IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL APPLICATION FOR LEAVE TO APPEAL NO 13 OF 2014

IN THE MATTER OF Section 49(1)(c) and (2)(c) of the Court of Appeal Act, Chapter 90 of the Laws of Belize

AND

IN THE MATTER OF an application for leave to appeal against sentence.

THE QUEEN Applicant

v

WILBERT CUELLAR Respondent

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

C Vidal, SC, Director of Public Prosecutions, and J Chan, Crown Counsel, for the applicant.
M Trapp Zuniga, Crown Counsel, for the respondent.

_____

17 June 2015 and 24 June 2016.

SIR MANUEL SOSA P

Introduction

[1] This is an application made by the Crown under paragraphs (c) of subsections (1) and (2) of section 49 of the Court of Appeal Act ('the Act') for leave to appeal against

what purports to be the sentence imposed by Hanomansingh J ('the judge') on Wilbert Cuellar ('Cuellar') on 21 May 2014. As stated in the notice of application, filed on 10 June 2014, the ground of the application is that the sentence imposed on Cuellar by the judge upon his conviction for attempted murder is unduly lenient. The notice indicates, in this regard, that such sentence is not consistent with (a) the range of sentences usually imposed by the court below upon convictions for attempted murder, (b) the facts of the case and (c) the sentence imposed on Cuellar's co-accused upon his conviction for that same crime.

The background

(i) Previous proceedings

- The trial and sentencing hearing in 2011

[2] Cuellar and his co-accused, viz Darwin Díaz ('Díaz') were tried for the crime in question in the court below sitting in the exercise of its criminal jurisdiction at Corozal Town in the Northern District in November and December 2011. The facts as regards the trial and subsequent proceedings can largely be gleaned from the judgment of this Court ('the Court' or 'this Court') delivered on 27 June 2014 in *R v Cuellar (Wilbert)* and *R v Díaz (Darwin)*, Criminal Appeals Nos 2 and 1, respectively, of 2012. (For convenience, the Court shall in the remainder of the present judgment refer to the judgment in these two appeals as 'the judgment in the conjoined appeals'.) On 12 December 2011, the jury with which the judge sat, by unanimous verdicts, found both Cuellar and Díaz guilty as charged; and, on 19 December, the judge sentenced Díaz to a term of 12 years' imprisonment but refrained from sentencing Cuellar, adopting instead what, in the not inconsiderable collective experience of the members of the Court who heard the present appeal, was the wholly unprecedented course of purporting, after the trial proper had ended, to 'stay' the indictment insofar as it related to Cuellar and allowing the latter to leave the courtroom as if he were a free man. (The Court will, after describing the background facts, revert briefly to the trial in order to identify a peculiar feature of it.)

- The conjoined appeals of 2012

[3] On 3 January 2012, Díaz, legally unrepresented, as it would seem, filed a notice of appeal by which he not only appealed from his conviction but erroneously, if understandably, purported to appeal his sentence as well. (The proper procedure, of course, is to file notice of application for leave to appeal against sentence.) To no one's surprise, as the Court would imagine, the Crown almost as promptly appealed from the order made by the judge in respect of Cuellar, filing a notice of appeal on 6 January 2012. Regrettably, the preparation of the record in the court below was attended by the lengthy delay which has become endemic in the system there in place. As long after the sentencing hearing of 19 December 2011 as 7 February 2013, the President of the Court placed it on record that all criminal appeals in respect of which he had received records were being included in the Cause List under preparation for the session then next coming, viz the March 2013 Session. Regrettably, the appeals of Díaz and the Crown were not amongst those criminal appeals and, hence, neither of them could be included in the Cause List for that session.

[4] This obstacle to inclusion in the Cause List was evidently cleared sometime before the start of the session next held, viz the June 2013 Session, for the two appeals were both on the Cause List for that session. The Court, however, deemed it necessary on 12 June 2013, in circumstances where (a) Cuellar was neither present in person nor legally represented and (b) Díaz asked for more time to seek legal representation, to traverse both appeals to its October 2013 Session.

