[2016] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 28/2003

BEFORE: **THE HON MR JUSTICE MORRISON P**
THE HON MR JUSTICE WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

RICHARD BROWN v R

Mrs Caroline Hay and Neco Pagon for the appellant

Mrs Sharon Milwood-Moore for the Crown

20, 23 September and 14 October 2016

F WILLIAMS JA

[1] This matter came before us as an appeal against sentence only, the appellant's appeal against conviction having been dismissed by this court on 11 March 2005 and by the Judicial Committee of the Privy Council (the Privy Council or the Board) on 3 December 2015.

[2] On that date, the Privy Council allowed the appellant's appeal against sentence and remitted the matter to this court for further consideration. There were two bases for the matter being remitted: one was the Board's doubt as to what allowance the

learned trial judge had made for the time that the appellant spent in custody pending trial, in setting the time to be served before he might become eligible for parole. The other was the appellant's longstanding mental health problems, which it said ought to be an additional factor to be considered by way of personal mitigation.

[3] On 23 September 2016 we made the following orders:

> "(i) The appeal against sentence is allowed;
>
> (ii) The sentence that was imposed is varied in that the minimum period stipulated for the appellant to serve before becoming eligible for parole is reduced from 25 years to 18 years.
>
> (iii) The sentence of life imprisonment is to be reckoned as having commenced on 23 January 2003."

[4] These are our promised reasons for making the above-stated orders.

Summary of the case against the appellant

[5] On 16 January 2003 the appellant was convicted of the murder of Errol Lynch on 22 September 1998. The deceased had been shot to death. The Crown's case was that the appellant and two other men went to the home of the deceased, where, after an argument, the appellant shot him. The details of the trial need not detain us, in light of the dismissal of the appellant's appeal against conviction by both this court and the Privy Council. Suffice it to say that the appellant was sentenced to life imprisonment with the stipulation that he should serve 25 years before becoming eligible for parole.

The appeal against sentence

[6] Mrs Hay, for the appellant, applied for and was granted leave to argue one ground of appeal; that is that:

> "1. The sentence is manifestly excessive in all the circumstances of the case and ought to be set aside and this Honourable Court ought to substitute [such] sentence as it deems just."

[7] As might have been expected, given the observations of the Privy Council, this appeal proceeded on two main bases: (i) that there was no clear reflection of how the learned trial judge accounted for the appellant's time spent in custody before trial; and (ii) the appellant's history of mental illness. The Caribbean Court of Justice (CCJ) decision of **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ) was cited in support of the contention that there ought to be a clear reflection of how time spent in custody before trial should be accounted for. It was Mrs Hay's submission that, in the sentencing of the appellant, the discretion to take into account time spent on remand prior to trial was improperly exercised. It was also submitted, in relation to the second limb of the challenge to the sentence, that the appellant's long history of mental illness was to be considered as a mitigating factor in determining the number of years to be served before the appellant was to become eligible for parole; or in deciding whether a determinate sentence might be substituted for the sentence of life imprisonment with 25 years to be served before the appellant might become eligible for parole.

Discussion

The accounting for the time spent in custody before trial.

[8] in relation to the time before trial that the appellant had spent in custody, the learned trial judge (at page 259, lines 5 to 7, of the transcript) stated as follows:

> "I also take into account that you have been in custody from 1998, and this will be reflected in the sort of sentence I am going to impose on you."

[9] Later, at lines 16 to 17 of the same page of the transcript, the learned trial judge is recorded as saying:

> "...I take into account that you were in custody for some four years plus..."

[10] In fairness to the learned trial judge, although, with the benefit of several recent judgments, we may be tempted to look askance at his approach to the matter, his approach reflected what, at the time of sentencing in 2003, was regarded as the conventional and widely-accepted way of dealing with time spent in custody before trial.

[11] It is with the benefit of the guidance provided in cases such as **Romeo DaCosta Hall**; and the Privy Council judgment in this case, among others, that what might now be accepted as the current, standard approach has emerged.

