

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

**CCJ Appeal No CR 1 of 2010
BB Criminal Appeal No 15 of 2008**

BETWEEN

ROMEO DA COSTA HALL

APPELLANT

AND

THE QUEEN

RESPONDENT

**Before The Rt. Honourable
and the Honourables**

**Mr Justice de la Bastide, President
Mr Justice Nelson
Mr Justice Saunders
Mme Justice Bernard
Mr Justice Wit**

Appearances

**Mr Andrew O G Pilgrim, Ms Carol-Ann N Best and Mrs Angela Mitchell-Gittens
for the Appellant**

Mrs Wanda M Blair and Mr Lancelot Applewhaite for the Respondent

JUDGMENT

of

The President and Justices Nelson, Saunders and Bernard

Delivered by

The Honourable Mr Justice Rolston Nelson

on the 15th day of April 2011

and

JUDGMENT

Of the Honourable Mr Justice Jacob Wit

- [1] The legislature of Barbados in passing the Penal Reform Act Cap 139 has done much to modernize the sentencing process by making it certain, transparent and consistent. The Court of Appeal of Barbados has also made its contribution towards clarity in the sentencing phase of trial in several judgments laying down sentencing guidelines for the benefit of judges, lawyers and the public at large. The present appeal raises an important issue as to how a sentencing court should treat time spent on remand by a prisoner, whether the courts below applied the proper principles in that regard and whether or not as a result the sentence imposed was excessive.

Background facts

- [2] Romeo da Costa Hall sought special leave to appeal against a decision of the Court of Appeal of Barbados dated March 12, 2010 dismissing his appeal against sentence and affirming a sentence of six (6) years' imprisonment imposed on him by Reifer J. on May 27, 2008. He further made an application for special leave to appeal as a poor person. He contended that the Court of Appeal erred in law in failing to take into account each day that he spent on remand in custody in reduction of his sentence. As a consequence, his sentence was excessive. At the outset of the hearing on the basis of the written submissions, we granted special leave to appeal and leave to appeal as a poor person and decided to treat this hearing as the hearing of the appeal.
- [3] On January 22, 2005 the Appellant's step-brother, Ryan Alleyne, and Toepeck Wickham, a brother of the deceased, Ephraim Wickham, had an altercation which escalated to physical violence. Ryan Alleyne struck Toepeck on the mouth with a concrete block. As a result Toepeck's brothers, Andrew and Ephraim, went in pursuit of Ryan Alleyne armed with a cutlass and a knife. There was a

confrontation. Ryan Alleyne was wounded. Later the Appellant and Ryan Alleyne, each armed with a cutlass, attacked Andrew and Ephraim. Ephraim was wounded in the head and back, and was pronounced dead on arrival at the hospital.

[4] In January 2005, the Appellant was arrested and charged with the murder of Ephraim. A count of causing serious bodily harm was added in 2008. The Appellant was committed to stand trial on both counts. At his trial on April 14, 2008 he pleaded not guilty to the count of murder, but guilty on the lesser count of causing serious bodily harm with intent. The Crown accepted the plea on the lesser count. Reifer J. held a sentencing hearing and pronounced her ruling on May 27, 2008 taking care to explain how she arrived at a sentence of six (6) years' imprisonment.

[5] In arriving at her decision on the sentence, the learned judge used the bottom of the scale for a grave case of manslaughter without the use of a firearm, to wit, 16 years: see *Pierre Lorde v R*¹. No issue now arises as to the judge's use of this benchmark, although disapproved on appeal. The tariff of imprisonment for causing serious bodily harm with intent is not far different. In *Marcus Ashford Johnson*² on a plea of guilty to wounding with intent the accused was sentenced to 15 years' imprisonment.

Reifer J. calculated the sentence as follows:

“I have used the bottom of the scale for a grave case of manslaughter as my starting point. I have discounted it by six years in consideration of the guilty plea, and a further two years in recognition of the other mitigating factors, and by a further two years for the time spent on remand. I therefore sentence you to six years in jail. This sentence will start from today's date ...”

[6] In allowing two years for the time spent on remand, the learned judge explained:

“Lastly, I have taken into account that you have spent four years and five months (sic) in custody. I will not credit you with the full

¹ (2006) 73 WIR 28 (CA)

² (unreported, Cr. App. No. 19 of 2005)

four years as it is reasonable in the circumstances that you would have spent some time on remand.”