[5] Unfortunately, this course, had to be taken for a second time at the October 2013 Session, when, following an adjournment granted from 25 October to 30 October to enable Cuellar and Díaz to secure legal representation, they both informed the Court that their respective efforts in that regard had ended in failure. On this occasion, the Court advised both Cuellar and Díaz to seek help from the Legal Advice and Services Centre in the meantime.

[6] It was thus that the appeals in question found their way into the Cause List for the February-March 2014 Session and came finally to be heard on 24 February 2014, when that of Díaz, still legally unrepresented (unlike Cuellar) was dismissed, insofar as it related to his conviction, but allowed, insofar as it related to his sentence. (His sentence of 12 years' imprisonment was set aside and replaced with one of imprisonment for 11 years and 8 months.) The appeal of the Crown, on the other hand, was allowed. The Court, having set aside the order of the judge purporting to stay the indictment insofar as it related to Cuellar, remitted the matter to the judge for the sentencing of him (Cuellar), ordering that he be kept in custody at the prison in Hattieville unless and until the judge should otherwise order. It should be emphasised that the order of the Court carefully and clearly spelled out that sentencing was to be carried out at the then current session of the court below in the Northern District.

- The sentencing hearing of 2014

[7] The stage was thus set for the sentencing hearing before the judge, which, for some reason, was delayed until 21 May 2014, notwithstanding that the President of the Court, having heard nothing of any sentencing of Cuellar, took it upon himself to enquire of the Deputy Registrar (Appeals) on 23 March 2014 as to what had since occurred. It seems reasonable to infer that it was only after the President made this enquiry that things began moving, as it were, and a sentencing hearing was held. (The Court will refer as necessary to the sentencing remarks of the judge after setting out the factual part of the background to the present appeal.)

(ii) Facts

[8] The charge of attempted murder contained in the indictment arose from an incident which occurred in the village of San José in the Orange Walk District on the afternoon of Sunday 5 April 2009. The relevant facts are also provided in the judgment in the conjoined appeals. Josue Chay ('Chay') was watching a football game being played on the village football field when he was menacingly approached by Díaz, who had a bicycle with him. Evidently believing that discretion is the better part of valour, Chay chose not to confront Díaz and instead withdrew to the opposite side of the field.

Díaz was then seen to ride away from the scene; but, alas, he was back some ten minutes later. He thereupon once more accosted Chay, who was sitting on his own bicycle, asking him, 'Do you remember me punk?' Without waiting for an answer, he reached under his shirt, pulled out a machete and further advanced towards Chay, who, in a desperate self-preservation measure, threw his own bicycle at him (Díaz). As Díaz, undeterred, kept coming at him, Chay took to his heels, heading towards the village cemetery. Díaz, for his part, gave chase, machete in hand. Upon entering the cemetery, Chay heard someone say, in Spanish, 'Dale en la madre' and, looking to see who had made this utterance, discovered that it was Cuellar, who lived nearby at the time. He then saw Cuellar hurl a piece of a cement block at him. This missile caught Chay smack in the face, knocking out two of his front teeth but, far more seriously (as it turned out), causing him to fall to the ground, supine. Thus decisively assisted by the intervention of Cuellar, Díaz was able repeatedly to chop Chay as he lay, helpless, on the ground.

