IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction
ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application BBCR2013/002 and
BB Criminal Appeal No 1 of 2011

BETWEEN

JEFFREY RAY BURTON	**APPLICANT/ INTENDED APPELLANT**

AND

THE QUEEN	**RESPONDENT**

CCJ Application BBCR2013/003
BB Criminal Appeal No 4 of 2011

BETWEEN

KEMAR ANDERSON NURSE	**APPLICANT/ INTENDED APPELLANT**

AND

THE QUEEN	**RESPONDENT**

[Consolidated by Order of the Court dated 12th day of December 2013]

Before The Honourables **Mr Justice Nelson**
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr Andrew Pilgrim QC, Ms Kristin C A Turton, Ms Angella A Mitchell-Gittens and Ms Lesley T Cargill for the Applicant in BBCR2013/002

Mr Ralph A Thorne QC and Ms Mechelle Forde for the Applicant in BBCR2013/003

Ms Donna Babb-Agard QC and Mr Alliston Seale for the Respondent

JUDGMENT
Of
Justices Nelson, Saunders, Wit, Hayton and Anderson

Delivered by
The Honourable Mr Justice Anderson
on the 26th day of March 2014

JUDGMENT

Introduction

[1] This appeal raises for the first time an important aspect of the juridical effect of a judgment of this Court upon a subsequent appeal in the court below. In *Romeo Da Costa Hall v The Queen*[1] this Court held that transparency in sentencing and the principles relating to the imposition of custodial sentences enshrined in the Penal System Reform Act[2] required that a sentencing judge explain how the time spent on remand factored into the sentence imposed. We held further that there was a primary rule of substantially full credit for time served prior to sentencing and if a judge chose to depart from that rule he or she should set out the reasons for such departure. The nuanced language reflected our reasoning that there was a residual discretion in the sentencing judge not to apply the primary rule. There is no need to investigate the contours or extent of the residual discretion in the present case. Nothing turns on it. Furthermore, given the relevant constitutional principles and in particular the constitutional right to individual liberty, it may be taken that substantially full credit means full mathematical credit. What remains in issue in the present appeal is whether the primary rule requiring full credit for time spent on remand ought to have been applied by the Court of Appeal in respect of an appeal of a sentence imposed by the sentencing judge before *Romeo Hall* was decided.

[1] [2011] CCJ 6 (AJ).
[2] Cap 139 of the Laws of Barbados.

[2] The issue arose in the following manner. On the 20th day of January 2011, Burton and Nurse ("the Appellants") were sentenced to seven and five years respectively for the offence of manslaughter. The sentencing judge "took into consideration" the time which the Appellants had each spent on remand but his judgment did not reflect a specific deduction. The judge did not indicate whether he considered it appropriate to depart from the primary rule of full credit for time served. On 20th April 2011, about three months after the imposition of the sentences, the judgment in *Romeo Hall* was delivered. Armed with that judgment the Appellants appealed to the Court of Appeal but the appeal was dismissed on 4th October 2013, primarily on the ground that the trial judge could not have foreseen that this Court would have decided *Romeo Hall* in the way we did and that the *Romeo Hall* decision was not to be applied retroactively.

[3] The applications by the Appellants for special leave to appeal to this Court and for special leave to appeal as poor persons were heard on 23rd January 2014. The main contention was that the Court of Appeal erred in not applying *Romeo Hall* to reduce the Appellants' sentences by the time spent on remand. We granted special leave to appeal and leave to appeal as poor persons and reserved judgment on the appeal of Burton but allowed the appeal with respect to Nurse and ordered his immediate release from custody. We promised then that the judgment in respect of the consolidated appeals of the Appellants would be delivered in due course and we do so now.

Background

[4] The factual circumstances giving rise to this appeal are most unfortunate involving as they do an incident among school children which led to the stabbing death of a young boy and the conviction and imprisonment of two other young boys.