[7] The Appellant, who has been in custody since his arrest, appealed on the same day on which he was sentenced on the ground that

(a) the sentence was excessive because the tariff for manslaughter was inappropriate (a ground not now pursued) and

(b) the judge failed to subtract the entire period on remand (January 23, 2005 to May 27, 2008) from the sentence she imposed.

Waterman JA delivering the judgment of the Court of Appeal noted that in the United Kingdom the issue of the allowance to be made in sentencing for time spent on remand was governed by statute. Waterman JA stated at [11] of the judgment:

“It would appear that in Barbados, where there is an absence of statutory provisions similar to those in the United Kingdom, that at common law the trial judge has the discretion to take all, part of, or even none of the time spent on remand into account when sentencing. The determination is dependent on the particular circumstances of each case ...”

[8] Waterman JA relied on dicta of Simmonds CJ in *Mark Rohan Jack v The Queen*³ at [21]:

“Contrary to anecdotes and perceptions among some members of the public, the High Court and Court of Appeal do, as a matter of routine, take into account periods spent on remand when sentencing. In our opinion, having regard to the volume and pace of pending criminal cases, a period of two years was reasonable.”

[9] The Court of Appeal therefore considered that the judge had not erred by not taking into account the entire time spent on remand since his arrest to May 27, 2008 (40 months and 4 days) and that the judge’s discount (2 years) for the time spent on remand was reasonable. The Court of Appeal therefore affirmed the judge’s sentence of six (6) years’ imprisonment.

³ (unreported, Cr. App. No. 9 of 2008)

Common ground

[10] It is common ground between the parties that in Barbados, unlike in the United Kingdom and other jurisdictions there is no statutory provision that makes it mandatory for a sentencing judge to give credit for time spent on remand prior to sentencing. The parties therefore agree that the issue between them is governed by the common law and that the sentencing judge has a discretion as to how to treat time spent on remand. The parties differ as to the scope and extent of that discretion, the mechanism for giving effect to it and the accountability of the sentencing judge for the exercise of that discretion.

The scope and extent of the discretion

[11] It is clear that the learned judge considered that she had a discretion in deciding what portion of the time spent on remand was to count towards the actual sentence. She refused to credit the Appellant with what she erroneously called “the full four years” since it was reasonable for him to have spent some time on remand. The round figure of “two years” was reasonable.

[12] The Court of Appeal considered that a trial judge had a discretion to take all, part of, or none of the time spent on remand into account. The quantum of pre-sentence custody to be credited depended “on the particular circumstances of each case”. Although the learned judge did not explain how she arrived at the discount of “two years”, the Court of Appeal held that the sentence was neither wrong in principle nor excessive. The methodology of the discount and the reasons for it are not set out in either judgment. It may well be, however, that both courts read the judgment of Simmonds CJ at [21] as laying down the standard credit to be allowed for time spent on remand. On this interpretation of the dicta of Simmonds CJ two years spent in jail awaiting trial was a reasonable

period to treat as time served. The constitutional guarantee of trial within a reasonable time carries with it a right to release on bail after a reasonable time. However, it does not follow that time spent in jail before the right to release arises is not to be fully taken into account for sentencing purposes. Speedy trial and sentencing are different aspects of the criminal process.

[13] The Crown contended for a broad judicial discretion in making an allowance for time spent on remand. In *Mark Rohan Jack v The Queen*⁴, the court merely asserted that it gave “a discount in the sentence for the time spent on remand.” In *Ricardo Deverne Griffith v The Queen*⁵ the Appellant had been on remand for nearly two years. Peter Williams JA held that no specific amount of credit was given in Barbados for time spent on remand. It was left to the discretion of the judge to consider the reasons and circumstances for the delay between remand and trial. In *Gould and Sealy v The Queen*⁶ the Appellants had been in custody for 3½ years pending trial. Peter Williams JA again emphasized that the precise amount of credit to be given for time spent in custody “was still left open to the discretion of the judge, who does not have to state the credit he has given”. In our judgment, the *dicta* in the cases cited state the judicial discretion to give credit for time spent on remand too widely.

[14] The Appellant conceded that there was a judicial discretion to determine what credit should be given for time spent on remand. Counsel for the Appellant contended, however, that there was a presumption in favour of full credit for time spent on remand, subject to any exceptional factors leading to a different conclusion. Counsel relied on *Callachand and another v The State*⁷. The Privy Council heard this case in Mauritius and gave its decision in Mauritius on September 26, 2008 but delivered its reasons in London on November 4, 2008.