[9] The Crown case was that only one of the seven chops wounds inflicted upon Chay by Díaz was so inflicted during the chase, ie before Cuellar's crucial intervention and that the remaining six were inflicted immediately thereafter. The description of those wounds, the subject of paragraph [34] of the judgment in the conjoined appeals, is therefore relevant for present purposes. Referring there to the expert evidence of Dr Cervantes, a Belizean neurosurgeon, who had had before him, whilst in the witness-box, the Medico Legal Report signed by Dr Rayo, a Nicaraguan neurosurgeon, the Court noted the following:

(a) chop wound to upper lip;
(b) three large chop wounds to head;
(c) one large chop wound to right side of face;
(d) chop wound to left hand; and
(e) chop wound to left side of back

as well as Dr Rayo's findings that Chay's skull was fractured and that he suffered severe head trauma and cerebral haematoma. The Court also pointed out in that

paragraph that, whilst Dr Rayo had classified the injuries as grievous harm, Dr Cervantes, for his part, had expressed the opinion that there had been life-threatening injuries and that the brain injuries could result in paralysis of the left side of Chay's body. (At paragraph [35], the Court alluded to the claim made by Chay at trial that, in fact, 'half of his body remained crippled'.)

[10] The Court now briefly reverts to the trial in order to direct attention to the peculiar feature of it already mentioned above. This feature was focused upon by the judge at the first sentencing hearing, ie that held on 19 December 2011. In the course of remarks reproduced by the Court in its judgment in the conjoined appeals, the judge stated that –

> '[T]here is a witness in the deposition (*sic*) and even if he or she was not listed on the back of the depositions (*sic*) I think as a result of the questions asked by the defence, the jurors or the court it became clear that that particular witness was very relevant to the issues involved in the case.'

A little later, the judge said –

> 'The court itself asked Corporal Can who was the investigating rank (*sic*) if from his investigations anyone was found who saw the incident and he said 'no'.'

Returning then to the subject of the deposition to which he had already adverted, the judge added –

> 'Perusal of the file there is the deposition of one Roni Sutherland who said from the behaviour of [Chay] and his friends he concluded that they were either under the influence of alcohol or drugs. And he further said that the person who pelted the cement brick (*sic*) at [Chay] was [Díaz] and he never mentioned your name at all as being present there.'

The Court, in isolating these three passages, does so not for the purpose of re-opening any issues which arose on the appeals heard and determined, as indicated above, in 2014, but rather to round out the picture in terms of the factual background to the instant appeal so as to leave no one in any doubt that it proceeds entirely mindful of the peculiar feature in question. (However, that said, it will observe, if only in passing, that the suggestion of the judge in the first of the three passages reproduced above is significantly blunted by the stark reality that, notwithstanding all that is there said, the very same jury of which he speaks was unanimous in its verdict, delivered after some 2¾ hours of deliberation, that Cuellar was guilty as charged.)

The sentencing remarks

[11] At the sentencing hearing held on 21 May 2014, the judge, after launching a volley of intemperate remarks which the Court does not consider it appropriate to enter into in the present judgment, purported to comply with the order of the Court by pithily pronouncing as follows:

> 'There is a direction from the Court of Appeal that I must sentence him and sentencing him I will do (*sic*). Stand up Cuellar. You are sentenced to time served.'

[12] Unprophetically, if revealingly, he concluded with the following one-liner:

> 'That's the end.'

[13] As subsequent events have unsurprisingly shown, nothing could have been farther from the truth.

The submissions before the Court

[14] In support of the only ground of application, which properly coincides with the sole permitted ground of appeal under section 49(2)(c) of the Act, the learned Director

deployed a double-limbed, as it were, submission to the effect that the sentence was unduly lenient having due regard, first, to the role of Cuellar in the causing of the injuries sustained by Chay and, secondly, to the range of sentences usually imposed by courts in this jurisdiction in respect of convictions for the crime of attempted murder (in the context of which latter limb she dealt, in keeping with what had been foreshadowed in the notice of application, with the sentence imposed on Díaz).

[15] Under the first limb of her contention, the Director directed attention to the facts as set out in the judgment in the conjoined appeals. These facts, she said, demonstrated that, when Cuellar hurled what she described as 'a cement block' (a description also preferred by counsel for Cuellar in the instant appeal) at Chay, it was with the intention of immobilising him so that Díaz, in hot pursuit and armed with his machete for all the world to see, could have his way with him (Chay). She further drew attention to the medical evidence of Dr Cervantes at trial, emphasising his opinion that the injuries suffered by Chay had endangered his life.

