[2019] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 35/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

TECHLA SIMPSON v R

Ms Melrose Reid for the applicant

Orrett Brown and Mrs Nickiesha Young Shand for the Crown

15 October and 29 November 2019

BROOKS JA

[1] Constable Joshua Black was targeted. On 17 November 2004, two men approached him in a lane in Bucknor District in the parish of Clarendon. They had come to rob him of his two firearms. They shot him several times - some of the shots were with one of his own firearms - took the firearms and left. He died from his injuries.

[2] Fortunately, persons nearby witnessed their nefarious deed. Unfortunately, only one person gave a statement to the police. It was a brave 13-year-old boy. On 28 January 2005, he attended an identification parade and pointed out Mr Techla Simpson

as being one of the gunmen, who had killed Constable Black, who was the boy's uncle. Mr Simpson was charged with murder in the course or furtherance of a robbery.

[3] By the time Mr Simpson's trial for the killing came on for hearing, over eight years later, in December 2012, the young witness had emigrated and was not available to testify. His deposition, which he gave in the then Resident Magistrates' Court (now Parish Court) on 22 July 2009, as part of a preliminary enquiry into the charge of murder against Mr Simpson, was the only eyewitness evidence tendered at the trial.

[4] Mr Simpson was convicted for the killing on 21 December 2012. On 10 May 2013, the learned trial judge sentenced Mr Simpson to imprisonment for life. She however ordered that he should serve 40 years before being eligible for parole.

[5] Mr Simpson has applied for leave to appeal from both his conviction and sentence. A single judge of this court refused both applications, but Mr Simpson has renewed them before this court.

[6] Ms Reid appeared in this court on his behalf. She very candidly advised this court that she could find no basis to support the proposed grounds of appeal against conviction that Mr Simpson had filed in support of his application. Learned counsel also informed this court that she could find no other arguable ground of appeal in that regard. Ms Reid was correct in her submissions to the court with regard to the issue of the conviction.

[7] Although not advancing any submissions against the conviction, Ms Reid submitted that the delay in bringing the case to trial and a flawed approach used by the learned trial judge, in sentencing Mr Simpson, resulted in a manifestly excessive sentence.

[8] Those will be the main issues discussed below.

The prosecution's case

[9] The details of the prosecution's case may be briefly stated. It is, however, important for the purposes of considering the sentence, to note the way that Mr Simpson and his accomplice carried out their attack on Constable Black.

[10] The young witness was standing near to Constable Black, with others, in the lane at the time that the two assailants approached Constable Black. The witness saw a short brown man, whom he later identified as Mr Simpson, approach and shoot Constable Black in his back. The child, like several others who were there, fled. He ran to his yard, which was nearby, and went onto the veranda.

[11] From his veranda, with the aid of a streetlight, he could see what occurred thereafter. While there, he heard more gunshots. He then saw the short brown man turn over Constable Black, who was on the ground. That man took out Constable Black's firearm and shot Constable Black with it. The boy then heard the tall black man tell the short brown one that, "Bigga seh is two gun him have" (page 81 of the transcript). The short brown man then took a second firearm from Constable Black. The

tall black man then called an end to the operation saying, "come, you don't see the man dead already" (page 81 of the transcript). The men then left the scene.

The case for the defence

[12] Mr Simpson gave sworn testimony at his trial. His defence was alibi. He said that he was at home at the time of the offence. His mother testified in support of his alibi.

The treatment of the young witness' evidence and the directions to the jury

[13] The young witness' evidence was admitted through the statutory provisions open to the prosecution. The learned trial judge properly considered, during a *voir dire*, whether it was fair to admit the child's deposition into evidence.

[14] Having done so, she gave the jury appropriate directions as to how to treat with it, how to treat the critical issue of visual identification and how to treat with the defence of alibi. All of the relevant directions were given in the context of accurate directions on the burden and standard of proof.