⁴ (unreported, Cr. App. No. 9 of 2008)

⁵ (unreported, Cr. App. No. 6 of 2007)

⁶ (unreported, Cr. Apps. Nos. 8 and 10 of 2006)

⁷ [2008] UKPC 49

[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:

“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*⁸ that the conditions applicable to prisoners on remand were not significantly less onerous than those which applied after sentence, that time spent

⁸ (2009) SCJ 59

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.

- [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.

Crediting pre-sentence custody

- [19] Before this Court neither the Appellant nor the Respondent took issue with the judge's starting point for the tariff of imprisonment. Equally there was no dispute about the discount of 6 years for the Appellant's early guilty plea and a further 2 years for "mitigating factors". If, in addition, credit is to be given for time spent in pre-sentence custody, how should such credit be given?

- [20] We are satisfied that in several common law jurisdictions the courts routinely deduct from the appropriate sentence arrived at the period of remand in custody. In the United Kingdom, by section 240(3) of the Criminal Justice Act 2003, 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 shall count as part of the custodial sentence, unless the judge decides pursuant to section 240(4) that no credit or reduced credit should be given in the interests of justice. Sub-section (5) of that Act requires the court to state in open court the number of days spent on remand in connection with the offence and the number of those days to be counted as time served under the sentence. For offences committed before April 4, 2005, the Criminal Justice Act 1967 applied. By section 67 of the 1967 Act, the length of a sentence of imprisonment was automatically treated as reduced by the time spent by the offender in custody before the sentence. The amount of remand time to be credited was then calculated by the Secretary of State.
- [21] The Australian Law Reform Commission in its report “*Same Crime, Same Time: Sentencing of Federal Offenders*” (ALRC 103) at para. 10.13 very helpfully identified three ways in which time spent in pre-sentence custody could be taken into account. The first method is to backdate the commencement of the sentence to the date on which the offender was taken into custody. This method requires the sanction of statute, and since Barbados law does not provide for it need not be considered further.
- [22] The second method is “to count time in custody as time already served under the sentence”. By this method where the actual sentence is 12 months but the time served in pre-sentence custody is 11 months, the court would impose a sentence of 12 months but declare that 11 months of the sentence had already been served. This method is based on legislation in Victoria and Queensland i.e. the Sentencing Act 1991 (Vic) section 18(1) and the Penalties and Sentences Act (Qld.) section 161(1).

- [23] The third method is to reduce the term of the sentence. The disadvantage of this method is that where the sentence is decreased by a substantial period of time already served, the apparently lighter sentence is likely to mislead the public and a subsequent court as to the seriousness of the offence committed: see the judgment of Goldstein J in *S v Vilikazi and others*⁹. Canada in its Criminal Code, RSC 1985, c.C-46 invests a judge with power to take into account time spent on remand by the use of the third method.
- [24] We are attracted to the second method referred to in the Australian Law Reform Commission report, but it seems to us, as it did to the states of both Victoria and Queensland, that legislation is needed to enable a court to pronounce a sentence and then declare that time spent in pre-sentence custody was to count as time served under that sentence. Although we think that in keeping with the trend in the common law jurisdictions above referred to, Barbados should consider enacting similar legislation, at present no such legislation exists. Therefore the second method of giving credit for the period of remand in custody is not available to the Court. We are fortified in this view by the following further considerations.
- [25] In the first place, judges in determining sentence have power to reduce such sentence before pronouncing it but not after. The power to shorten the term of imprisonment to which a person has been sentenced is not part of the judge's inherent function or jurisdiction and the exercise of such a power must be expressly conferred by statute. Secondly, a declaration, as envisaged by the second method, that part of a sentence has been served is in substance indistinguishable from ante-dating the sentence. It is agreed that statutory sanction is required for the latter. It would be odd to say the least if it was not also required for the former. In *S v Vilakazi*¹⁰ a declaration was made without statutory sanction but no reasons were given. In fact, the matter was not even discussed and in any event the South African law on the subject is admittedly in

⁹ 2000(1) SACR 140, 142

¹⁰ (576/07) [2008] ZASCA87; 2009(1) SACR 552 (SCA)

an unsettled state. Thirdly, the sentence, part of which is to be declared to have been already served, is not simply a legal fiction; it is a very real sentence since it is proposed in effect to treat it as the sentence referred to in rule 41(1) of the Prison Rules which provides that a prisoner “may by good conduct and industry become eligible for discharge when a portion of the sentence not exceeding one quarter of the whole sentence has yet to run.” Indeed rule 41(1) does not provide for the grant of remission to prisoners on remand, who are not then being monitored for good conduct or industry since they are not under sentence. Remission in rule 41(1) refers to a prisoner “who is serving a sentence of imprisonment”. It follows that the question of remission in respect of time spent on remand does not arise. Fourthly, one must not fall into the trap of arguing that because there is no prohibition against a court treating time spent on remand as part of the sentence, one must assume that the court has such a power.

