHAN MCLOUGHLIN, ESQ.
MANHATTAN DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
One Hogan Place
New York, NY 10013

Cynthia R. Piett
Official Court Transcriber



1 MS. JONES: Good afternoon. I am Lauren Jones,
2 from The Legal Aid Society of New York City, here on behalf
3 of appellate, Mamadou Ba. May I please request two minutes
4 for rebuttal?

5 ACTING CHIEF JUDGE CANNATARO: Of course.

6 MS. JONES: Thank you.

7 So this case presents another question about the
8 excessive sentence power. This is another case in which
9 the intermediate appellate court is applying an incorrect
10 standard when exercising their excessive sentence power.
11 Here, the appellate term, first department, treated the
12 fact that the sentence was legal and negotiated as a bar to
13 review.

14 JUDGE SINGAS: Well, I'm going to stop you there
15 because let -- they also said, we perceive no basis for
16 reducing the fine. If they had stopped there, would that
17 be okay?

18 MS. JONES: If they had stopped there, there'd be
19 - - - I think there would still be a little bit of a
20 question about whether or not that means that they
21 performed a discretionary review. But because they are not
22 required by statute to elucidate, I think that there would
23 be less of a problem than what happened here, which is that
24 they continued on and did give their reasons, which to read
25 the second sentence of this to - - - sentence decision - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

-

JUDGE SINGAS: Right. But can't we read it also as the second sentence being in addition to the first sentence, as opposed to the second sentence being drawn from the first sentence? You know, you're just as - - - you're saying that they said this for a sentence, and then they're explaining it. But why couldn't they say the first sentence, they've done their analysis, and they're adding the second sentence? I mean, I think that's just as reasonable interpretation as yours; am I wrong?

MS. JONES: Well, we argue that the fair reading of the two sentences is that the second sentence is the rationale for the first. But - - - and there's - - - that - - - if the second sentence is - - - is an addition, it's - - - it's, essentially, a nonsequitur in a part of a decision that is only two sentences long. I mean, that requires, essentially, ignoring that second sentence, and it's irrelevant.

I mean, they're saying the - - - the sentence was legal in a case where no illegal sentence claim was raised. And they're saying that he received the sentence that he bargained for in a case where there was no claim that his plea withdraw - - - his plea should be withdrawn, because he didn't receive that sentence.

JUDGE SINGAS: But I could say the same thing



1 about that, right? I could say the second sentence - - -
2 the first sentence is extraneous, then. If what they were
3 really saying is that it was a negotiated plea, they don't
4 need the first sentence, right? So the fact that it's
5 there might indicate that they've done a separate analysis.

6 MS. JONES: I'm sorry. Can you repeat that
7 question?

8 JUDGE SINGAS: I'm saying that they might not
9 even need - - - if it's just an explanatory - - -

10 MS. JONES: Uh-huh.

11 JUDGE SINGAS: - - - sentence, the second one of
12 the first sentence, they wouldn't need the first sentence.
13 So I'm saying it's just as reasonable to say, they said the
14 first sentence, right. We perceive no basis for reducing
15 it. Stop. We did that analysis. And by the way, it's
16 also a negotiated sentence.

17 MS. JONES: Well, I think that that's - - -
18 because there were no issues raised in the briefs about
19 that - - - the two issues in the second sentence, I think
20 there would be no reason for the court to have included
21 that in its decision, if it were not the explanation. And
22 I think if - - - if we have doubt about what the court
23 meant here, we can look to its other excessive sentence
24 cases from both before this decision and after, where they
25 repeatedly say that a defendant who is sentenced in



1 accordance with his bargained-for plea should not now be
2 heard to complain that he - - -

3 JUDGE TROUTMAN: So - - -

4 MS. JONES: - - - received what - - -

5 JUDGE TROUTMAN: - - - is it your argument that
6 the clarification is appropriate here?

7 MS. JONES: Yes, Your Honor.

8 JUDGE TROUTMAN: Okay.

9 MS. JONES: Clarification is appropriate.

10 JUDGE GARCIA: If we clarify, what would the
11 remedy be? What - - - what do we do with the case?

12 MS. JONES: The remedy would be a remand to the -
13 - - a remittal to the appellate term first department to
14 either - - - to explain their decision or to - - - to - - -
15 to redo it, applying the appropriate standard.

16 JUDGE GARCIA: So if we send this back and then
17 they put in a now line that says, this sentence is not
18 unduly harsh or excessive, that would be enough?

19 MS. JONES: Yes, Your Honor. Yes, Your Honor.

20 JUDGE GARCIA: And do you have any idea - - - I
21 would assume excessive sentences claims are fairly often
22 made in this appellate term?