[5] On September 29, 2006 a student of the Garrison Secondary School lost his cellular phone on the school bus and there arose a disagreement among the

various factions as to who might have taken the phone. Accusations and threats were made. The students on the bus included Averell Leroy Wright, Burton and Nurse. A week later, on 6th October 2006, Burton and Nurse boarded the Ellerslie school bus on their way home. The driver took the bus along the usual route and picked up students from Garrison Secondary School including Wright and two of his friends. When the bus reached the area of Maxwell, Burton walked from his seat in the rear towards the front of the bus but was deliberately impeded by Wright. A fight ensued which continued through the door of the vehicle and unto the pavement. Nurse jumped from the bus and joined the scuffle. Burton drew a knife from his school bag and stabbed Wright in the chest who collapsed after fleeing a short distance. Nurse was 17 years. Burton and Wright were each aged 15 years but Wright would never see his sixteenth birthday. The stab wound caused haemorrhage and shock from which he died at the place he had fallen. Within minutes Burton and Nurse were intercepted by the police and an ice pick recovered from Nurse and a knife covered with human blood from Burton. They were arrested and three days later, on 9th October 2006, charged with murder. Nurse was remanded to prison but was granted bail on 23rd July 2009. Burton was remanded to the Government Industrial School and, upon reaching 18 years of age, transferred to Her Majesty's Prisons at Dodds, St Phillip.

[6] At their arraignment on 8th March 2010, Burton and Nurse pleaded not guilty to murder but guilty to manslaughter. The pleas were accepted by the Crown. At their *allocutus* both young men expressed remorse for their actions on that fateful day some four years earlier. All indications were that they had cooperated fully with the police. Pre-sentencing reports prepared by the Probation Department generally commented favourably on both. Their lawyers presented stirring pleas in mitigation stressing the factors of remorse, early guilty pleas, good probation reports, youthful age at the commission of the offence, and otherwise unblemished good character. The lawyers argued that application of the judicial

guidelines on sentencing pronounced by the Court of Appeal in *Pierre Lorde v R*[3] should result in sentences of time served.

[7] The learned trial judge considered the factors in mitigation in which he included the time spent on remand[4] as well as the sentencing guidelines relied on by Counsel. Having regard to the aggravating fact that both young men had been armed and the seriousness of the offence, the judge concluded that a period of incarceration was necessary and sentenced Burton to seven years and Nurse to five years in prison. In answer to a query from Burton's lawyer as to whether the sentence would run from the date of the plea the learned judge indicated that he had already taken into consideration that the young men had been on remand and that the sentences would run from the date of sentence.

[8] The appeal to the Court of Appeal was on the sole ground that the sentences were excessive for two separate reasons. The Appellants argued that the decision in *Romeo Hall* required that each of them should be given a full discount for time spent on remand and that the sentences were not in accordance with the judicial guidelines on sentencing. The court dismissed the appeal on the bases that *Romeo Hall* did not apply retroactively and that the guideline judgments were not meant to take away the discretion of the sentencing judge who was entitled to determine the appropriate sentence to impose for the offence, taking into consideration all of the circumstances of the particular case and the known sentencing principles.

[9] By individual applications made on 18th and 19th November 2013, which were later consolidated, the Appellants sought special leave from this Court to appeal the decision of the Court of Appeal. They alleged that egregious errors of law had been committed by both the learned trial judge and the Court of Appeal and that these errors had resulted in a miscarriage of justice by depriving them of their constitutional right to liberty for a period in excess of what was legally justifiable in the circumstances of the case. They alleged that the courts below fell into error by failing to give full credit for the full period spent on remand by way of a strict

[3] (Criminal Appeal No. 11 of 2003, Court of Appeal, Barbados) (unreported).
[4] High Court Transcript, page 99, lines 21-23.

mathematical deduction ("the *Romeo Hall* point") and by imposing and affirming sentences that were excessive having regard to the judicial guidelines pronounced in such cases as *Pierre Lorde v R* ("the judicial guidelines point").

[10] The order in which the issues are dealt with may be important. Questions concerning the severity or excessive nature of the sentence go to the appropriateness of the sentence in respect of which aggravating and mitigating factors play an important part. It is only after the judge has decided the appropriate sentence taking into account the gravity of the offence and all the mitigating and aggravating factors that the question of whether and how to give credit for time served then arises. It must be emphasized that time spent on remand is not a mitigating factor. The prisoner has a prima facie right to obtain credit for such time so as to reduce concomitantly the sentence imposed by the judge. For this reason it will be convenient to consider the issue of adherence to the judicial guidelines which relate to the appropriateness of the sentence before considering the question of deduction from that sentence of the time spent on remand.

