IN THE COURT OF APPEAL OF BELIZE AD 2015

CRIMINAL APPEAL NO 3 OF 2014

LENNY BENGUCHE Appellant

v

THE QUEEN Respondent

BEFORE
The Hon Mr Justice Sir Manuel Sosa — President
The Hon Madam Justice Minnet Hafiz-Bertram — Justice of Appeal
The Hon Mr Justice Murrio Ducille — Justice of Appeal

D Barrow SC and I Swift for the appellant.
K. Awich, Crown Counsel for the respondent.

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26 May and 14 October 2015.

HAFIZ-BERTRAM JA

Introduction

[1] On 8 January 2013, Lenny Benguche ("the appellant") was indicted for maim which he committed on 29 January 2008. He was convicted for the said crime and on 28 February 2014, sentenced to 10 years imprisonment by Gonzalez J. On 5 March 2014, the appellant issued a notice of appeal against his sentence and conviction. At a case management conference (CMC) held on 26 May 2015, learned senior counsel, Mr. Barrow informed the CMC Panel that the appellant would withdraw the appeal against his conviction and proceed only on the appeal against sentence. The Panel on that

date ordered that (1) the application for leave to appeal the sentence be treated as the hearing of the appeal itself; (2) the matter be disposed of by written submissions only and (3) Senior counsel for the appellant to file an affidavit from the prison officials exhibiting official documents showing the time served by the appellant before conviction.

[2] The appellant's sole ground of appeal was that the sentencing judge did not take into consideration the time spent in prison on remand before his conviction. The trial judge at the time of sentencing was aware that the appellant had been remanded but could not ascertain the time spent.

[3] As ordered by the CMC Panel, an affidavit was issued on behalf of the appellant sworn to on 4 June 2015 in support of his application for leave to appeal his sentence. The deponent of the affidavit was Virgillo Murillo, Chief Executive Officer of the Belize Central Prisons. He deposed that he has responsibility for the keeping of records of the prison which "include information as to the dates of entry into and the leaving of the prison by remanded and convicted persons, as well as the legal documents that authorize the detention and release of such persons, including warrants of committal." Mr. Murillo exhibited to his affidavit the documents in relation to the imprisonment of the appellant as from 21 November 2008 to 4 June 2015 (the date when the affidavit was sworn).

The evidence

[4] On 21 November 2008, the appellant was admitted for the following offences:

> "Case # 2035/05 – Drug Trafficking $5,505.00 I/D 18 months
>
> Case # 5692/07 - Possession of controlled drugs $805.00 I/D 6 months

His time for these offences **expired 17 May 2010.**

[5] He was also remanded for the following:

> "Case # 4601 Wounding
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> Case # 2881 Drug trafficking
>
> Awaiting trial – Attempted Murder."

[6] Mr. Murillo exhibited a 'Warrant of Commitment' which showed that the appellant was committed on 20 July 2009 for attempted murder of one Christina Zetina whom he allegedly shot on 29 January 2008. On 4 June 2010, the appellant was acquitted for the said attempted murder.

[7] On the said day, 4 June 2010, the appellant was indicted for maim for the shooting of Zetina. The trial resulted in a hung jury and the appellant was remanded.

[8] On 2 August 2012, appellant went before Lucas J in connection with 'Goal Delivery'. Lucas J was informed of the appellant's acquittal of attempted murder of Zetina and that there was a hung jury for the maim count. On the said day, Lucas J discharged the appellant. The warrant to discharge was dated 3 August 2012. The appellant was not re-indicted on that date and was not remanded.

[9] The appellant was re-indicted on 8 January 2013, for the count of Maim, in relation to the said shooting of Zetina. He was convicted on 21 February 2014 and committed on the said day. He was sentence on 28 February 2014 which commenced on the said date.

[10] The imprisonment for the drug offences expired 17 May 2010. The appellant was not remanded between the period 3 August 2012 and 21 February 2014.