23 MS. JONES: I think they're - - - they are fairly
24 often made. I think less so because the sentences in the
25 appellate term aren't as long.

1 JUDGE GARCIA: In any case, where they use this
2 type of language, that would go back for them to put in a
3 unduly harsh and excessive standard?

4 MS. JONES: I think the ones that are currently
5 at this stage, you know, where they - - - where this court
6 has not denied leave, that, yes, the - - - which I think
7 would be a fairly small amount of cases.

8 I would also point out that the - - - the danger
9 of this case, the reason why it really needs clarification
10 is because it - - - it's not just this particular case.
11 It's everybody who's looking at what the appellate term
12 first department is saying in its excessive sentence cases.
13 And when they say that the sentence, it will - - - it will
14 not be reduced, period. It's legal and negotiated. That
15 is sending a message to the litigants who are preparing to
16 bring these claims to this court.

17 The other part of this - - - this decision is
18 that the court failed to - - - the court - - - the
19 intermediate appellate court shouldn't have been
20 considering the fact that it was legal or that it was
21 negotiated at all. The legality of the sentence is
22 unquestionably irrelevant to whether or not the sentence
23 was excessive. And the negotiation, itself, should not
24 have been considered either.

25 JUDGE TROUTMAN: But the court does have a



1 responsibility not to let illegal sentences stand, correct?

2 MS. JONES: Yes. But if the - - - if the
3 sentence had been illegal, that claim would have been
4 brought to the court. And the way that it's written here
5 is not - - - you know, this sentence, even though legal, is
6 harsh and severe is - - - is not harsh or severe, as the
7 statute is written. Instead, the way this is written is -
8 - - is much more of a - - - the - - - it's giving the
9 rationale because it was legal, we're not reducing.

10 And the negotiation, itself, also should not have
11 been considered here. The - - -

12 JUDGE SINGAS: But why not? Because this is a
13 fine, right? So it's not like a sentence. And the
14 negotiation may demonstrate that there was a discussion
15 about what a defendant could afford to pay. So I mean, is
16 the fact that it's a fine different at all in your
17 analysis? Does it make a difference?

18 MS. JONES: I don't think so. The fact it's a
19 fine, I think, especially here, where the - - - it's clear
20 on the record that their other option was three days of
21 community service. I think it seems that Mr. Ba was more
22 willing and interested in taking a perhaps unduly harsh
23 fine than give up three more days of having to lose wages,
24 to not be able to go to his job, to not be able to take
25 care of family members, when he had already gone back to

1 court seven - - - this is the seventh time he had come to
2 court on this case.

3 I also think that there are other reasons not to
4 consider the negotiation. For example, the - - - there's
5 just no way to evaluate the negotiation on the record.

6 JUDGE TROUTMAN: Do the parties stand on equal
7 standing?

8 MS. JONES: No, the parties do not stand on equal
9 standing. There is an unequal bargaining power here. I
10 think it's really obvious here, where the prosecution
11 decided not to prosecute these cases anymore within a year
12 of Mr. Ba's sentencing. I mean, I think it really shows
13 the great power that they have.

14 ACTING CHIEF JUDGE CANNATARO: Thank you, Ms.
15 Jones.

16 MS. JONES: Thank you.

17 MS. MCLOUGHLIN: Good afternoon. May it please
18 the court. Meghan McLoughlin for the people.

19 The appellate term acted well within its
20 discretion here in affirming defendant's sentence of a 500-
21 dollar fine for illegally offering to sell counterfeit
22 luxury handbags. In its decision to affirm, as this court
23 has already pointed out, the court stated that it had
24 perceived no basis for reducing the fine. That statement,
25 alone, demonstrated that the court had considered and

1 rejected defendant's arguments to the contrary.

2 JUDGE TROUTMAN: Why was it - - - what is the
3 significance of - - - if anything, of them saying, legal
4 and negotiated, using those words?

5 MS. MCLOUGHLIN: So as Your Honor has already
6 pointed out, the court has a duty to affirm and uphold a
7 legal sentence. So it's the people's position that in
8 terms of when they reference the legality of the sentence,
9 that the court was covering its basis in explaining that
10 it's affirming the sentence that is legal. So no problems
11 there.

12 ACTING CHIEF JUDGE CANNATARO: Was that one of
13 the defendant's arguments, that the sentence was illegal?

14 MS. MCLOUGHLIN: I'm sorry, Your Honor?

15 ACTING CHIEF JUDGE CANNATARO: Was that an
16 argument that defendant made on that appeal?

17 MS. MCLOUGHLIN: No, Your Honor. The argument
18 made on appeal was that it was excessive. And in affirming
19 the sentence that the court had imposed, the appellate term
20 mentioned that the sentence was legal, and it was affirming
21 that sentence.