The Judicial Guidelines Point

[11] The Appellants argue that the Court of Appeal erred in affirming sentences that were unduly harsh bearing in mind their tender age at the time of the offence, the early pleas of guilty, their remorse and contrition, and the favourable nature of the pre-sentencing reports. They adverted to *Pierre Lorde v R* in which the Court of Appeal reviewed some forty previous cases decided between 1992 and 2005 and gave guidelines as to the tariffs that may be appropriate for particular categories of offences. In *Pierre Lorde* the court was especially concerned with the propriety of sentences in manslaughter cases where death was caused by the use of a firearm and the guidelines reflect this but some guidance was also given on sentencing where death was caused by other weapons. The Appellants placed much store on the fact that the weapon used in this case was a knife and argued that this factor ought to have been taken into account by the sentencing judge.

They contended that where the offence would otherwise have fitted the characteristics of a particular category with its concomitant tariff, the sentence should be reduced because the weapon used was a knife and not a firearm.

[12] In delivering the judgment of the court below Moore JA highlighted the difficulty in requiring that the tariffs suggested in the guideline judgments must dictate the sentences imposed. It was difficult to isolate any one factor as the determinant of the appropriate sentence. The learned Justice of Appeal said:

> In the guideline judgments much emphasis is placed on the weapon used to kill. We do not think that the method of killing or the weapon used to kill is necessarily the main, and is certainly not the sole factor taken into consideration by the sentencer when determining the appropriate sentence to impose for the offence. Sentencing is an art, not a science. Every sentence must be considered with due regard being had to all of the circumstances of the particular case. Therefore, the sentence imposed in every case must be left to the discretion of the sentencer acting on known sentencing principles.

[13] We agree that the exercise of judicial discretion is and must remain at the heart of the sentencing process. The guidelines cannot place the sentencing judge into a strait-jacket or in any way fetter that judicial discretion. This would run counter to the legislative injunction in the Penal System Reform Act[5] which stipulates that the length of a custodial sentence "shall be for such term as in the opinion of the court is commensurate with the seriousness of the offence" and "shall be for such longer term as in the opinion of the court is necessary to protect the public from serious harm from the offender". These are matters which fall to be determined first and foremost by the trial judge often involving as they almost invariably do assessment of the factual matrix of the case including, perhaps most importantly, the conduct and demeanour of the offender.

[14] As has been said repeatedly, the guidelines are only guidelines and not meant to be applied slavishly to every case. They provide assistance to the sentencing judge not rules from which departure is prohibited. No guidelines can ever cover

[5] Cap 139 of the Laws of Barbados.

the totality of circumstances in which criminal ingenuity and recklessness may be expressed. We accept the essence of the opinion offered by Sir David Simmons, C.J. in *Bend and Murray*[6] when he said:

> We have issued these guidelines on sentences for manslaughter merely to indicate the range or scale of sentences. Judges will still be free to tailor sentences according to the facts of a particular case. It must be remembered that, in our system, judicial discretion is at the heart of the sentencing process. That discretion will invite flexibility and, from time to time it will produce inconsistency. These guidelines are intended merely to assist judges and the legal profession, not to bind judges and fetter their discretion. At the end of the day sentencing is very much an art and not a science.

[15] But this is much different from saying that the guidelines lack legal significance or may be disregarded without reason. The guidelines distil important aspects of sentencing principles. When pronounced by the Court of Appeal they constitute rules of practice. Lower courts must have regard to the guidelines. The sacrosanct nature of the discretion of the sentencing judge is preserved in two ways. Firstly, the guidelines indicate a range of sentences that may be appropriate for particular categories of offences and it is for the sentencing judge to decide where on the continuum of the tariff the specific sentence ought to be placed having regard to the peculiarities of the circumstances of the offence and the offender. Secondly, it is perfectly appropriate for the sentencing judge to not follow the guidelines in a particular case if he or she concludes that their application would not result in the appropriate sentence. Public confidence in the criminal justice system must be maintained by the imposition of suitable penalties taking into consideration the penological objectives of protection of the public, deterrence, and rehabilitation of the offender, and it is for the sentencing judge in his discretion to make the call as to the sentence that will come closest to achieving those objectives. However, 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.

[6] (Criminal Appeals Nos.19 and 20 of 2001, unreported decision of 27 March 2002) [30].