The law

Time spent on remand

[11] Credit for time spent on remand is governed by common law and the sentencing judge has a discretion as to how to treat time spent on remand. This is clearly stated in **Costa Hall v The Queen [2011] CCJ 6 (AJ**), a case cited by both parties. The Court in looking at the scope and extent of the discretion, endorsed the approach taken in the case of **Callachand and another v The State [2008] UKPC 49.** The Court at paragraph 15 – 17 said:

> [15] In *Callachand* the Appellants were sentenced to seven years penal servitude for causing the death of one Joomun but without the intention to kill. The sentencing court was not made aware of the time spent by the Appellants in custody on remand. The Privy Council held at [9] that save in exceptional cases or where a difference in local conditions of detention on remand and after sentence existed the proper approach, having regard to the value ascribed to individual liberty, was as follows:
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>> "But they [their Lordships] 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 fully taken 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. We find it difficult to believe that the conditions which apply to prisoners held on remand in Mauritius are so much less onerous than those which apply to those who have been sentenced that the time spent in custody prior to sentence should not be taken fully into account. But

if that is thought to be the position there should be clear guidance as to the extent to which time spent in custody prior to sentence should not be taken fully into account because of the difference between the prison conditions which apply before and after the sentence."

[16] The Board remitted the case to the Supreme Court of Mauritius to consider whether, and if so to what extent, the time spent by the Appellants in custody prior to sentence should count towards their sentences, and to explain the reasons for its decision for the benefit of the Appellants and the assistance of all sentencing judges.

[17] The Law Reform Commission of Mauritius subsequently expressed the view, based on the evidence of the Commissioner of Prisons in *Callachand & Another v The State [2009] SCJ 59,* that the conditions applicable to prisoners on remand were not significantly less onerous than those which applied after sentence, that time spent on remand should be taken into account in the manner indicated by the Privy Council. We endorse this approach particularly where conditions endured by prisoners on remand are more onerous than those after sentence and note that in the instant appeal there is no evidence on the record of any compelling factors that would displace the *prima facie* rule of full credit for time served in pre-sentence custody."

Departure from primary rule

[12] In **Hall**, the Court also discussed when a sentencing judge should depart from the primary rule of full credit. At paragraph 18, the Court said:

"[18] We recognize a **residual discretion in the sentencing judge not to apply the primary rule,** as for example: (1) where the defendant has deliberately contrived to enlarge the amount of time spent on

> remand, **(2) where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced,** (3) where the period of pre-sentence custody is less than a day or the post-conviction sentence is less than 2 or 3 days, (4) **where the defendant was serving a sentence of imprisonment during the whole or part of the period spent on remand** and (5) generally where the same period of remand in custody would be credited to more than one offence. This is not an exhaustive list of instances where the judge may depart from the prima facie rule, and other examples may arise in actual practice."

[13] The second and fourth rule are relevant to the case at hand. As shown by the evidence, the appellant was serving a sentence for drug offences and he was remanded for other offences.

[14] In the case of **Jeffrey Ray Burton v The Queen [2014] CCJ 6 (AJ)** the Court confirmed that in **Hall** it was recognized that there may be circumstances in which there could be departure from the primary rule. The Court said at paragraph 1 that:

> "[1] … In *Romeo Da Costa Hall v The Queen* this Court held that transparency in sentencing and the principles relating to the imposition of custodial sentences enshrined in the Penal System Reform Act required that a sentencing judge explain how the time spent on remand factored into the sentence imposed. … The nuanced language reflected our reasoning that there was a residual discretion in the sentencing judge not to apply the primary rule. ….."

Submissions of the parties

[15] Learned Counsel for the appellant submitted that the sentencing judge failed entirely to direct himself as to the legal duty to apply the primary rule. Further, since

there had been no advertence by the sentencing judge to the rule, the matter of reasons for departing from the rule did not arise. It was further contended that there was nothing in the record that can provide reasons for the court of appeal to do other than apply the primary rule. As such, a full credit should be given to the appellant for the 3 years and 2 weeks the appellant spent on remand.

[16] Learned Counsel for the respondent agreed that the trial judge did not give any consideration to the guidelines as set out in the case of **Hall.** However, the respondent did not agree with the appellant that the entire period, calculated by the appellant to be 3 years and 2 weeks, should be credited since the appellant was serving time for other offences.