[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.

Accountability

[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 reasons for such departure. See also *Callachand* at [11]¹¹.

A final observation

[28] In the course of argument there was a suggestion that the time spent on remand could be treated as “prison years” and grossed up to calendar years, applying the formula that 9 months served in prison are equivalent to one calendar year. Remissions of sentence have to be earned and are normally effected by administrative action during the prisoner’s incarceration. We therefore do not consider it correct to “gross up” the time spent on remand to calendar years in order to calculate the credit for time served.

¹¹ *Supra* see footnote 7

Order

[29] We therefore hold that the learned judge and the Court of Appeal fell into error in not applying the appropriate principles in arriving at the sentence of six years' imprisonment. Based on a starting point of 16 years reduced by a discount of 6 years for the early guilty plea and a further 2 years for "mitigating factors", the Court but for its further discretion to give credit to the prisoner for time spent on remand would have imposed a sentence of 8 years' imprisonment ("the notional term"). For the reasons given earlier in this judgment, the Court deducts from the notional term 40 months of the period January 23, 2005 to May 27, 2008 spent on remand in custody and substitutes pursuant to section 14 of the Criminal Appeal Act Cap 113A a sentence of 56 months to run from the date of sentence, May 27, 2008. In the result, the Appellant succeeds in his claim for full credit for time spent on remand prior to sentence. The appeal is therefore allowed, and the order of the Court of Appeal set aside.

JUDGMENT OF THE HONOURABLE MR JUSTICE J WIT

[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. We agree, moreover, that there are basically three methods by which credit can be given for time spent in custody, to wit (a) reducing the sentence, (b) backdating the sentence or (c) imposing the proper sentence while declaring that the time

spent in custody will count as time served under the sentence. It would appear that we all agree that method (c) is the most preferable and that method (a), to say the least, is flawed¹². Nevertheless, the majority has settled on the latter approach, somewhat uncomfortably and reluctantly it would seem, on the ground that the other two methods are not available in Barbados as there are no statutory provisions allowing either of them. It is on this very point that I respectfully beg to differ with my colleagues for the reasons I will set out in this judgment. Before coming to these reasons, however, I would like to add some observations and some remarks of my own.

[31] The issue before us, ie what, if any, should be the effect of pre-trial detention of a convicted person on sentencing that person, is not one that is peculiar to Barbados, the Commonwealth or even the Common Law jurisdictions. It is a universal problem which every civilized judicial system on the face of the earth has to grapple with. Even as we seek to prescribe a solution to this problem that is proper and suitable for us in the Caribbean, it makes sense to look also at how other jurisdictions have been dealing with this issue. In doing so, I have focused particularly on the following questions: (a) is time spent in custody taken into account and if so to what extent, (b) is crediting such time mandatory or discretionary, (c) by whom is it done (the courts or the administration), (d) why is it done (what is the rationale of the “discount”), and (e) how, or by which method, is it done?

[32] A worldwide view seems to have emerged that time spent in pre-trial detention should, at least in principle fully count as part of the served time pursuant to the sentence of the court. The respective instruments of the International Criminal Courts and Tribunals¹³, for example, make it mandatory for these courts and tribunals to give full credit for time spent in custody. This is also the case in the

¹² Method (b) has a somewhat similar effect as method (c) but as sentences are usually backdated to the date on which the accused was taken into custody the backdating method is not suitable for crediting interrupted periods of pre-sentence custody, see The Australian Law Reform Commission report “*Same Crime, Same Time: Sentencing of Federal Offenders*” (ALRC 103) at paras. 10.13 and 10.35

¹³ Art. 78(2) Rome Statute of the International Criminal Court, Rule 101(C) of the Rules of Procedure and Evidence of both the ICTY and the ICTR, Rule 101(D) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone

Member States of the European Union with the exception of Germany and, since 4 April 2005, the United Kingdom where the courts have been given a very narrow discretion not to give full credit albeit in exceptional circumstances and for reasons to be stated in open court when giving the decision¹⁴. I note, though, that in the United Kingdom prior to 2005, section 67 of the Criminal Justice Act 1967 applied. That section provided that a sentence of imprisonment imposed on an offender by a court “shall be treated as reduced” by any relevant remand time. In this the courts had no role to play as remand time was credited by the Secretary of State (Prison Service) by way of administrative action.