[16] In this case we do not consider that the learned trial judge departed from the guidelines and thus attracted the obligation to give reasons for such departure. In *Pierre Lorde* the guidelines were issued in the following terms:

> [35] … In a contested trial where death was caused by a firearm and the facts are on the borderline of **murder** with no mitigating features, the range of sentence should be 25 years and upwards, including, in a proper case, life imprisonment. In a contested trial where death was caused by a firearm and the facts are grave but mitigating factors such as provocation exist, the range of sentence should be 18 to 22 years. However, an early plea of guilty in a non-contested case on similar facts will attract a lower sentence in the range of 14 to 18 years. In a contested trial where no firearm was used and there are no mitigating circumstances, the range of sentence should be 16 to 20 years. An early plea of guilty in this type of case will reduce the range of sentence to 10 to 14 years. In a contested trial where no intrinsically dangerous weapon was used and there are mitigating features, the range of sentence should be 8 to 12 years. An early plea of guilty in this type of case may attract a sentence of less than 8 years.

[17] The present case involves a stabbing death and appears not to fall squarely within any of the categories described in the guidelines, a fact recognized by the learned trial judge. The first two categories deal with death caused by a firearm. The third category concerns cases where no firearm was used and there are no mitigating circumstances whereas the present case exhibits several mitigating factors. The case also does not fall into the fourth category because a knife can properly be classified as an intrinsically dangerous weapon. On the other hand, although the present case is resistant to the formal categorizations in *Pierre Lorde*, some assistance may nonetheless be elicited from earlier statements by the judges in that case. Speaking for the court, Sir David Simmons C.J. acknowledged that punishment tended to be heavier where death was caused by a firearm in contrast to the situation where a knife or similar sharp-edged weapon was used. Where such a weapon was used the "general range of sentences where there were mitigating factors was between 10 and 15 years although there were a number of sentences in the single digits" including a sentence for 8 years.[7]

[7] *Pierre Lorde v R* (Criminal Appeal No.11 of 2003, Court of Appeal, Barbados) [33].

[18] The sentences imposed on the Appellants would appear broadly to fall within accepted sentencing practices and precedents. Burton inflicted the fatal wound and therefore earned the stiffer penalty of seven years. Nurse pleaded guilty to manslaughter in respect of the same offence but received the lesser term of five years because he had not himself done the stabbing. In both instances the sentences fell within the broad guidance given in *Pierre Lorde*. We therefore see no reason to disagree with the Court of Appeal that there is no basis for disturbing the sentences imposed by the learned trial judge on the ground that they were excessive as such.

[19] Counsel for the Appellants invited this Court to revise the guidelines to facilitate more precise guidance to the sentencing judge particularly in cases involving stabbing deaths in which there are mitigating factors. We note that the trial judge appears to have agreed that the present guidelines do not specifically cover the precise circumstances of this case. There may also well be several other gaps in the guidelines but we do not consider it appropriate for us to attempt a recast of them in the present circumstances. No set of guidelines can possibly capture the great diversity of special circumstances attended in each case. More importantly, the guidelines are formulated by the Court of Appeal following significant research and consideration of a considerable number of cases decided by that court. Any revision of the guidelines should ideally be undertaken by the Court of Appeal in the first instance, bearing in mind the requirements and exigencies of the prevailing circumstances and after full argument with possible input from the Bar and possibly from other stake holders in Barbados. As a rule, we do not consider it appropriate for us to revise guidelines and certainly not by a side-wind.

The Romeo Hall Point

[20] The principal issue in the appeal before us is whether the Court of Appeal should have applied the principle set out in *Romeo Hall* requiring full credit for time spent on remand. That court rejected the argument that the sentences imposed on the Appellants were excessive because the Appellants had not been given a full

discount for the time spent on remand. The maximum sentence for manslaughter was life imprisonment and the sentences were therefore justified by law. There was no complaint that the trial judge had improperly taken some matters into account or acted on wrong principles. There was no basis for contending that the trial judge ought to have foreseen that the CCJ would have decided *Romeo Hall* as it did. Citing the case of *R v Graham*[8] for the proposition that legislative alteration of the statutory penalty between sentence and appeal could not apply to vary the prevailing tariff at the time of sentencing, the court said:

> The legislature is the law making body for Barbados. When the legislature passes an enactment and wishes it to have retroactive effect it is specifically so provided in the enactment; it is the duty of the court to expound and apply the law, not to make it. Therefore when a person was sentenced in accordance with the legislation in force at the time, and the tariff prevailing at the time, the Court of Appeal will not intervene on account of subsequent changes in the legislation or in the tariff.