[12] In **Romeo DaCosta Hall**, the appellant sought to challenge his sentence of six years' imprisonment, which was imposed after he had pleaded guilty to the offence of causing grievous bodily harm with intent. The main basis of his appeal was that the learned trial judge and the Court of Appeal of Barbados (which had affirmed the

sentence) erred in law in failing to take into account, each day that he spent on remand in custody, which would have resulted in a reduction in his sentence. Nelson J, writing on behalf of the majority, gave the following guidance in dealing with crediting pre-sentence custody, at paragraphs [26] and [27] of the judgment:

> "[26] ...The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand. The primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months and must state his or her reasons for not granting a full deduction or no deduction at all...
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> [27] In the interests of transparency in sentencing and in keeping with the principles relating to the imposition of custodial sentences in the Penal System Reform Act, Cap. 139 a sentencing judge should explain how he or she has dealt with time spent on remand in the sentencing process. As indicated above, if the judge chooses to depart from the prima facie rule of substantially full credit for time served prior to the sentence, he or she should set out the reason for such departure. See also *Callachand* at [11][11]."

[13] Wit J, at paragraph [30] of the judgment, dissenting from the majority, helpfully and succinctly outlined the areas of agreement between himself and the majority as follows:

> "[30] For the most part I am in agreement with the majority judgment delivered by Nelson J. We agree that the lower courts did not apply the appropriate principles in arriving at the sentence of six years and that the appeal should therefore be allowed. We also agree, in principle, that time spent in custody should fully or at least substantially be taken into account by the sentencing judge when calculating the length of a custodial sentence. We further agree that

> this constitutes a *prima facie* rule from which the judge may only depart in a limited number of cases..."

[14] At paragraphs [50] and [51] of the judgment, Wit J also states the guiding principles to be as follows:

> "[50] The method by which time spent on remand is to be credited should at all times be transparent, reasonable and just. But it should equally be practical, predictable and simple. *Ergo*, there should not be too much leeway for varying outcomes and the discretionary power of trial judges should therefore be construed as quite narrow lest their sentencing practices be perceived, arguably with some justification, as arbitrary and unpredictable. Any departure from the *prima facie* rule of full credit for time served in pre-sentence custody must be contemplated with great caution and can in my view only be grounded on exceptional circumstances which constitute some form of abuse of the process...
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> "[51] In any event, in order to ensure that custody time will be fully credited in a consistent and transparent way, the reasons for departing from the rule should be compelling and stated in open court when passing sentence. Moreover, the time that must be set off against the sentence must be clearly specified by the sentencing judge. Clarity demands no less." (Emphasis added)

[15] Also significant in this regard is the case of **Ajay Dookee v The State of Mauritius and Another** [2012] UKPC 21, cited by Mrs Hay. There, at paragraph 12, the Board, in a judgment written by Lord Brown, considered, among others, the case of **Callachand and Another v State of Mauritius** [2008] UKPC 49, and made the following observations:

> "12...The real question arising here is how to deal with the 14 months earlier spent by the appellant in custody

> awaiting trial. This question, as to the proper approach to time spent in custody awaiting trial, was considered by the Board in *Callachand v State* [2008] UKPC 49, [2009] 4 LRC 777. The following passages from Sir Paul Kennedy's judgment for the Board are now in point:
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> > '9 The Board is not concerned in the present case with time spent in custody as an appellant. So their Lordships need not consider the need to deter frivolous appeals. But they are concerned with the basic right to liberty. In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing...." (Emphasis added)

[16] Additionally, the Privy Council, when this matter went before it (**Richard Brown v The Queen** [2016] UKPC 6), considered the case of **Ajay Dookee v The State**. The Privy Council observed that that case of **Ajay Dookee** had dealt with the imposition of a determinate sentence of five years' imprisonment and a consideration of how to apply the period of 14 months that the appellant in that case had spent in custody. It further observed that there had been detailed information about the differences in the conditions of custody on remand as opposed to when one was a convicted prisoner. It also noted that the Board considered in **Ajay Dookie** that credit should normally be

given to the extent of between 80% and 100% for time spent on remand, with 80% being the default position.