[33] The requirement to credit time spent in custody is provided for on a mandatory and statutory basis in India¹⁵, New Zealand¹⁶, some Australian states¹⁷ and in the United States of America (both at the federal level¹⁸ and in most, if not all, of the states¹⁹).²⁰ In most Australian states²¹ and Canada²² the courts are allowed by statute to exercise a discretion in giving credit for pre-sentence time but the practice is that they will give full credit (in Canada even up to one day and a half for every day spent in custody²³) and when declining to do so they are expected to provide valid reasons. Regionally, one can look at Puerto Rico²⁴ and the Dominican Republic²⁵, where the courts are statutorily required to give full credit, and Suriname²⁶, Aruba and the former Netherlands Antilles²⁷ where the respective

¹⁴ See *Pre-trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, by A.M.Kalmthout, M.M Knapen and C. Morgenstern (eds)(2009)

¹⁵ S. 428 of the Code of Criminal Procedure, 1973 [Act No. 2 of 1974]

¹⁶ Ss. 91-91 of the Parole Act 2002

¹⁷ Eg New South Wales (Crimes (Sentencing Procedure) Act 1999 (NSW) ss 24(a), 47(3)

¹⁸ Under 18 US § 3585(b)

¹⁹ Eg California (Penal Code s. 2900.5(d)), Massachusetts (The General Laws of Massachusetts, Chapter 279: s. 33A), New Mexico (NMSA 1978, s. 31-20-12 (1977)), Florida (Fla.Stat. § 921.161 (1991)

²⁰ In New Zealand and the United States (federal level) the credit is given by the Administration. For the USA see *United States v Wilson* (90-1745), 503 US 329 (1992)

²¹ eg Western Australia (Sentencing Act 1995 (WA) s 87(b)

²² s. 719 of the Criminal Code (as recently amended)

²³ s. 719 (3.1.)

²⁴ s. 75 of the Penal Code of Puerto Rico

²⁵ S. 24 of the Código Penal de la República Dominicana

²⁶ S. 44 of the Wetboek van Strafrecht van Suriname (Criminal Code of Suriname)

²⁷ S 31 of their respective Criminal Codes

Criminal Codes still allow the courts some discretion but where it is standard practice to automatically grant full credit for pre-sentence time.

[34] Besides the countries of the Commonwealth Caribbean there are some other common law countries that do not have statutory provisions for crediting time spent on remand, notably Botswana, South Africa and Mauritius. Clearly, these countries acknowledge that at common law their courts have a discretionary power to give or to decline credit for time spent on remand when sentencing a convicted person. But even so, since the 1980s it has been the practice of the courts in Botswana that, as a rule, time spent on remand is to be taken fully into account, although, in exceptional cases and for compelling reasons to be stated in the judgment departure from that practice is possible²⁸. The situation in South Africa is admittedly less clear. According to a leading author “The courts have stopped short of saying that the term of confinement whilst awaiting trial should be subtracted from the term of imprisonment which the court considers appropriate, but *in practice this is probably the basic intention.*”²⁹ It is true, though, as revealed by South African case law³⁰ that the courts do not yet appear to have adopted a consistent and transparent approach to this issue.

[35] Finally, the courts in Mauritius following the recent decision of the Privy Council in *Callachand and another v The State*³¹ would seem to have adapted their practice in that they now give full credit for time spent on remand except when there are compelling reasons not to do so.

[36] The conclusion reached in the judgment of the majority is therefore in accord not only with the judgment of the Privy Council in *Callachand* but also and, in my view more importantly so, with the prevailing views of States and courts throughout much of the world on the subject.