[15] The learned trial judge properly put both the prosecution and defence cases to the jury, and the jury arrived at its decision. It cannot be said that the trial was unfair or that Mr Simpson's defence was prejudiced by the child's absence.

[16] It is for those reasons that we agree with Ms Reid that there is no arguable ground in respect of the conviction in this case.

The sentencing exercise

[17] When the case came on for sentencing, the learned trial judge had before her, not only the antecedent report, which showed that Mr Simpson had five previous convictions, but she also had the social enquiry report and a report from the correctional institution, where he was then incarcerated. She considered the sentence along the traditional principles of deterrence, prevention and rehabilitation. She weighed the impact of the five previous convictions and the fact that the offences, for which he had been previously convicted, got more serious as time progressed. She considered Mr Simpson's age, the likelihood that he would have learnt from his past experiences, and the report that he had recently been inclined to conformity with the rules of the penal institution. In coming to the figure that she imposed, the learned trial judge also took into account the fact that the prosecution had not asked for the death penalty, which was open to it, bearing in mind the nature of the killing. Since the learned trial judge did not stipulate otherwise, the sentence would run concurrently with the other sentences that Mr Simpson was already serving at the time.

The submissions in respect of the complaints against sentence

[18] Ms Reid submitted that the delay in bringing the case to trial was a breach of Mr Simpson's constitutional right to a fair hearing within a reasonable time. This right, she submitted, is guaranteed in the Charter of Rights enshrined in our Constitution. Learned counsel argued that, in cases where there is such a breach, there is a growing trend, in a number of countries, toward preventing them proceeding to trial (the technical term is called "a stay of proceedings", or, for short, "a stay").

[19] Ms Reid argued that this court should declare that cases that involve long delay, should not be allowed to proceed to trial. Learned counsel accepted that it was not usual in this jurisdiction to seek to stay trials on the basis of delay. She argued, however, that even if the point was not taken in the court below, there should be no bar to the point being considered by this court.

[20] Learned counsel accepted, however, that given the peculiar circumstances of Mr Simpson's case, those points could not properly be made on his behalf. The record shows that for a large portion of his time awaiting trial for this offence, Mr Simpson was serving sentences for other offences.

[21] She argued, however, that the delay, which was in no way attributable to Mr Simpson, is still a breach of his constitutional right to a fair trial within a reasonable time and resulted in him having to serve a longer time than he would have served, had it not been for the delay.

[22] Learned counsel submitted that this court should rule that in Mr Simpson's case and similar cases, the offender ought to be given credit for the pre-trial time spent in custody, despite the fact that he was serving a sentence during the whole or a portion of that time.

[23] Learned counsel accepted that previously decided cases did not support that stance. She argued, however, that as a result of the conventional stance, Mr Simpson is serving a sentence which, had his trial not been delayed, would have started sooner,

had a greater concurrence with the sentences that he was already serving, and therefore eventually resulted in a shorter period of incarceration. The learned trial judge erred, learned counsel submitted, in failing to give Mr Simpson full credit for all the time that he spent in custody prior to his sentencing.

[24] Learned counsel also supported Mr Simpson's complaint against the length of the sentence that was imposed in this case. She argued that the learned trial judge did not use the currently required structured approach to sentencing. The result, she submitted, was that the learned trial judge's approach was flawed.

[25] These failures, Ms Reid submitted, resulted in a sentence that was manifestly excessive.

[26] Mr Brown, appearing for the Crown, very helpfully traced the history of the various dates that Mr Simpson's case came on before both the Parish Court and the Circuit Court. He also outlined Mr Simpson's previous convictions and sentences.

[27] The latter history showed that Mr Simpson was taken into custody on 23 January 2005. His first conviction, thereafter, was on 7 February 2006, for illegal possession of a firearm. Whereas he was not, at that time, credited with the time spent in custody prior to being sentenced, he subsequently received that credit when he was sentenced, after an appeal, for another murder, for which he had been convicted.