[21] Counsel for Burton submitted that where a superior court declares a common law position it does not simply resolve the case before it but rather it alters the law. If the relevant law as known and understood by the Court of Appeal at the time of hearing is different from that applied by the trial judge, the Judges of Appeal were bound to apply the correct principle. Given that the Court of Appeal was aware of the *Romeo Hall* principle at the time of the appeal that court was bound by it and bound to apply it.

[22] The Respondent took an opposing view and submitted that the principle set out in *Romeo Hall* could not be applied retroactively. The court of first instance could not have applied the tariff in the manner enunciated by this Court because it did not have benefit of that decision at the time of sentencing, and the concept of judicial precedent provides only for subsequent decisions to be bound by a precedent. Accordingly, the Court of Appeal was precluded from applying *Romeo Hall* because that decision was made after the learned judge imposed the sentences. The Respondent further contended that application of Romeo Hall

[8] [1992] 2 Cr. App. R. (S) 312(CA).

would produce the difficulty of defining a "cap or ceiling" on the period of time within which an Appellant could submit that his or her sentence was subject to a reduction on the basis of its proximity to the judgment handed down in *Romeo Hall* and asked: "how does a court calculate the length of time (from the date of the decision in *Romeo Hall* to the date of sentence) which is permissible and upon which an Appellant can entreat the Court of Appeal or the Caribbean Court of Justice, to apply that 'principle of proximity'"?

[23] We are of the view that the decision in the court below and the argument of the Respondent before us proceeded on a wrong premise. The issue is not whether the trial judge had improperly taken some matters into account or failed to consider relevant matters or acted on wrong principles. In particular, it was impossible for the trial judge to have taken account of our decision in *Romeo Hall*, which had not been given at the time he pronounced sentence, and it would have been improper for him to have attempted to anticipate that decision. The real question is whether the Court of Appeal hearing the appeal from the trial judge and seised, as it was by then, of the decision in *Romeo Hall* ought to have applied the principle of full credit for time served on remand. We consider that the Court of Appeal should have done so.

[24] We agree that, as a rule, legislative changes in the law do not have retroactive effect unless specifically so provided in the enactment and agree with the decision in *R v Graham* to that extent. But judicial pronouncement of applicable common law principles cannot be equated to legislative changes. The orthodoxy is that judges do not make the law but merely declare what the law is. According to the declaratory theory, a new decision merely declares the law as it always existed and shows that the law had been misapprehended in any earlier decision to the contrary. Accordingly, "the overruling of a precedent, unlike the repeal of a statute, has retrospective operation because no established rule of law is thereby abolished."[9] The retroactivity implicit in judge-made rules may therefore be more apparent than real. But it is not necessary to subscribe to the declaratory theory to

[9] J.K. Grodecki, 'Conflict of Laws in Time' 35 BYIL (1959) 58, 62.

arrive at the same conclusion; even those cases throwing doubts on the theory retain its progeny of the retrospective effect of a change made by judicial decision. In *Kleinwort Benson Ltd v Lincoln City Council*[10] Lord Browne-Wilkinson explained that notwithstanding the rejection of the underlying myth that judges merely declare rather than make the law, it remained the case that,

> … once the higher court in the particular case has stated the changed law, the law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the [previous decision] was overruled.[11]

[25] We agree.

[26] In asserting the non-retroactivity of *Romeo Hall* the court below essayed that the matter had been put beyond doubt in *Jerry Anderson Weekes v The Queen.*[12] This case involved an application before this Court for an extension of time within which to appeal so as to enable the applicant to obtain the benefit of the *Romeo Hall* ruling. In an exchange with Counsel for the applicant the presiding Justice, Nelson JCCJ, in a different context from the current one, said:

> It is obvious that a judgment can only take effect from then on into the future. It can't be retrospective otherwise you would never be able to come to new decisions in the law. The law could not evolve because you'd be constantly going one step forward and a hundred steps backwards. I don't think that's the way it operates.