²⁸ See Court of Appeal of Botswana (Moore JA) in *Mpati v the Attorney General*, Criminal Appeal No CLCLB-052-06 (not published) and *Sethula v the State* (Aguda JA) [1986] BLR 272

²⁹ S.S. Terblanche, *The Guide to Sentencing in South Africa* at 236-7

³⁰ Even the Supreme Court of Appeal of South Africa does not seem to be consistent, compare, for example, *S v Vilakazi* (567/07), [2008] ZASCA 87; 2009 (1) SACR 552 (SAC), a judgment delivered by Nugent JA, and *DPP v Mngoma 2010 (1)* (SACR 427 (SAC), a judgment delivered by Bosielo JA

³¹ *Supra* see footnote 7

[37] Another important point I would like to comment on is the legal basis for the adoption of this approach. Neither the judgment of the majority nor the judgment in *Callachand* seems to deal with this point. Perhaps there are good reasons for not doing so. At different times and in different jurisdictions different reasons have been given for giving full credit for time spent in custody. In some jurisdictions one finds that the legislation or judicial practice, as the case may be, was prompted by the extremely long periods of pre-trial detention of prisoners and the inhuman conditions in which remand prisoners were held (India³², Botswana³³). In other jurisdictions, the United States in particular, giving full credit for pre-trial custody was considered to be constitutionally required in a limited category of cases, for example when the only reason for ordering custody was that the prisoner was indigent and not in a position to afford bail; in such cases it was thought that it would offend the Equal Protection Clause of the Constitution (of the United States) not to give credit for the time spent in custody as non-indigent persons in the same position would not have spent that time in jail³⁴. These and other such rationales for the practice, however, only cover the practice in part. They do not provide a comprehensive legal basis for the practice in its entirety.

[38] It would seem that the Constitution of Barbados does not provide a clear legal basis for giving full credit for time spent in custody. The Constitution, however, does guarantee both the fundamental right to liberty (section 13) and the presumption of innocence (section 18(2)(a)). It is also true that while the former provision does state that “No person shall be deprived of his personal liberty”, it continues, however, by saying “save as may be authorised by law”. This expression particularly applies to the situation where a person is incarcerated “in execution of a sentence of a court ... in respect of a criminal offence of which he has been convicted”. But it equally includes the situation where a person is held

³² See eg *State of Maharashtra v Najakat alias Mubarak Ali* [2001(6) SCC 311] (Thomas J)

³³ See *Sethula v the State* (fn 16)

³⁴ See eg *Crediting Prisoners Sentenced before 1960 with Preconviction Incarceration Time*, University of Pennsylvania Law Review, Vol.118 No. 2 (Dec 1969), pp 280-287, and *Credit for Time Served between Arrest and Sentencing*, University of Pennsylvania Law Review, Vol. 121 No. 5 (May 1973), pp 1148-1156

on remand “upon reasonable suspicion of his having committed ... a criminal offence under the law of Barbados” even though “every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty”.

[39] The Constitution of Barbados does not mention nor does it imply a clear obligation for the courts when deciding on the sentence of the prisoner to give credit for the time spent in custody. However, under that supreme law all institutions, the courts included, are duty bound to act rationally, reasonably and fairly, in which context the two provisions do seem to have some relevance.

[40] It would appear then that the legal basis for giving full credit is basic fairness, the avoidance of injustice or, formulated more positively, the interest of justice. Liberty is clearly highly valued by the Constitution. Liberty should therefore be the golden rule and detention, however it is called and for whichever reason it is imposed, must remain the exception to that rule. In an “ideal” world³⁵ the presumption of innocence would require the courts not to incarcerate a person until he or she has been found guilty. But in the real world that is simply not possible. There are, perhaps unfortunately, many situations which make it necessary to detain some people before they are tried. This is especially unfortunate if that person is eventually found to be innocent. But even in the case of a conviction it would be unfair to the prisoner not to acknowledge, in a very real and effective manner, that he has, albeit with hindsight, *de facto* been serving his sentence from the day he was detained. Clearly, and I paraphrase here the words of the Supreme Court of Canada (Arbour J) in *Wust v The Queen and the AG for Ontario*³⁶, pre-trial detention (sometimes called “dead time”) is not *intended* as punishment but it is, in effect, *felt* as punishment in the same way as if it were based upon a sentence. As succinctly stated by Arbour J: ““Dead time” is “real” time’! And justice, I would add, can only be obtained, or perhaps at best be

³⁵ Ideal between parentheses because it is true, of course, that in a really ideal world there would not be crime in the first place.

³⁶ 2000 SC 18 at [45]

approached, when realities are firmly acknowledged. In the Caribbean, that means Caribbean realities.

[41] When it comes to sentencing a convicted person, the sentence (in the real sense of time spent in prison) should, therefore, in principle, be effectively the same whether the person was on remand or free on bail when being sentenced. That will in quite a few cases avoid or at least diminish gross inequalities between those who can and those who cannot afford bail. It might in other cases even avoid sentenced prisoners from having to serve in effect a longer sentence than the maximum sentence. In all cases, however, it will do justice to the reality of incarceration.