[16] Turning to the second limb of her submission, the Director invited the Court to find that the established sentencing range for cases of attempted murder in this jurisdiction is 8-15 years' imprisonment. She helpfully highlighted for the Court, amongst others, the sentences imposed in the cases of *Chavez (Herson) and anor v R*, Criminal Appeals Nos 26 and 27 of 2009 (sentences of 9 years), *Diego (Glenford) v R*, Criminal Appeal No 11 of 2010 (a sentence of 8 years), *R v Díaz (Darwin)*, already cited above, (a sentence of 11 years and 8 months), *Ramsey (Leroy) v R*, Criminal Appeal No 5 of 2013 (a sentence of 8 years), *Thurton (Akeem) v R*, Criminal Appeal No 4 of 2012 (a sentence of 14 years and 6 months resulting from the reduction of a 15-year sentence to take account of time spent on remand in custody)), together with the sentence referred to at paragraph [22] of the judgment in *R v Hernandez (Hilberto)*, Criminal Appeal No 33 of 2011 (a sentence of 12 years).

[17] The Director submitted that, in the final analysis, making full allowance for all mitigating factors prayed in aid by Cuellar, his sentence was unduly lenient.

[18] Mrs Trapp Zuniga, for Cuellar, usefully opened her written submissions with an exemplary and unequivocal concession to the effect that the judge had imposed an unduly lenient sentence in this case. (Like the Director, she found the phrase 'time served' ambiguous and unhelpful.) She suggested, quite rightly in the view of the Court, that it was a sentence passed with no regard to the ample guidance which was there for the taking, so to speak, in what she referred to as 'the various authorities from this Honourable Court for a charge of attempted murder'. The Court unhesitatingly pays tribute to her for her refreshing candour.

[19] Mrs Trapp Zuniga not having herself provided this Court with copies of any of its judgments involving sentences for attempted murder, it is obvious that she had in mind those which had already been cited by the Director: for which, see paragraph **[16]**, above.

[20] In commendably fearless representation of her client, but scrupulously adhering to the dictates of decorum every step of the way, Mrs Trapp Zuniga next proceeded severely to criticise the conduct by the judge of both sentencing hearings held in respect of Cuellar, that of 2011 as well as that of 2014. The judge, in her submission, had, by the 'improper or incorrect' exercise of his discretion, created a situation which had resulted, in more ways than one, in injustice to Cuellar.

[21] Her criticism was at its most incisive, in the respectful view of the Court, when dealing with the inexplicable absence at these sentencing hearings of any judicial appreciation, indeed regard, for the lessons to be learned from the judgment of the Court in *R v Wade (Sherwood),* Criminal Appeal No 24 of 2005. This important decision was, after all, one which Crown Counsel at the sentencing hearing of 2011 had, with praiseworthy alacrity, brought to the attention of the judge in sufficient time for him (or, at any rate, any judge possessed of the equipoise required of a Supreme Court Justice) to avoid rushing in where wise men fear to tread. There, Carey JA, writing for a panel whose other members were the then Lord President and the current one, had reaffirmed a cornerstone of sentencing law, viz that, as it was put at paragraph 6 –

'[T]he sentence of the court must be based on the jury's findings…'

The judge, in the submission of counsel, ought to have accepted the guidance of the Court in *Wade* and sentenced Cuellar to an appropriate term of imprisonment.

[22] Counsel, as the Court understood her, further argued that, by refraining from so doing, the judge effectively lulled Cuellar, who had had no legal representation at his trial, into a state of complacency *vis-à-vis* his conviction. Deprived of the usual powerful incentive, ie a prison sentence, for appealing from a conviction for a very serious crime which was real and certain not to go away on its own, Cuellar ended up not filing an appeal. Mrs Trapp Zuniga instructively drew here a contrast with the response of Díaz, who, despite the fact that he, too, had been unrepresented at his trial, filed a notice of appeal, as best he could, from prison and thus secured for himself the hearing and determination (as far back as 2014) not only of an appeal from his conviction but also of a deemed application for leave to appeal against his sentence.