[28] Mr Brown accepted that the delay of eight years in bringing Mr Simpson's case to trial was, for the most part, not Mr Simpson's fault. Learned counsel contended,

however, that the delay did not prejudice Mr Simpson. Mr Brown argued that a number of the adjournments resulted from the need to secure legal representation for Mr Simpson; thereby complying with another Charter right, namely the right to legal representation. Learned counsel submitted that **R v Flowers** [2000] UKPC 41 supported those submissions.

[29] Learned counsel also supported the sentence that the learned trial judge had imposed. He argued that the sentence was within the range of sentences that was recognised in **Christopher Thomas v R** [2018] JMCA Crim 31 (at paragraphs 88-93).

The issue of delay and its effect on the trial

[30] Before embarking on a discussion of the issues raised in these submissions, it must be acknowledged that the time that it took the State to bring Mr Simpson's case to trial is unacceptably long. His Charter right to a trial within a reasonable time has been breached. Section 16(1) of the Constitution (part of the Charter of Rights) states:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[31] Over the period of eight years that it took the matter to come to trial, there were many mention and trial dates. There were numerous reasons given for adjournments, almost none of which could be laid at Mr Simpson's feet. The situation is most regrettable. The nature of his crime and the history of his criminal conduct over the years, prior to his incarceration, cannot absolve the State for the commission of this

breach. Every effort should be made to ensure that there is no repetition of such an egregious situation.

[32] In addition to that recognition of the breach, some consideration should be given to providing him with a more tangible remedy for the breach. As Ms Reid quite candidly accepted, that remedy cannot, however, be a quashing of the conviction. Mr Simpson's history and the previously decided cases on the point militate against such a remedy.

[33] The more recent authorities stipulate that the quashing of a conviction is not the normal remedy for a breach of a constitutionally guaranteed right. This was made clear by the Privy Council in a case from this jurisdiction, **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26. Lord Carnwath, in delivering the opinion of the Board, applied the principle, which he drew from **Attorney General's Reference** [2004] 2 AC 72. Lord Carnwath said, in part at paragraph 26:

> "The same issues had been considered in 2003 in the **Attorney General's Reference** case [2004] 2 AC 72, in the context of the equivalent provision of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Bingham, with whom the majority agreed, summarised the relevant principles:
>
> > '24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1) [the equivalent to section 16(1) of the Charter]. For such breach there must be afforded such remedy as may…be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the

> breach is established…*If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction.* Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.'" (Italics as in original)

[34] **Melanie Tapper v Director of Public Prosecutions** was decided before Parliament promulgated the Charter. Nonetheless, their Lordships made those observations after having considered the then constitutional provisions in Jamaica, the charter of rights in Mauritius and the European Convention for the Protection of Human Rights and Fundamental Freedoms. All of those deal with the right to a fair trial within a reasonable time before an independent tribunal.

[35] As their Lordships have indicated, the more usual remedy for the breach, in the case of a person convicted after a fair trial, is either a public acknowledgement of the breach or a reduction in the penalty imposed. The remedy must, of course, depend on the circumstances of the individual case. Their Lordships did not completely rule out the quashing of a conviction, but it is fair to say, that that remedy would normally only be applied where the fairness of the trial was prejudiced by the constitutional breach. That

is not the situation in Mr Simpson's case. As has been explained above, he was properly convicted for killing Constable Black.

[36] Based on the fact of his conviction, and relying on the extract from **Attorney General's Reference**, there is only one other remedy for that breach that is available to Mr Simpson for the admitted breach of his constitutional right to a trial within a reasonable time. It is a reduction of his sentence, and is available to him in this court, on this appeal. There is no need to place on him the obligation to apply for redress in the Supreme Court, pursuant to section 19 of the Constitution. Their Lordships have sanctioned such an approach in **Melanie Tapper v DPP** and in **Flowers v The Queen** [2000] UKPC 41, and this court has recently granted redress by way of reduction of sentence (see **Curtis Grey v R** [2019] JMCA Crim 6). In determining whether the remedy of a reduction of sentence, ought to be afforded Mr Simpson, it is necessary to examine and apply some of the factors set out in **Flowers v The Queen**.