22 ACTING CHIEF JUDGE CANNATARO: Is that something
23 that this appellate term regularly does? Do they always
24 include a little extra info about the legality of the
25 sentence?

1 MS. MCLOUGHLIN: I believe occasionally. And
2 just to be clear, it was not necessary in this decision for
3 the court to say that.

4 JUDGE WILSON: But in particular, do they do that
5 when there's no excessive sentence claim and no claim that
6 the sentence is illegal?

7 MS. MCLOUGHLIN: It's - - - I don't have an exact
8 number of the amount of times that the appellate term has
9 made that same statement. However, it was not necessary to
10 the decision in the same way that it was not fatal to the
11 decision. There is no indication that the appellate term
12 relied on that fact. And this court need look no further
13 than the previous decisions by the appellate term that
14 does, in fact, reduce legal sentences. So the court
15 clearly does not view it as a bar, as defendant - - -

16 JUDGE WILSON: Okay.

17 MS. MCLOUGHLIN: - - - claims, if its prior
18 decisions fly directly in the face of that claim.

19 Now, in the term - - -

20 JUDGE TROUTMAN: What about the claim that
21 there's rarely an exercise of the right to reduce sentences
22 as evidence that they don't know that they can?

23 MS. MCLOUGHLIN: The -- - - as counsel actually
24 already pointed out, the sentences in the appellate term
25 are generally lower than in the Appellate Division. So



1 that could be one reason why it's less oft - - - it's less
2 often the case that they're being reduced.

3 However, there are three distinct reasons why
4 this court could be confident and should be confident that
5 the appellate term knows exactly what its power is and - -
6 - and is utilizing it to the full extent.

7 First, the language of the decision, which was
8 already discussed, is that the court perceived no basis.
9 That indicates that the court - - -

10 JUDGE RIVERA: Wasn't that just a conclusion?

11 MS. MCLOUGHLIN: Well - - -

12 JUDGE RIVERA: A conclusion?

13 MS. MCLOUGHLIN: It's a conclusion based on its
14 analysis.

15 JUDGE RIVERA: Yes, and the analysis is not in
16 that sentence.

17 MS. MCLOUGHLIN: Yes.

18 JUDGE RIVERA: All right.

19 MS. MCLOUGHLIN: And the CPL nor this court has
20 never required the appellate term to explain its decision
21 again - - -

22 JUDGE RIVERA: No, but they - - - the - - - no,
23 but the panel added its own words, right?

24 MS. MCLOUGHLIN: Yes. The appellate term then
25 went onto explain two undisputed facts about this case.



1 JUDGE RIVERA: In the same paragraph, with "we
2 perceive no basis for reducing the fine"?

3 MS. MCLOUGHLIN: Yes. But there is no - - -
4 there is no evidence, and this court should not take that
5 sentence to believe that the court, for some reason, took
6 those two factors and - - -

7 JUDGE RIVERA: Wasn't that the paragraph topic
8 sentence and now you're explaining your conclusion?

9 MS. MCLOUGHLIN: Even if the court did consider
10 the negotiation aspect, that - - - it's the people's
11 position that that would not have been improper. And in
12 any event, the court did not need to - - - and, or, at
13 least up until this point, this court has never required
14 the appellate term to explain every single reason why it
15 made the decision it did.

16 And moving onto the second reason that this court
17 can be confident - - -

18 JUDGE RIVERA: No, but we do require that the
19 correct standard to be applied.

20 MS. MCLOUGHLIN: I'm sorry, Your Honor.

21 JUDGE RIVERA: We do require the correct standard
22 to be applied.

23 MS. MCLOUGHLIN: Absolutely. And here, the
24 appellate term did - - -

25 JUDGE RIVERA: And so if the paragraph rev - - -



1 if we disagree with you, the paragraph reveals that they've
2 applied the wrong sent - - - standard, that's what - - -
3 that's what we conclude, do you agree that this goes back;
4 it gets remanded for them to either explain?

5 But if we conclude that they have applied the
6 wrong standard, I assume what we would direct them to do is
7 to apply the proper standard; do you agree that that would
8 be the remedy?

9 MS. MCLOUGHLIN: If this court finds that the
10 appellate term applied the incorrect standard, then that is
11 presumably what would happen. However, the court did not
12 apply the incorrect standard.