[23] Turning her attention away from the sentencing hearing of 2011 to that of 2014, Mrs Trapp Zuniga animadverted on the conspicuous absence from the judge's sentencing remarks of a reason or reasons for sentencing Cuellar to 'time served' in the face of the sentencing range revealed by the case-law to which the Director had previously referred this Court. In this connection, she (Mrs Trapp Zuniga) cited the judgment of the Caribbean Court of Justice in *Burton (Jeffery Ray) v R and Nurse (Kemar Anderson) v R* [2014] CCJ 6 AJ, conjoined appeals from the Court of Appeal in Barbados, in which judgment Anderson J, having referred to (a) the duty of lower courts to have regard to sentencing guidelines laid down by the Court of Appeal and (b) the fact that the guidelines there under discussion indicated a particular sentencing range, went on to state, at paragraph 15, that –

'… if the sentencing judge decides to depart from the guidelines established by the superior court then he or she should explain his or her reasons for doing so.'

[24] In further development, with reference to local case-law, of her argument, Mrs Trapp Zuniga dealt, in particular, with the judgment of the Court in *Diego's* case, cited above, in which Mr Diego had (in the course of a shooting unexplained in the judgment) caused gunshot injuries to the left elbow and right thigh of Mr Sacasa, neither of which was considered life-threatening by the attending physician, and the Court, dismissing Mr Diego's appeal against conviction and his eight-year sentence, said of the latter, at paragraph [9], that it 'was, if anything, lenient'.

[25] If the Court understood counsel aright, the point of her critique was that the judge in the present case had not only by his radical departure, in sentencing Cuellar, from the sound guidance to be found in the relevant cases but also by the flagrant impropriety of his manner in so doing (ie his not having bothered to vouchsafe reasons for the departure other than that the verdict was, in his view, tainted by the Crown's decision not to call Sutherland as a witness) rendered the defence of his sentence, on the present appeal by the Director, a task well-nigh impossible.

[26] On the subject of mitigating factors which operated in favour of Cuellar and which were drawn to the attention of the judge in the instant case in the hope of thus enabling him to impose an appropriate sentence, Mrs Trapp Zuniga's enumeration was as follows:

- the fatherlessness of Cuellar;
- the dependence on him of three infant daughters and a common law spouse;
- alleged eyesight problems said by him to be caused by cataracts;
- the honest way in which he allegedly earned his living and supported his family prior to his being remanded in custody from March 2014 to May 2014;
- his having remained in the country and dutifully attended court whenever required from 2009 up to date.

As the Court understood the submission of Mrs Trapp Zuniga, the judge's failure to avail himself of the assistance thus tendered to him by her and her co-counsel on behalf of

Cuellar at the sentencing hearing of 2014 constituted a grave disservice to Cuellar which had worked injustice against him and which the Court could rightly take into account in deciding on his sentence in the instant appeal.

[27] Mrs Trapp Zuniga contended, with force, that Cuellar suffered injustice as a result of the judge's seriously flawed handling of his sentencing and she invited the Court, if it were to find such contention cogent, to treat it as furnishing, when combined with the circumstances of Cuellar and his role (limited in her submission) in the attempted murder of Chay, abundant justification for the imposition of a sentence of less than 12 years on him. She stressed in this regard that Díaz was the aggressor during the events in question on 5 April 2009. And she reminded the Court that it was he who left the football field and later returned armed with a machete, he who chased Chay and he who inflicted machete wounds on Chay. She emphasised that Cuellar himself, on the other hand, used only 'a cement block' against Chay and never pursued him. In short, counsel contended, Cuellar's role was but 'minimal'.

Discussion

[28] As has already been indicated above, the Court regards as proper the concession of Mrs Trapp Zuniga that the sentence of 'time served' was unduly lenient. In the language of section 49(4) of the Act, the Court 'thinks that the sentence passed by the trial court was unduly lenient'.