[37] **Flowers v The Queen** is also a decision of the Privy Council on an appeal from this jurisdiction. In that case, their Lordships examined the factors they considered to be relevant when addressing a complaint that there has been a breach of constitutional rights. They are:

a. the length of delay;

b. the reason for the delay;

c. the defendant's assertion of his right; and

d. the prejudice to the defendant.

[38] The factor of prejudice has three further considerations, namely, the need to:

d1. prevent oppressive pre-trial incarceration;

d2. minimise anxiety and concern of the accused; and most importantly

d3. limit the possibility that the defence will be impaired.

Their Lordships emphasised that the fairness of the entire system will be skewed if a defendant is unable to adequately prepare his case.

[39] Mr Simpson's case will be considered according to those guidelines.

a. The length of the delay

[40] Their Lordships pointed out that delay is the triggering mechanism. The delay must be presumptively prejudicial then one can assess the other factors. There is no gainsaying that there has been egregious delay in this case.

b. The reason for the delay

[41] Their Lordships noted that the court should assess the reasons for the delay as advanced by the State. Different weights apply according to the reason proffered. Where the reason is outside of the control of the State, less weight is applied against the State. It must be borne in mind that Mr Simpson was charged with another person in respect of this case. In this case, the reasons for the delay have been varied. They are (not in any order of prevalence), in the main:

a. attempts to secure legal representation for Mr Simpson;

b. the absence of the witness;

c. absence/withdrawal of defence counsel;

d. insufficient jurors;

e. applications for change of venue;

f. non-disclosure of documents to new defence counsel;

g. applications for use of the young witness' deposition not being ready; and

h. Mr Simpson was brought to court late or not brought to court.

[42] It cannot be said that there was a deliberate attempt to delay the trial. The reasons for the delay do not indicate any deliberate action on behalf of the State. It must also be recognised that there was almost a five-month delay between the date of conviction and the date of sentence. This was also not Mr Simpson's fault but was apparently due to the exigencies of judicial service.

c. Mr Simpson's assertion of his Charter right

[43] Ms Reid submitted that although Mr Simpson did not raise the issue of his Charter right in the court below, it was open to him to assert the right in this court. That submission is supported by the Privy Council's opinion in **Flowers v The Queen**. Their Lordships were concerned that the issue should be raised in the courts in the

jurisdiction from which appeals to them originated, and not for the first time before them. Their rationale was that the local courts are aware of local conditions and better able to assess the validity of complaints about the length of delays and the reasons for those delays.

[44] Their Lordships did note, however, that a failure to assert the right within a reasonable time is a factor to be considered in determining the remedy to be applied (see paragraph 50).

d. The prejudice to Mr Simpson

[45] Their Lordships, in **Flowers v The Queen**, accepted that a long delay, even in the absence of any specific evidence of prejudice, could constitute prejudice. Their Lordships quoted, with approval, from the judgment in **Bell v The Director of Public Prosecutions** [1985] AC 937 (yet another case from this jurisdiction), in which it was said in part, at page 952:

> "…Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the applicant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted."

[46] In **Flowers v The Queen**, their Lordships, in assessing the four elements of the aspect of prejudice, nonetheless stated that the effect on the accused's defence is the most serious.

[47] The first element of prevention of oppressive pre-trial incarceration will not carry any weight in Mr Simpson's case. He was serving sentences for the bulk of that time. That factor would also have reduced the effect of the element of anxiety and concern of facing another trial. It is true, however, that he would probably not have known that the prosecution would not have been pursuing the death penalty in this case. That element of concern could therefore be afforded some weight.

[48] Although the prejudice to the defence normally carries the most weight, it will not carry any in Mr Simpson's case. His defence was alibi and he was able to call his mother as his witness in support of that alibi. He did not assert that his defence was impaired in any way by virtue of the pre-trial delay.