13 JUDGE RIVERA: Okay. Let me ask you a question.
14 Let's say we have - - - we disagree with you on that. Can
15 defendant raise any other grounds that weren't raised
16 initially as a basis for reducing the sentence - - -

17 MS. MCLOUGHLIN: It - - -

18 JUDGE RIVERA: - - - or relieving them somehow of
19 the harshness of the sentence?

20 MS. MCLOUGHLIN: The appellate term would
21 presumably have to rely on the briefs and the record below
22 to make a redetermination.

23 JUDGE RIVERA: Okay.

24 MS. MCLOUGHLIN: The problem with that is that
25 the defendant gave every single reason that he or the



1 defendant had in its reasoning to reduce.

2 And that actually brings me to my second point of
3 why this court can be sure that the correct standard was
4 used, because the claim was fully briefed. So the
5 defendant gave the appellate term all of the information to
6 determine or not determine that the sentence was unduly
7 harsh or severe. The court did not find that.

8 The people rebutted the defendant's claim
9 explaining why the sentence was not unduly harsh or severe.
10 And it would be unreasonable to presume that the court
11 disregarded its responsibility entirely, disregarded the
12 law that this court has already explained. And it was
13 recounted by both parties, and aberrantly decided to
14 withhold discretion and halt its analysis after two mere
15 facts.

16 JUDGE RIVERA: But maybe I missed it. But they
17 could have said, we've reviewed the grounds raised by a
18 defendant and we reject them as not providing a basis for
19 reducing the fine.

20 MS. MCLOUGHLIN: The court could have said that.
21 And it probably would have. However, here, it did not
22 explain because under the CPL and under Mingo, specifically
23 by this court, the court had no reason to explain every
24 single idea behind its decision up until that point.

25 Now, finally, the court's prior decisions,



1 including Carmon, that was - - - it decided in 2019,
2 confirms that the appellate term did not find either the
3 legality of the sentence or the fact that it was fairly
4 negotiated as a bar to reducing the sentence.

5 In that case, the court found that the 200-dollar
6 fine that had been imposed against the defendant, though
7 legal, and though fairly negotiated, was, in any event,
8 unduly harsh or severe. So that just happened in 2019.
9 And one of the judges pre - - - actually, the presiding
10 judge on this panel of Ba was on that panel, clearly, not
11 under the impression that the legality of this sentence and
12 the negotiated aspect of it were bars to reduction. And
13 that was very much the case here. The court's prior
14 precedent with regard to the - - - the scope of discretion
15 has always been permissive.

16 So in Delgado, in Farrar, in Thompson, this court
17 found that the - - - the trial court and, subsequently, the
18 intermediate courts are not barred from reducing sentences
19 that are the result of fairly negotiated pleas. This court
20 has never held, and should not hold, it's the people's
21 position, that a court should be barred from considering,
22 frankly, any of the circumstances surrounding the
23 defendant's sentence.

24 Similarly in Delgado, this court found that this
25 court may exercise its discretion without deferring to the



1 trial court. It has not held that the court cannot
2 consider, and it has not held that a de novo review is
3 required, as opposed - - - as in contrast to what defendant
4 claims.

5 If there are no further questions, I rest on the
6 people's brief.

7 ACTING CHIEF JUDGE CANNATARO: Thank you.

8 MS. JONES: I would just like to start by
9 focusing on the questions about what we are requesting on
10 remand, if this case were to be remanded. So we would ask
11 that the - - - that the court be required to review all of
12 the factors again, us - - - employing the correct standard.

13 And that I do also believe, in response to one of
14 the questions that was add - - - asked to opposing counsel,
15 that briefing should be permitted again because of the fact
16 that when this case was considered, we were working with
17 the appellate term's current standard, which was incorrect.

18 We were working with the appellate terms'
19 decision, which were saying that defendant shall not now be
20 heard to complain, and they were cited in the prosecution's
21 brief. So I think a briefing after this - - - a - - - if
22 this court were to decide that the standard would - - -
23 standard was incorrect, would look differently.

24 JUDGE GARCIA: Counsel, if we - - - if we were to
25 agree or approach this case the way we did in Delgado to



1 say, this is what they meant but it isn't what they said,
2 and that - - - you know, hypothetically, and that wouldn't
3 be a good thing, would that make a difference in the
4 remedy, as opposed to "they applied the wrong standard"?