[42] Those who perceive giving full credit for time spent on remand as being “soft on crime”, and I am mindful of the fact that there might be many with such a perception, are simply wrong. Crediting pre-sentence time is exactly what it is: crediting. It has nothing to do with mitigation but it has everything to do with computation and calculation. Time spent on remand should therefore be *set off* against the sentence, and not be used to *reduce* it. This is also the reason why in some jurisdictions the crediting of pre-sentence time is done by the administration instead of by the courts. It is therefore important to distinguish between, on the one hand, the length of the sentence and, on the other hand, the manner in which that sentence is to be executed or served. These two aspects of the sentencing process should not be confused. This is the reason why time spent in custody has to be *counted* as time already *served* under the sentence without it having an effect on the length of the sentence itself.

[43] Apart from the views one can have on the fundamental underpinnings of this issue, there are also grave practical problems with the method of sentence reduction. The majority in referring to a very revealing judgment of Goldstein J, a judge in the High Court of Johannesburg, mentions the misleading effects resulting from reducing the sentence in order to take pre-sentence time into account. When full credit is given, the method may very well result in awkward and therefore less convincing sentences. For example, in the case before us this

method, taking account of a reduction of 3 years, 4 months and 4 days (the time spent on remand before sentencing), would have produced a sentence of 4 years, 7 months and 26 days. Or it might lead, in the case of two persons convicted for the same crime but arrested on different occasions, to differences in sentences which are not easily understood by the public.³⁷

[44] The majority is “conscious of the anomalies” of this method. In my view there is good reason to be so conscious. In order to avoid the oddity of sentencing serious offenders to a prison term of years, months, weeks and days, for example, the courts, if I may use the expression of Goldstein J, will have to “fudge the period of awaiting trial.” Moreover, given the sometimes exorbitant periods of pre-trial detention in Barbados, reducing sentences with the time spent in custody might inevitably result in sentences which would seem not to be in compliance with the statutory guideline laid down in section 41(2)(2) of the Penal System Reform Act, CAP. 139 ie that “the gravity of a punishment must be commensurate with the gravity of the offence.” Worse than that, however, is the fact that by using the method of reducing the sentence, the courts might be doing justice in a way that is, to put it mildly, far from perfect.

[45] The case at hand provides a clear example for that proposition. Although under the sentence passed by the majority of this Court (56 months) the appellant will have spent eight years in prison at the end of his prison term if no discharge on the basis of remission is given to him, he will in accordance with section 41 of the Prison Rules 1974 be *eligible* for remission by the end of November 2011 ie after six years and ten months in prison. Had he been sentenced under the preferable method to eight years with a declaration from the court that the time spent in custody will count as time spent under the sentence, he would have been so eligible after only six years in prison ie since the month of January of this year, a difference of ten months! That would have put the appellant in the same position as if he had been sent to prison on the day of his sentencing in which case also he

³⁷ See the judgment of Goldstein J (Witwatersrand Local Division) in *S v Vilikazi and others* 2000 (1) SACR 140 (W)

would have been eligible for remission after six years. The conclusion must therefore be that the appellant may have to spend 10 months longer in prison for the sole reason that he was on remand when he was sentenced on 27 May 2008. That cannot be right.

[46] The majority reasons, however, that it is not possible under the laws of Barbados to either backdate a sentence or “to count time in custody as time served under the sentence.” After noting that the jurisdictions which allow the courts to use these methods have legislation that enables them to do so, the majority has argued that such legislation is indeed needed. I respectfully disagree.

[47] Sentencing is a judicial function *par excellence* subject only to statutory and, perhaps to a more flexible extent, common law limitations. There are no such limitations in this respect. It would seem to me, therefore, that it squarely lies within the powers of the courts to impose a sentence of imprisonment while declaring that the time spent on remand is to be counted as already having been served under that sentence. In my view, no statutory provision, although helpful and perhaps preferable, is *necessary* to enable the courts to make such a pronouncement, the less so now that the declaration has the obvious *effect* of reducing the sentence without formally doing so. If a reduction of sentence lies within the powers of the courts, as it undoubtedly does, then any approach which has the effect of such a reduction should logically also be *intra vires*. It was probably this line of reasoning which prompted the Supreme Court of Appeal of South Africa in *Vilakazi v The State* (3 September 2008)³⁸ to sentence an accused to fifteen years’ imprisonment “from which two years [the time spent in custody] are to be deducted when calculating the date upon which the sentence is to expire”. South Africa, like Barbados, has no legislation to enable this approach although, unlike Barbados (and Botswana for that matter), it has a statutory provision that prohibits backdating a sentence³⁹.