[49] Based on all the above, and taking into account, as was done in **Flowers v The Queen** (at paragraph 60), the case against Mr Simpson and the prevalence of the offence of murder in this country, there could be no consideration of a quashing of his conviction. A reduction of the sentence would, however, be an appropriate tangible remedy for the breach of his Charter rights.

[50] The next step in this judgment is to assess the sentence that the learned trial judge imposed.

Assessing the sentence that was imposed

[51] The trend toward the more structured approach to sentencing, which is now standard in courts in this jurisdiction today, was in its infancy when the learned trial judge sentenced Mr Simpson. There was, however, some guidance to sentencing along those lines in authorities such as **Regina v Everald Dunkley**, (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002. At page 4 of that judgment, Harrison JA stated:

> "If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise."

[52] One of the watershed cases, signalling the change from the previous intuitive approach to sentencing, is the decision of the Caribbean Court of Justice in **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ). Although it, and some other cases, to which it referred, was available at the time of the sentencing in this case, the structured approach was not yet the standard used in the trial courts in this country. **Meisha Clement v R** [2016] JMCA Crim 26, and The Sentencing Guidelines For Use By Judges Of The Supreme Court Of Jamaica And The Parish Courts (the Sentencing Guidelines) became the standards in this jurisdiction, after this case was concluded.

[53] In light of the fact that the learned trial judge did not use that structured approach, and that the sentence of 40 years before eligibility for parole is a significant sentence, the validity of that sentence may properly be tested using the later approach.

[54] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:

a. identify the sentence range;

b. identify the appropriate starting point for the particular case, taking into account the relevant range;

c. consider any relevant aggravating factors;

d. consider any relevant mitigating features (including personal mitigation);

e. consider, where appropriate, any reduction for a guilty plea;

f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable).

[55] The offence in this case is one that can attract the ultimate sentence (see section 3(1)(a) of the Offences Against the Person Act (the OAPA)). The minimum sentence for

these offences is a sentence for life with no eligibilty for parole before 20 years. Section 3(1C)(a) of the OAPA states:

> "where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole;"

[56] The Sentencing Guidelines do not provide any further assistance than to quote from the OAPA concerning the minimum period of incarceration before parole, for these offences. It may be noted however that section 2(1A) of the OAPA does specify the types of offences that may attract these sentences. It says:

> "For the purposes of subsection (1)(a), the offences referred to in this subsection are-
>
> (a) burglary or housebreaking;
>
> (b) arson in relation to a dwelling house;
>
> (c) robbery; or
>
> (d) any sexual offence."

[57] There are previously decided cases, involving offences of these types, that can assist with establishing a range for the number of years to be spent in prison, prior to being eligible for parole.

[58] The first of the relevant cases is **Christopher Thomas v R** [2018] JMCA Crim 31. In that case, Mr Thomas had killed a policeman as an act of reprisal. Morrison P, in delivering the judgment of the court, assessed sentences in a number of recent cases. That assessment he said, at paragraph [93], suggested "a usual range of 20 to 40

years' imprisonment, or life imprisonment with a minimum period to be served before becoming eligible for parole within a similar range".

[59] In **Christopher Thomas v R**, the court reduced a sentence of 40 years, that had been imposed at first instance, to 28.5 years. Morrison P, in demonstrating the reasoning of the court, took into account Mr Thomas' age, his previous good character and a good report from his community. Those factors, he reasoned, warranted a reduction of the sentence to 35 years. It was the period of six and a half years on pre-trial remand that reduced the final sentence to 28.5 years.

[60] Another very helpful case is **Paul Brown v R** [2019] JMCA Crim 3. F Williams JA, writing on behalf of the court, canvassed nine cases involving longer sentences for murder. He concluded at paragraph [8] of his judgment, that the "cases show a range of sentences of between 45 years' and 25 years' imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder". Examples of the latter class of case were:

a. **Jeffery Perry v R** [2012] JMCA Crim 17 where Mr Perry was sentenced to life imprisonment and ordered to serve 45 years before becoming eligible for parole. He had killed three children.

b. **Rodrick Fisher v R** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008. In that case

Mr Fisher had been convicted for three counts of murder.