5 MS. JONES: Well, in - - - I - - - in Delgado,
6 the cases were not remanded, and so if it were exactly the
7 same - - -

8 JUDGE GARCIA: Well, let's say - - -

9 MS. JONES: - - - analysis of that - - -

10 JUDGE GARCIA: - - - now we really want to lay
11 the rule down.

12 MS. JONES: Right.

13 JUDGE GARCIA: Say, you know, the standard's
14 unduly harsh, excessive, this is what you should be saying
15 if you're saying anything, and we think that's what you
16 meant, or we - - - or that's what you meant here but you
17 didn't say it, go back. Would that affect the proceedings
18 below in terms of what you're saying, briefing, and
19 different arguments?

20 MS. JONES: I think - - - I think it would be the
21 same, in that the briefing would nevertheless, look
22 different than what it did to the court before because it
23 would be a new clarified standard and the ways in which the
24 - - - some of the things that the appellate term was - - -
25 were saying that were incorrect, that were being repeated



1 in the briefing would no longer be applied.

2 JUDGE GARCIA: I assume you did brief the right
3 standard, though?

4 MS. JONES: Yes, Your Honor.

5 ACTING CHIEF JUDGE CANNATARO: Along - - -
6 because I was wondering the same thing. So you're just
7 saying that the briefing might be different because have
8 this decision held, you might have focused more on the
9 legality of the sentence and the negotiated nature of it?

10 MS. JONES: Well, I'm saying that the - - - the
11 prosecution, in their briefs to the appellate term,
12 parroted this language, you know, cited the court that they
13 were in front of - - -

14 ACTING CHIEF JUDGE CANNATARO: Right.

15 MS. JONES: - - - which frequently says that
16 defendants should not be heard to complain; that they
17 received the sentence that they bargained for. And so that
18 was the - - - that was the language that they were using.

19 And then in reply, we came back and said, you
20 shouldn't use that.

21 JUDGE TROUTMAN: So also, if you go back, aft - -
22 - if there were clarification, arguably wouldn't it be the
23 argument for further briefing, is that there is no more - -
24 - there's no further question as to whether the court
25 applied the right standard; it had all of the information



1 and it could still do as it did already?

2 MS. JONES: It - - - it could. It's - - - it - -
3 - the court could apply the correct standard, consider the
4 correct factors, not consider that it was illegal or
5 negotiated sentence, and nevertheless, find that the
6 sentence was unduly harsh. But the - - - we would
7 certainly argue that - - -

8 JUDGE RIVERA: Why doesn't it - - -

9 MS. JONES: - - - they shouldn't.

10 JUDGE RIVERA: Why doesn't it, if - - - if all we
11 say is, we assume you applied the correct standard? Why -
12 aren't you able to argue to them?

13 I'm not saying you can. It just strikes me, I'm
14 surprised you're not saying, it - - - the court of appeals
15 assumed this. Only this panel knows, only this court knows
16 whether or not it applied the correct rule. We think it's
17 obvious, from the language, it - - - it did not, and we ask
18 you now to apply the correct rule. Here's our full
19 briefing on the facts.

20 MS. JONES: Yes.

21 JUDGE RIVERA: They may not buy it. They may not
22 agree with you. They may say, no, the court of appeals, of
23 course, correctly understood us. Shame on us for not
24 making it clear, but yes, we were doing - - - we were
25 applying the correct standard.



1 MS. JONES: Well, I agree that we could - - -
2 that - - - that briefing would be necessary - - -

3 JUDGE GARCIA: That'd be a strategic call for
4 you, I would think.

5 MS. JONES: - - - and we could make that
6 argument. I mean, we would like the intermediate appellate
7 court to fully consider the discretionary review here,
8 given that - - -

9 JUDGE RIVERA: Well, otherwise, I don't want to -
10 - - I'm sorry. I'm just not clear, then, what the briefing
11 part of it is. Are you saying they would change your - - -
12 their brief but you would not?

13 MS. JONES: Oh, I believe we would change our
14 briefing as well.

15 JUDGE RIVERA: That's what I'm saying.

16 MS. JONES: For sure, based on the correct
17 standard, yes.

18 JUDGE RIVERA: Okay.

19 MS. JONES: Yes. Yes. Yes.

20 JUDGE RIVERA: Okay.

21 MS. JONES: Absolutely.

22 ACTING CHIEF JUDGE CANNATARO: Everybody gets a
23 new - - -

24 MS. JONES: Exactly.

25 ACTING CHIEF JUDGE CANNATARO: - - - brief.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. JONES: Yep.

JUDGE RIVERA: Okay. All right.

ACTING CHIEF JUDGE CANNATARO: Thank you.

MS. JONES: Thank you.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Cynthia R. Piett, certify that the foregoing transcript of proceedings in the Court of Appeals of Mamadou Ba v. The People of the State of New York, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Cynthia R. Piett

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 14, 2023