[29] In agreement with both the Director and Mrs Trapp Zuniga, the Court further considers that the use by the judge, in passing sentence, of the phrase 'time served' was, to say the least, unhappy. Cuellar had not, and indeed has not, 'served time' in connection with the instant case to date. He has only been at the prison on remand in custody, initially, for six months ('the six-month period'), pending his trial, and, subsequently, for 87 days ('the 87-day period'), pending his sentencing hearing. Self-evidently, on neither of the two occasions on which he was sent to the prison was he under a sentence of imprisonment.

[30] The Court is of the view, nevertheless, that what the judge intended to do is clear: he meant to impose on Cuellar a sentence equal in length to the period of time during which he had been at the prison on remand pending his sentencing hearing in order to ensure that he would not spend another day at such prison. In short, the Court, whilst compelled to conclude that the judge committed the ***simple*** error, so to speak, of treating the 87-day period as "time served", hesitates to think that he could have committed the ***compound*** error of treating not only the 87-day period but also the six-month period as 'time served'. The Court proceeds therefore on the basis that the judge imposed on Cuellar a sentence of 87 days' imprisonment.

[31] He did so in circumstances where the sentencing range in cases of attempted murder in this jurisdiction is not in any doubt. That range, in the considered view of the Court, is one of 8-15 years' imprisonment, as the Director, uncontradicted by Mrs Trapp Zuniga, has submitted. (Conspicuously absent from the list of sentences for the crime of attempted murder supplied to the Court by the Director, it should be noted, is that of 12 years' imprisonment substituted by this Court (Hogan P and Inniss and Georges JJA) for the original one of 15 years' imprisonment more than 39 years ago in *Haylock (Vallan) v R*, Criminal Appeal No 1 of 1977, in which judgment was delivered on 4 March 1977.) The sole discernible reason of the judge for deciding merely to pat Cuellar on the wrist, as it were, after this conviction for attempted murder was that he found the conviction unpalatable. The Court has, by its judgment in the conjoined appeals (which is, for present purposes, water under the bridge), sought to demonstrate the error of the judge's ways in this regard and sees no reason whatever further to occupy itself with this particular mistake, as egregious as it was, of the judge.

[32] The Director contented herself with pointing to the applicable sentencing range; but Mrs Trapp Zuniga, whilst tacitly accepting that such range is 8-15 years, submitted, in effect, that the sentence imposed on Cuellar should be less than that imposed on Díaz having regard to the difference in their respective roles in the attempt made on the life of Chay on the afternoon of 5 April 2011. The Court, however, is unable to agree with Mrs Trapp Zuniga in her comparison of these roles. It categorically rejects her

characterisation of the role of Cuellar as minimal. He it was, after all, who stopped the fleeing Chay dead in his tracks that afternoon. Had he not taken it upon himself to meddle in the conflictual situation involving Díaz and Chay, who can rule out the possibility that Chay may have made good his escape, unscathed except for the one chop wound inflicted on him before his fall?

[33] And as for the relative heinousness of the respective acts of Cuellar and Díaz, it can at least be said on behalf of the latter that he alleged at trial that Chay had engaged in provocative behaviour towards him at the football field. In Cuellar's case, in contrast, it has at no stage, whether at trial or thereafter, been alleged that Chay provoked, or otherwise offended, him in even the slightest of ways. His intervention on behalf of Díaz thus remains wholly unaccounted for, the result of his consistent denial of any degree of guilt, a matter to which it will be necessary to return later in this judgment.