[17] Against the background of these observations, however, the Board noted the differences in circumstances between the **Ajay Dookee** case and the instant case. These were its further observations:

> "49. The present case is different in two respects. First, the period of the appellant's detention as unfit to plead did not result from a decision by him to plead not guilty (incidentally entitling him to more favourable conditions than a convicted prisoner), but from his illness. Secondly, in the case of a determinate sentence the decision about credit for time on remand fixes the release date. In the present case the minimum period set by the judge merely sets the earliest date on which the prisoner may become eligible for parole. The Board does not know what allowance the judge made in setting that date. It is hard to see why full allowance should not be given for the time spent by the appellant in custody, unless there is a particular reason for directing otherwise..." (Emphasis added)

[18] In the underlined portions of the passage just quoted the Board recognized the difficulty posed by the uncertainty as to the exact allowance that the learned trial judge made for the time that the appellant had spent in custody before trial. It opined as well that full credit should have been given for the time that the appellant spent in custody in this case (in keeping with dicta in **Romeo DaCosta Hall** and other cases).

[19] It is now accepted that, in the absence of any particular reason, the giving of full credit for the time that an appellant or convict spends in custody is what is to be considered as the default position. In the view of Wit J in the **Romeo DaCosta Hall** case, such a reason would have to be "compelling".

[20] This position was confirmed recently in this court's judgment in the matter of **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P, writing on behalf of the court, at paragraph [34] of the judgment, stated the following:

> "[34] ...in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."

[21] In the United Kingdom that position has been given statutory authority in section 240 of the Criminal Justice Act 2003, which, so far as is material (Section 240 (3)), reads as follows:

> "(3) Subject to subsection (4), the court must direct that the number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by him as part of the sentence."

[22] It was not entirely clear to this court to what extent (if at all) the learned trial judge gave credit to the appellant for the time that he had spent in pre-trial custody, about three years of which would have been due to his unfitness to plead. This was, therefore, one basis on which we allowed the appeal.

The appellant's history of mental illness

[23] The appellant's long history of mental illness was the other factor that we took into account in allowing the appeal and making some adjustment to the minimum sentence to be served by the appellant before he is to become eligible for parole.

[24] Although the fact of his history of mental illness was not a matter that was raised in any significant way during the course of his trial, on documentary evidence produced to the Board it became apparent that the appellant was referred for professional treatment for some sort of mental illness from as early as 1987 - that is, when he was about 20 years of age - he having been born on 8 November 1967 (see, for example, the report of Dr George Leveridge, psychiatrist, dated 9 August 2001). He appears to have been admitted to Ward 21 of the University Hospital of the West Indies at that time; and, over the years, received psychiatric treatment either as an admitted patient or an out-patient, at the Bellevue Hospital. At paragraphs 8 to 15 of the Privy Council judgment in this matter, there is a more-detailed recital of other aspects of the appellant's history of mental illness. It is worthy of note, as well, that one psychiatrist at some stage expressed the view (rightly or wrongly) that: "It is likely however that this illness would have caused substantial impairment of his mental state at the time the offence was allegedly committed" (see the report of Dr Franklin Ottey, consultant psychiatrist, dated 20 November 2002).

[25] The appellant was taken into custody on 30 September 1998 for the murder for which he was eventually convicted. He was, however, not assessed as being fit to plead by a psychiatrist until 2001 (see the letter of Dr Leveridge, mentioned in the above paragraph).

[26] The most-recent medical report on the appellant is that of Dr Clayton Sewell, consultant forensic psychiatrist, dated 2 December 2015. The diagnosis of the appellant

is stated as: "Schizophrenia; Cannabis Use Disorder (Moderate)". That diagnosis was being "maintained" - that is, it had been made previously and was not being made then for the first time. Among the recommendations was the following:

> "1. Richard Brown continue to receive indefinite antipsychotic treatment to reduce his risk of relapse, give him the greatest chance of being able to function at his peak an reduce his risk to himself and others."