[61] One of the cases that F Williams JA canvassed was **Massinissa Adams and others v R** [2012] JMCA Crim 59. In that case, Mr Adams and his cronies targeted a senior police officer who was visting a home. It appears that the motive for the killing was to take the officer's firearm. Mr Adams was the "mastermind behind the robbery and murder" (paragraph [30] of the judgment). The sentence imposed on Mr Adams on appeal was life imprisonment and he was ordered to serve 30 years before becoming eligible for parole. It was considered that he was a relatively young man, who had no previous convictions and had a good report from his community (see paragraph [33] of the judgment).

[62] **Massinissa Adams v R** and **Christopher Thomas v R** are very helpful in that they both involve the deliberate killing of a police officer. In Mr Adams' case, the similarity is even greater, as it involved the planned killing of the police officer in order to steal his firearm.

[63] Mr Simpson does not have the favourable qualities that Mr Adams and Mr Thomas possessed at the time that they were respectively sentenced. Mr Simpson is not of previous good character. He did not receive a favourable social enquiry report and he has previous convictions, including one for murder. The other aggravating factors are the nature of the killing; the premeditated targeting and shooting of Constable Black, eventually with his own firearm, and the theft of the firearms.

[64] His mitigating factors are few. They were, that at the time of sentence:

a. he was at the relatively young age of 30;

b. he may have been operating under the direction of someone else; and

c. the report that his conduct at the prison had been improving since he had been imprisoned for the other offences.

[65] With a starting point of 35 years, in line with **Christopher Thomas v R**, the aggravating features warrant a period of 42 years before eligibility for parole. The mitigating features would warrant a reduction of two years. The learned trial judge was, therefore, not wrong in making an order of 40 years' imprisonment before eligibility for parole.

[66] She did not, however, consider the pre-trial incarceration. It is, however, not automatic that Mr Simpson should receive the benefit that would normally result from that consideration.

The pre-trial/pre-sentence incarceration

[67] The matter of giving credit for pre-trial incarceration, where the offender was, at the time, serving a sentence for another offence, has been assessed by this court in **Charley Junior v R** [2019] JMCA Crim 16. In that case, this court recognised the principles that:

a. there is a primary rule that full credit must ordinarily be given to pre-trial incarceration;

b. the credit should as far as possible be done by way of an arithmetical deduction;

c. a sentencing judge has a discretion, in certain circumstances, to depart from the primary rule; and

d. one of the exceptions that the sentencing judge may apply is where the pre-trial incarceration overlaps with imprisonment or remand in respect of unconnected offences.

[68] Guideline 11.4 of the Sentencing Guidelines recognises the latter two principles listed above. It states:

> "Despite the general rule [that full credit must ordinarily be given to pre-trial incarceration], the sentencing judge retains a residual discretion to depart from it in exceptional cases, such as, for example:
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> (i) where the offender has deliberately contrived to enlarge the amount of time spent on remand;
>
> (ii) where the offender is or was on remand for some other offence unconnected with the one for which he or she is being sentenced;
>
> (iii) **where the offender was serving a sentence of imprisonment during the whole or part of the period spent on remand**; and
>
> (iv) generally where the offender has been in custody for more than one offence and cannot therefore expect

> to be able to take advantage of time spent on remand more than once." (Emphasis supplied)

The Sentencing Guidelines drew support for these exceptions from the cases of **Callachand and another v The State** [2008] UKPC 49 and **Romeo Da Costa Hall v The Queen**. Guideline 11.6 requires a sentencing judge to give reasons for departing from the primary rule.

[69] The material made available to this court by the Crown, especially as regards the number and nature of his previous convictions, shows that Mr Simpson should not benefit from the period of any pre-trial incarceration. He was, at all material times, in custody, whether on remand or serving a sentence, in respect of offences other than the present one. As has been pointed out above, he has already received credit for the period that he spent on remand. The Sentencing Guidelines and the reasoning in **Romeo Da Costa Hall v The Queen** support that approach.