[34] In terms of mitigating factors, the Court is mindful of the short list urged upon it by Mrs Trapp Zuniga. In going through such list, it seems only fair to bear in mind, the roller-coaster which the life of Cuellar has no doubt, in a real sense, become following his trial, thanks to the undeniable botching of both sentencing hearings in which he has been involved. The Court, however, sees little, if anything, in the first supposed mitigating factor, viz the fatherlessness of Cuellar. Being a very mature man himself, Cuellar is not in a unique position as a result of his father being deceased. In any event, father or no father, at his age, he should be a fully independent man. The second item on the list is more substantial, not so much because Cuellar has a dependent common law wife (given the large and increasing presence of women in the workplace) but because he has dependent children of tender years. This factor is compounded by the circumstance that the youngest of these children, all of whom are girls, may well have been conceived after Cuellar was made to walk free from a court of law by a judge who told him that a grave injustice had been perpetrated against him. It is to be gathered from what was said, first, at the hearing of the conjoined appeals in February 2014 and, later, at the sentencing hearing of May 2014, that she was born in August or September 2012 whereas, as already noted above, the first sentencing hearing was held in

December 2011. The third factor cited by counsel is allegedly poor eyesight resulting from cataracts in both eyes, in one of which Cuellar is said to be totally blind. The Court reminds itself, in giving consideration to this factor, that no health professional was called to substantiate Cuellar's claim, which is a trifle surprising coming from one whose marksmanship on that fateful afternoon was such that he was able to hit a man running for his life square in the face with a missile. The Court is unable to accord much weight to this factor. This is not, however, the case with the fourth and fifth listed factors which go, respectively, to the good record and character of Cuellar prior to 5 April 2009.

[35] As is plain from the summary provided above of the submissions of the Director, she chose not to single out aggravating features but, rather, primarily to invite the attention of the Court to the role played by Cuellar in the perpetration of the attempt on Chay's life. This the Court has already done at paragraph **[32]**, above, in rejecting the comparison drawn by Mrs Trapp Zuniga between the respective parts played by Cuellar and Díaz. But the Court must go a little farther, being unable to wink at the glaring reality that, at the sentencing hearing of 2014, the accent was decidedly on the claim of innocence, to which, for some reason, not only Cuellar, but also those called to speak on his behalf, steadfastly clung. The trial was long over by then: it was past time for coming to grips with the jury's verdict of Guilty. To insist on guiltlessness after the jury have spoken is tantamount to seeking to perpetuate untruth. The adoption of such a stance is, moreover, inconsistent with true remorsefulness. Unsurprisingly, Cuellar's silence on the matter of remorse has been nothing short of ear-splitting. That fact does not redound to his advantage at this stage. In the eyes of the Court, it is unquestionably an aggravating factor. And the Court considers itself reinforced in this view by the pertinent observations of Kerr LCJ, as he (now a member of the United Kingdom Supreme Court) then was, in *R v Magee* [2007] NICA 21, paragraph **[17]**.

[36] All things considered, the Court is satisfied that, were it not for the fact that Cuellar's two sentencing hearings were bungled in the way they manifestly were, a sentence of twelve years' imprisonment would constitute condign punishment for his crime. But he has been subjected to needless ups and downs since 2011, when the

long-drawn-out macabre comedy of errors of which he has been a (if not the) major victim started to unfold; and the Court is persuaded that this factor should find adequate reflection in his sentence. In the view of the Court, a reduction of one year would ensure such reflection. However, Cuellar having spent both the six-month period and the 87-day period on remand in custody as already noted above, a corresponding deduction of six months plus 87 days (with 87 days treated as 3 months for the sake of convenience) is also required.

Disposal

[37] For the reasons given above, the application, which was heard on 17 June 2015, is granted and treated as the appeal, which is allowed. The sentence of 'time served' passed by the judge is set aside and a sentence of 10 years' and three months' imprisonment is imposed in substitution therefor. It is the further order of the Court that Cuellar present himself to the Police at the Orange Walk Town Police Station by 8 am on 25 June 2016 for transportation to the Belize Prison. Needless to say, his sentence shall commence to run on the day he so presents himself or is otherwise taken into custody by the Police.

_____

SIR MANUEL SOSA P

_____

AWICH JA

_____

HAFIZ BERTRAM JA