[27] When the appellant's case was considered by the Privy Council, it was stated at paragraph 49 of the judgment that: "The appellant's longstanding mental health problems will be an additional factor to be taken into account by way of personal mitigation".

[28] The matter of the mental condition of an appellant or convict and the effect that that condition ought to have on the sentence that is imposed on him or her has received consideration by this court in a number of cases. There is, for example, the case of **R v Valerie Witter** SCCA No 53/1973, judgment delivered on 20 December 1973. In that case this court was able to satisfy itself of the appropriateness of the sentence that had been imposed by the learned judge, with the assistance of a psychiatric report on that applicant's condition and the evidence of the doctor who had prepared the report.

[29] More recently, this court again had to consider the matter in the case of **Andrae Bradford v R** [2013] JMCA Crim 17. In that case, Morrison JA (as he then was), delivering the judgment of the court, referred to **R v Valerie Witter**, quoting the dictum of Henriques P at page 4 of that judgment, which was as follows:

> "... it is of vital importance that medical evidence should be taken so that the trial court can be in a position to ascertain what sentence it should impose and also that this court should be equipped with the necessary material to determine whether in all the circumstances the sentence passed by the learned trial judge was or was not an appropriate one."

[30] More to the point for the purposes of the instant appeal, however, Morrison JA gave the following guidance for dealing with cases of psychiatric illness and the rationale that underlies the approach to be taken. This guidance is to be found at paragraphs [11] and [12] of the judgment. It is given with specific reference to the need for a sentencing judge generally to take into consideration, *inter alia*, the character and antecedents of the particular individual to be sentenced:

> "[11] ...It seems to us that, in cases of suspected psychiatric illness or impairment, this requirement assumes particular significance, for the reasons given in a leading Australian text on sentencing ('Australian Sentencing: Principles and Practice', by Richard Edney and Mirko Bagaric, Cambridge University Press, 2007, page 164):
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> > 'An offender who appears for sentences and who is suffering from a psychiatric or psychological illness falling short of insanity at the time of the offence, or at the time of sentencing, may have this illness treated as a mitigating factor in sentencing. The basic policy reason underpinning psychiatric or psychological illness as a mitigating factor pivots on the idea that a person suffering from such an illness has a lesser moral culpability than those who are not suffering from this incapacity. It is also underpinned by the notion that persons should only be punished in accordance with their level of moral culpability. Importantly, those suffering from a psychiatric or

> psychological illness depart from the rational, deliberative agent that is the fundamental standard of criminal responsibility for the purpose of punishment. Where persons suffering from a psychiatric or psychological illness have a reduced capacity to choose and order their conduct then their capacity for full moral reasoning and judgment is impaired and this should be reflected in the sentencing of this cohort of offenders.'
>
> [12] So it was plainly necessary in the instant case, in our view, to take the applicant's psychiatric status into account as a potentially mitigating factor. The learned trial judge ordered a psychiatric evaluation of the applicant after he had already passed sentence on the applicant, and not before, as he was required to do in order for him to be able to determine the sentence that was appropriate to the applicant's particular circumstances." (Emphasis added)

[31] Applying these words of guidance to the instant case, it will be noted that the learned trial judge did not have the benefit of any psychiatric evaluation of the appellant. This was due to the fact that, as previously mentioned, the matter of the appellant's psychiatric illness was not raised during the course of the trial to any significant extent. All that emerged came about during the course of the appellant's cross-examination when he is recorded as having said, in answer to a question from Crown counsel as to whether he remembered the preliminary examination: "No, ma'am, I was a sick person them time". Questions were also asked of him in re-examination about his treatment for his illness (see paragraph 8 of the Privy Council judgment and

pages 195-196 of the transcript). The learned trial judge was therefore unable to have considered the appellant's psychiatric condition as a possible mitigating factor.