[70] Mr Simpson was arrested on 23 January 2005 in respect of firearm offences that were committed on the previous day. He was remanded in custody until 7 February 2006, when he was convicted in respect of those offences. One of the sentences passed at that time was for him to serve 10 years' imprisonment at hard labour.

[71] On 4 July 2011, he was convicted for the offence of murder, which was also committed on 22 January 2005. He was sentenced, on 19 December 2011, to life imprisonment, for that offence, and was ordered to serve 25 years before being eligible

for parole. He was, at that time, already serving the sentences in respect of the firearm offences.

[72] It was also on 23 January 2005, that the investigating officer in the present case took an interest in Mr Simpson, and arranged for an identification parade to be held.

[73] That history and the authorities demonstrate that although the learned trial judge did not mention Mr Simpson's pre-trial incarceration, she would have been justified in not taking any of it into account.

Application of a remedy for the breach of the constitutional right

[74] That is not, however, the end of the matter. It is now necessary to consider a reduction of Mr Simpson's sentence, based on the above reasoning concerning the remedy for the breach of his constitutional right to a trial within a reasonable time.

[75] A reduction of two years would be appropriate. In **Curtis Grey v R** there was a four year delay in bringing the case to trial. This court reduced the sentence by one year as a remedy for the breach of Mr Grey's constitutional right to a trial within a reasonable time. In **Melanie Tapper v DPP**, there was a five year delay between conviction and the determination of her appeal. This court held that a reduction of the sentence, from 18 months to 12, would have been an appropriate remedy for the delay. It eventually suspended the 12 month sentence, but that suspension proved to have been on the mistaken belief that she had given compensation to the victim of her

crime. Their Lordships held that the remedy that this court applied should not be faulted. They said at paragraph 19:

> "…In the circumstances, the Board finds no grounds to question either [the Court of Appeal's] decision to reduce the sentence, rather than to adopt some other remedy, or the amount of the reduction."

Summary and conclusion

[76] Although Mr Simpson's trial was long delayed, his defence is not prejudiced by that delay. The trial was fairly conducted and the learned trial judge properly gave the jury all the relevant directions on the treatment of the young witness' deposition and the burden and standard of proof.

[77] The jury's decision to convict him cannot properly be disturbed. We agree with Ms Reid that the grounds of appeal in respect of the conviction cannot be disturbed.

[78] Learned counsel's submissions in respect of sentence are also accurate insofar as she complained about shortcomings in the sentencing procedure used by the learned trial judge. The learned trial judge did not use the more structured approach, even then being advocated by the decided cases. Nor did she specifically consider whether Mr Simpson should be given any credit for time spent in custody on remand prior to trial and sentencing.

[79] The learned trial judge, although she imposed a robust sentence on Mr Simpson did not pass a manifestly excessive one in the circumstances. The nature of the offence and Mr Simpson's antecedent history, including his past convictions, justified that

sentence that the learned trial judge had imposed. The application of the more structured, mathematical approach demonstrates that the learned trial judge, despite her ommissions, arrived at the correct sentence.

[80] Although that sentence was correct, Mr Simpson is entitled to a remedy for the breach of his Charter right to a fair trial within a reasonable time. A deduction of two years from his sentence would be a fair remedy.

[81] Accordingly, the orders are:

1. The application for leave to appeal against conviction is refused, and the conviction is affirmed.
2. The application for leave to appeal against sentence is granted.
3. The hearing of the application in respect of sentence is treated as the hearing of the appeal.
4. The appeal against sentence is allowed and the sentence imposed by the learned sentencing judge is adjusted so that the sentence of imprisonment for life is affirmed, but the period that the offender is to serve before becoming eligible for parole is reduced from 40 years to 38 years.
5. The sentence is to be reckoned as having commenced on 10 May 2013.