Discussion

[17] The trial judge sentenced the appellant to 10 years imprisonment and in passing the sentence said:

> "I am aware that you have been remanded for this offence for some time, a time which cannot be ascertained. This is the sentence of the court."

[18] It is the opinion of the court that the learned trial judge erred by not taking steps as was done by this Court, to obtain evidence from the prison officials in relation to the time spent by the appellant in prison so as to give him credit. It was the duty of the trial judge to apply appropriate principles in arriving at the sentence as was done in the case of **Hall,** that is, to decide whether to apply the primary rule or use the residual discretion to depart from that rule. The trial judge erred by not considering the time spent on remand prior to sentencing in relation to those offences for which the appellant was not convicted.

[19] The Court is not in agreement with the arguments for the appellant that since there had been no advertence by the sentencing judge to the rule in relation to credit, the matter of reasons for departing from the rule does not arise. There is evidence

before this Court showing that the appellant should be given some credit, though not full credit, for the pre-sentence custody. It would certainly be a travesty of justice for this Court to ignore evidence which shows that there should be a departure from the primary rule.

Method used for credit

[20] The CCJ in **Hall** discussed several methods by which credit could be given as seen at paragraphs 19 – 26 of the judgment. In that case, the Court was attracted to the third method which is to give credit by reducing the term of the sentence. However, the Court recognized that there could be some anomalies of this method and said that a sentencing judge is required to explain how he or she has dealt with time spent on remand. At paragraph 26 of the **Hall** judgment, the Court said:

> "[26] We are conscious of the anomalies of the third method (reduction of the sentence by the time spent on remand). The application of this method may result in persons charged and convicted of the same offence being given markedly different sentences. This anomaly and the mistaken perception the third method might produce of a lighter sentence underline the importance of the following guidelines in such cases and indeed in all cases in which a sentence is reduced because of time spent on remand. 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. Goldstein J in *S v Vilikazi (supra)* at p. 142 stated that in granting credit for time spent on remand the Court is "driven to eschew simple subtraction and fudge the period of awaiting trial, thereby doing substantial but

perhaps less than perfect justice." While there is an element of truth in this statement, even without the complication of time spent in pre-trial custody, sentencing is never an exact science particularly when a serious offence is involved."

[21] In the instant case, this Court is in agreement with the above method to reduce the sentence by the time spent on remand.

[22] This appeal was not on the ground that the 10 years sentence was excessive. It was on the sole ground that the sentencing judge did not take into consideration the time spent in prison on remand before his conviction. The Court having looked at the evidence from the Chief Executive Officer of the prisons found that the appellant was admitted on 21 November 2008 to serve a period of 18 months as a default sentence for the offences of drug trafficking and possession of controlled drugs. This term of imprisonment expired on 17 May 2010. The appellant was also committed for other offences and later acquitted for attempted murder and discharged for the charge of maim on 3 August 2012 as a result of a hung jury. He was later re-indicted for maim **on** 8 January 2013 in relation to the said shooting of Zetina. He was convicted on 21 February 2014 and committed on the said day. He was sentence on 28 February 2014 which commenced on the said date. The appellant was not remanded between the period 3 August 2012 and 21 February 2014.

[23] The appellant cannot be given full credit for all the pre-sentence custody since his term of imprisonment of 18 months for drug offences expired on 17 May 2010. There has to be a departure from the primary rule and a reduction given only for the time spent in custody between 17 May 2010 (when his sentence expired for drug related offences) and 3 August 2012 (when he was discharged for the count of maim as there was a hung jury). The total reduction being in years and months. This amounts to approximately 2 years and 2 months. The sentence of 10 years which commenced on 28 February 2014 is therefore, reduced by 2 years and 2 months.

Directions

[24] The trial judge should ensure that the now established practice in sentencing, as shown above, is followed. The court must take into account any time for which an accused has been held in custody in relation to the offence to which the sentence relates.

Disposition

[25] The appeal is allowed and the order of the trial judge set aside. The sentence of 10 years is reduced by 2 years and 2 months for time spent on remand prior to sentencing.

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SIR MANUEL SOSA P

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HAFIZ-BERTRAM JA

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DUCILLE JA