The period of 25 years

[32] The issues previously discussed apart, Mrs Hay also argued that the sentence of 25 years before parole was in and of itself manifestly excessive. She cited two cases in support of her contention. One case was **Kevin Young v R** [2015] JMCA Crim 12. In that case, the appellant had been convicted of the offence of murder. The murder was said to have been committed by the attacker firing some six shots into the body of the deceased, some of the shots having been fired as he (the deceased) lay on the ground. The sentence that was imposed after a trial was life imprisonment, with the appellant to serve 30 years before becoming eligible for parole. That sentence was reduced on appeal to 20 years before becoming eligible for parole. The other case cited was that of **Maurice Lawrence v R** [2014] JMCA Crim 16. In that case, the period stipulated for the appellant to serve before becoming eligible for parole was 20 years. However, on appeal, this was reduced to the statutory minimum of 15 years. On the basis of these authorities, Mrs Hay sought to persuade the court that a sentence of 12 to 15 years would have been appropriate in the circumstances.

[33] We were unable to agree with Mrs Hay in this regard. In relation to the **Maurice Lawrence v R** in particular, that appellant had, at trial, entered a plea of guilty, a factor that would have earned him a discount, in keeping with modern sentencing principles. His age and good character were also matters that weighed in his favour.

[34] The considerations in **Kevin Young v R** were, in some respects, to similar effect. That appellant at the sentencing hearing was shown to have made, in the social enquiry report, what this court regarded as a statement amounting to a full confession of guilt.

[35] Additionally, it is well known that no two cases are ever the same. Their facts and circumstances will differ. The individual offender will also differ from case to case and so too will each sentence. Therefore, cases cited to the court to assist it in arriving at an appropriate sentence can only be used as a guide. In fact, in further demonstration of these points, we might consider, along with the cases cited by Mrs Hay, the case of **Carlington Tate v R** [2013] JMCA Crim 16. In that case, this court dismissed the appellant's appeal against sentence and conviction, where he had been sentenced to be imprisoned for life for the offence of murder, with the stipulation that he should not be eligible for parole until he had served 30 years.

[36] Looking at the facts and circumstances of the instant case in which the accused and others are said to have gone to the home of the deceased and shot him dead in its immediate vicinity; and given the previous conviction of the appellant for robbery with wounding, we were unable to say that in this case the sentence, considered by itself, was manifestly excessive.

The date from which the sentence was ordered to run

[37] When the appeal in this matter was dismissed by this court on 11 March 2005, it was ordered that the sentence commence as of 23 April 2003 – or some three months after he had been sentenced by the learned trial judge. That order was in keeping with the standard practice that then obtained.

[38] In **Tafari Williams v R** [2015] JMCA App 36, Morrison P (Ag) (as he then was) helpfully explored the history of and rationale for this practice, which, since November 2013, this court has ceased to follow. It was a practice meant to attempt to avoid potential prejudice to an appellant or applicant whose case was delayed through no fault of his or her own. Morrison P (Ag) (at paragraph [7] of the judgment) stated the practice which at present obtains:

> "The court's current practice, substantially influenced by the decisions of the Privy Council in **Tiwari (Leslie) v The State** [2002] UKPC 29, (2002) 61 WIR 452 and **Ali v Trinidad & Tobago** [2005] UKPC 41, is now to order that such sentences should in general run from the date of sentencing at trial. However, the matter remains ultimately a matter for the discretion of the court, to be dealt with in accordance with the circumstances of each case." (Emphasis added)

Conclusion

[39] The issues relating to: (i) the appellant's long history of mental illness which was not taken into account by the learned trial judge; (ii) the uncertainty surrounding the learned trial judge's accounting for the time that the appellant spent in custody before trial and (iii) this court's present practice in making orders for dates from which sentences are to run, were the considerations that led us to make the orders reflected

in paragraph [3] hereof. We sought in making them to give the appellant full credit for the time spent in custody before trial (four years and four months); deducting that period from the starting point of 25 years before eligibility for parole, and to make a further adjustment on account of the mitigating factor of his longstanding mental illness.