³⁸ *S v Vilakazi*, see footnote 19

³⁹ S 32(1) of the Correctional Services Act 8 of 1959

- [48] If the argument against this approach would be that the courts have no business to consider the possibilities of remission when deciding which sentence to impose, I would answer that such is only partly true. Clearly, a sentencing judge cannot say “I think you should be removed from society for six years and therefore given the fact that you will be eligible for remission after three quarters of the sentence has been served I will sentence you to eight years”. That would certainly be improper. But on the other hand, the courts cannot completely ignore the realities of remission⁴⁰ and the less so if that would lead to apparent injustice. Unlike in the example I just mentioned, the method of counting time in custody as time served under the sentence (arguably a legal fiction as there are so many fictions in the law) is not prejudicial to the prisoner nor does it encroach on the powers of the executive as to discharging that prisoner for reasons of good behaviour before the sentence expires. Instead, this method, which, incidentally, is used in all but a handful of jurisdictions, enables the judiciary to fine-tune even robust sentences with immaculate precision while fully respecting the province of the executive.
- [49] Leaving this area of legal contention, I now return to some other aspects of the issue before us on which, I believe, the majority and I are basically in agreement.
- [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. There would certainly be such an abuse if the crediting process were to lead to double counting or, perhaps more accurately, double discounting of pre-sentence time. But as the majority has indicated, there are also other forms of abuse.

⁴⁰ See eg the exception established by the English Court of Appeal in *Turner* (1967), 51 C App Rep 72

- [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.
- [52] It has been argued by counsel for the respondent that there are substantial differences between time spent on remand and time spent after sentence in Barbados due to certain privileges that remand prisoners enjoy in accordance with the Barbados Prison Rules 1974 and that, therefore, the two forms of detention could not for the purpose of sentencing be treated equally. With the greatest respect, I disagree with that proposition. In almost every country in the world (and I do not think that Barbados is an exception to that rule) there is a visible gap between “the law in the books” and “the law in action (reality)”. In most countries in the world, including so-called first world countries, the law books provide for a regimen for remand prisoners that would appear to be more flexible and accommodating than the one provided for sentenced prisoners; but usually the reality is that there is either not much difference between these regimens or that, in fact, the regimen for remand prisoners is harsher than that for their fellow prisoners.
- [53] Even if Barbados proved itself to be the happy exception to that sad rule of experience, which I cannot rule out of course, the privileges that seem to have been bestowed on remand prisoners are not such that they would outweigh the fact that these accused persons have lost their liberty and are incarcerated, the less so if one compares these persons with those who, like them, are accused of a serious crime but having been admitted to bail are free and in a much better position to prepare their defence than those on remand.⁴¹ It is probably not for nothing that many countries in the world have made the full crediting of time spent in custody mandatory without any regard to the differences in their various prison regimens as here alluded to.

⁴¹ See also Privy Council in *Leslie Tiwarie v The State* [2002] UKPC 29

[54] I agree with the majority that the courts below have erred in not applying the proper principles and that the appeal should be allowed. As indicated above, however, I would have come to a different sentence. The trial judge intended to sentence the appellant to eight years' imprisonment which she considered to be the proper sentence. That being so she should in my view have imposed that very sentence. Additionally, full credit should have been given for the time spent on remand ie from the 22nd January 2005 to the day the prisoner was sentenced.

[55] A last remark. A consequence of the view I have expressed is that the appellant already effectively having completed (more than) six years of a sentence of eight years would now have been, pursuant to s. 41 of the Prison Rules 1974, *eligible* for a discharge on the basis of remission as he would have been clearly in a position where "a portion of his sentence not exceeding one-fourth of the whole sentence" of eight years (which is two years) has yet to run. This, however, does not mean that we should have automatically ordered the prisoner's release. Firstly, remissions of sentence, as the majority states, fall within the purview of the prison administration and should, except perhaps in an odd case of judicial review, not be handled by the courts. Secondly, again in accordance with the majority, remissions have to be earned (and whether the appellant would have earned a remission we do not know). In any event, sentencing judges have no business with concepts like "calendar years" or "prison years." Even without them, sentencing is already difficult enough.