[27] We consider that the reliance on this statement was misplaced for two reasons. Firstly, the observations of Justice Nelson were made in the entirely different context of res judicata from that which arises on the present appeal. In *Weekes* an application for extension of time in which to appeal was rejected. The applicant had been sentenced to a period of 14 years imprisonment in 2003 for unlawful killing. His appeal to the Court of Appeal was dismissed in 2006 and the sentence affirmed. Shortly after the decision in *Romeo Hall* in 2011 he sought leave to

[10] [1999] 2 AC 349.
[11] Ibid 358-59; see also Lord Goff of Chievley expressing similar views at 375.
[12] AL 0011 of 2011.

apply for an extension of time to file an application for special leave to appeal and argued that he had a real prospect of success in obtaining a reduction in his sentence in accordance with the *Romeo Hall* principle. We refused the application on the basis that it was necessary to bring finality to judicial proceedings; it was not permissible for the applicant to reopen his case some five years after sentence had been affirmed by the Court of Appeal. It is, however, a quite different thing to say that an Appellant whose appeal is pending before the court cannot benefit from the earlier declaration of the law.

[28] Secondly, and more generally, whilst the judgments of this Court are binding on lower courts and any *obiter dictum* intended to clarify the law should also be followed in appropriate cases,[13] the statements or observations of members of the Court speaking extemporaneously in their individual capacity fall into an entirely different category. Such statements or observations would not have had the benefit of deliberation. For this reason they cannot be taken as representing the decision or the view of the Court. Furthermore, however phrased, the statements or observations may not have been intended to state a definite position but rather to test a proposition or to facilitate enquiry into the nature or strength of specific argument by counsel. If such statements or observations could be relied upon as authority there could be judicial concern about the expression of views from the Bench during legal argument and the freedom of the Court to inquire into all aspects of argument by Counsel could thereby be compromised or undermined.

[29] This Court is alive to the difficulty alluded to by the Respondent of defining the point in the past to which the principle in *Romeo Hall* may be said to extend, thus granting a right to persons now serving custodial sentences to apply for a reduction of their sentences on the basis of time spent on remand. Such persons may have been incarcerated for many years prior to the declaration of the changed law. We note that this problem does not arise in the present case in that the Appellants were in the process of appealing the sentence imposed by the trial judge when *Romeo Hall* was decided. There was no need to apply for an

[13] *Sayce v TNT (UK) Ltd* [2012] 1 WLR 1261(CA) [24] (Moore-Bick LJ).

extension of time in which to lodge the appeal to the Court of Appeal. Indeed, a further appeal was possible to this Court. The present case is therefore very similar to *Hazell v The Queen*[14] in which Peter Williams JA for the Court of Appeal disposed of the appeal by noting that while the notional sentence was eight years, "full credit must be given in accordance with *Romeo Hall* decided after the judge imposed sentence, for the two years and 69 days spent in custody."

[30] We consider that the basic rule is that prisoners whose cases or appeals are pending or in respect of whom the statutory period to appeal to the courts has not yet expired are entitled to benefit from the ruling in *Romeo Hall*. Prima face no other prisoner is so entitled. There remains a possibility of applying for an extension of time within which to lodge an appeal but such an application must be supported by sound and convincing argument. The applicant bears a heavy burden to satisfy the court on a number of matters including that there was good reason for the delay. It is only in wholly exceptional circumstances that an extension would be granted in order to file an appeal in order to benefit from the declaration of the law in *Romeo Hall* and the chances of success of such an application become more remote with the passage of time since that decision. Good reason for delay becomes more and more difficult to identify. After the period for appeal has passed the judicial process has prima facie run its course and is exhausted and any attempt to benefit from the declaration of the changed law is more properly addressed to and by the Executive through the exercise of the prerogative of mercy. This was the effect of our judgment in *Weekes*.

[31] Finally, Counsel for the Appellants urged this Court to adopt the 'set off' approach to sentencing as advanced by Justice Wit in his minority decision in *Romeo Hall* in preference to the majority decision which required that the sentencing judge decide the 'notional term' from which the period spent on remand is deducted. Under Justice Wit's formulation the trial judge would impose the appropriate sentence while declaring that the time spent in custody will count as time served under the sentence. This would permit the time spent on remand to

[14] Criminal Appeal No. 24 of 2008, Court of Appeal, Barbados.

count for purposes of remission under the prison rules and has the obvious advantage to the prisoner that computation of his or her period of remission would be on the entire sentence and not just the term of the sentence less the time spent on remand.

[32] This matter was fully considered by this Court in *Romeo Hall*. The majority was well aware of the practical consequences in adopting the approach of Justice Wit but was of the considered view that legislative intervention was necessary to empower it to declare that time spent on remand should be counted as time served. The majority considered that the time spent on remand could not be treated as "prison years" and grossed up to calendar years because remission of sentences was earned whilst serving sentences in prison and were normally effected by administrative action under the prison rules during the prisoner's incarceration.

[33] This Court is competent to depart from its previous decision if it considers it right to do so but it will refrain from the exercise of this power in the absence of compelling reasons. It will only depart from a previous decision in exceptional circumstances. The doctrine of precedent requires a level of certainty that is intolerant of frequent overturn of the decisions of the highest court, especially in relation to decisions recently given. Recurrent reversals could also weaken respect for the rule of law. Moreover, such reversals are ideally undertaken by the Full Bench sitting en banc after mature reflection and only after the most extensive submissions on the point at issue, which in this case would include submissions on the relevant legislative landscape, prison rules and administrative practices. For these reasons the Court declines the invitation of Counsel to reconsider its decision in *Romeo Hall*.

Application of Romeo Hall

[34] It is clear that the trial judge did not adhere to the principle of granting to the Appellants full credit for the time spent by them in pre-trial custody. The judge

treated the time spent on remand as a factor in mitigation[15] whereas the prisoner is prima facie entitled to have that time deducted from the sentence imposed. The judge noted that Burton had spent an excess of four calendar years on remand but stated that this had to be balanced "with the fact that normally one would expect a matter of this sort to have an in-built gestation period, if I may call it that, due to the fact of the system of at least a 2-year period."[16] It is a reasonable assumption that the learned judge took the same approach in relation to Nurse whose sentence was pronounced shortly after Burton's and at the same sitting. Again this runs contrary to the clear principles adumbrated in *Romeo Hall* which do not recognize the concept of a gestation period before the constitutional right of the individual is given birth and comes into being. The constitutional right to individual liberty must be respected whatever the foibles of the criminal justice system may be, and we consider that it was wrong to have given no credit for "at least" two years spent on remand. It is a wrong which the Court of Appeal ought to have corrected following the ruling in *Romeo Hall* of which it had full knowledge and cognizance at the time of the appeal.

Burton

[35] Burton was taken into custody on 6th October 2006 and sentenced on 20th of January 2011 to seven years' imprisonment, the sentence to run from the latter date. Burton had therefore spent 4 years and three months on remand. Of this period the judge appears to have given credit for all but the 2-year "gestation period". For the reasons we have given Burton should have received full credit for the entire period spent on remand. The sentence of the court should therefore have been 5 years imprisonment from the 20th of January 2011 and the sentence must be varied accordingly.

[15] See High Court Transcript e.g., page 99, lines 21-24 (Burton) and page 104, lines 15-19 (Nurse).
[16] See High Court Transcript page 97, lines 2-6 (Burton).

Nurse

[36] Nurse was taken into custody on 6th October 2006 and granted bail on 23rd January 2009. He was sentenced on 20th of January 2011 to five years in prison, the sentence to run from the latter date. Nurse had therefore spent over 2 years and three months on remand. A reasonable imputation from the statements made by the trial judge is that credit was given for all but the 2-year "gestation period". For the reasons we have given Nurse should have received full credit for the entire period spent on remand. The sentence of the court should therefore have been 3 years imprisonment from the 20th of January 2011 and the sentence must be varied accordingly. Even without any consideration of remission Nurse would have served the sentence of three years at the time of the hearing before us on 23rd January 2014 and for that reason we ordered his immediate release.

Order

[37] The appeals are allowed and the judgment of the Court of Appeal set aside. The sentences imposed by the trial judge are hereby varied as indicated in [35] and [36].

The Hon Mr Justice R Nelson

The Hon Mr Justice A Saunders

The Hon Mr Justice J Wit

The Hon Mr Justice D Hayton

The Hon Mr Justice W Anderson