[2016] CCJ 13 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No BBCR2016/001
BB Criminal Appeal No 18 of 2010

BETWEEN

SHAWN RICARDO PINDER	**APPLICANT**

AND

THE QUEEN	**RESPONDENT**

Before the Honourables	**Mr Justice Nelson** **Mr Justice Hayton** **Mme Justice Rajnauth-Lee**

Appearances

Mr Marlon Markland Gordon and Ms Safiya Moore for the Applicant

Mrs Donna Babb-Agard Q.C. and Mr Elwood Watts for the Respondent

REASONS FOR THE DECISION
of
The Honourable Justices Nelson, Hayton and Rajnauth-Lee
Delivered by
The Honourable Mr Justice Nelson
on the 22nd day of June, 2016

[1] On May 19, 2016 this Court heard two applications by Mr. Shawn Pinder (hereinafter referred to as "the Applicant") for special leave to appeal to this Court under section 8 of the Caribbean Court of Justice Act, Cap 117 and for special leave to appeal as a poor person pursuant to Rule 10.17 of the Caribbean

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Court of Justice (Appellate Jurisdiction) Rules. The Court refused both applications and promised to give its reasons later. We publish those reasons now.

Background

[2] These applications derive from the Applicant's conviction for manslaughter in connection with the death of Arden Puckerin (hereinafter referred to as "the deceased") on August 26, 2004. The Applicant and a co-accused were charged with the murder of the deceased and remanded in prison on September 2, 2004. Their trial commenced on January 22, 2010. By the end of the trial the Applicant was the lone accused. He was found guilty of manslaughter on April 30, 2010 and was sentenced to 15 years' imprisonment on June 2, 2010. His appeal against conviction and sentence was heard by the Court of Appeal in November 2014 and was dismissed on January 13, 2015. It is from that decision that the Appellant sought special leave to appeal and to appeal as a poor person by way of notice dated January 4, 2016.

The test for special leave in criminal appeals

[3] The test for special leave in criminal appeals was first propounded by this Court in *Cadogan v R (No. 2),*[1] where Hayton JCCJ stated that the 'grant of special leave is, of course, a matter of discretion. However, if there is a realistic possibility of a miscarriage of justice if leave is not given for a full hearing, then leave will be given.' In *R v Doyle*,[2] Nelson JCCJ reiterated this test in the following terms:

> Generally, this Court will only intervene in criminal cases in circumstances where a serious miscarriage of justice may have occurred in the court below or where a point of law of public importance is raised and the applicant persuades the Court that if not overturned a questionable precedent might remain on the record. In such a case, the grant of leave to appeal is not necessarily an indication that the Court agrees with the point, but only that the point of law is arguable.

[1] (2006) 69 WIR 249; [2006] CCJ 4 (AJ) at [2].
[2] (2011) 79 WIR 91; [2011] CCJ 4 (AJ) at [4].

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[4] The Applicant must therefore persuade this Court that a potential miscarriage of justice or a genuinely disputable point of law arises out of the decision appealed from in order to qualify for the grant of special leave.

The contentions before the Caribbean Court of Justice

[5] The Applicant contended that he was entitled to special leave because his trial was unfair, being contrary to section 18(1) of the Constitution and that his sentence of 15 years was excessive and unlawful. On both points, counsel for the Applicant repeated the same arguments deployed before the Court of Appeal. In response leading counsel for the Crown, Mrs. Babb-Agard Q.C., contended that the Applicant's arguments had been heard and rightly rejected by the Court of Appeal. Therefore, special leave should be refused.

Unfairness of the trial

[6] The argument on unfairness was divided in two parts: one relating to the amendment of the indictment at an advanced stage of the prosecution and the other, concerning failure to discharge the entire jury after some members were observed conversing with a discharged juror.

[7] The Applicant had been jointly charged with the murder of the deceased along with a co-accused on the basis that they were engaged in a joint enterprise. The co-accused, at the close of the prosecution case, made a successful no-case submission and was discharged. The prosecution then sought and obtained leave of the trial judge to amend the indictment to leave the Applicant as the sole accused.

[8] The Applicant contended that permitting amendments at such a late stage were prejudicial to him because: (i) it changed the basis of the case he had to meet in midstream from joint enterprise to circumstantial evidence, (ii) the discharge of his co-accused might lead the jury to conclude that he was not discharged because he was guilty and (iii) late amendments might well work injustice and should not be allowed; a proposition which he derived from *R v O'Connor*.[3]

[3] [1997] Crim LR 516.

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[9] Mrs. Babb-Agard Q.C. for the Crown contended that the trial of the Applicant had been fair and he had suffered no injustice by the amendment. Circumstantial evidence, she noted, was not the only plank on which the Crown relied after the discharge of the co-accused. There was other evidence implicating the Applicant including his own oral statements which placed him on the scene of the murder of the deceased and ran contrary to his defence of alibi. According to the Crown, the judge was not therefore obliged to discharge the jury and order a fresh trial in the wake of the successful no-case submission because enough evidence remained implicating the Applicant in the murder of the deceased.

[10] The Court finds no merit in the Applicant's submissions under this head. Taking together the first and third limbs of arguments presented, it is important to bear in mind the sequence of events at the trial. As noted by the Court of Appeal, after the co-accused was discharged on March 17, 2010, the trial continued against the Applicant. Six (6) weeks later, on April 27, 2010, immediately before the judge began his summation the prosecution sought and obtained leave to amend the indictment by removing the name of the co-accused. The new indictment was read to the Applicant and he repeated his not guilty plea.

[11] Both parties conceded that it might have been preferable if the amendment had been made earlier. However section 6 of the Indictments Act[4] makes it clear that a judge can grant an amendment of the indictment at any stage of the trial 'unless having regard to the merits of the case the required amendment cannot be made without injustice'

[12] We agree with the Court of Appeal that whether an accused is prejudiced by a change in the focus of the case from joint enterprise to circumstantial evidence depends on 'what further facts are divulged, whether or not the case remains essentially the same after the discharge is made and whether the case against the remaining ones can be proved without reference to the one(s) discharged.'[5] Further, the judge in his summing-up properly directed the jury 'to banish' from

[4] Cap 136 of the Laws of Barbados.
[5] Criminal Appeal No. 18 of 2010 (unreported) delivered on November 24, 2015 at [23].

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their minds any evidence which might link the co-accused to the Applicant and to concern themselves solely with the Applicant.

[13] In those circumstances, the Court of Appeal rightly concluded that the situation which emerged after the co-accused was discharged was to all intents and purposes the same as if the application to amend the indictment had been made earlier. During the ensuing six (6) weeks after the successful no-case submission, no reference was made to the co-accused. The evidence led did not alter the facts of the case or introduce new facts. Nor was the charge upon which the Applicant was arraigned altered. The Applicant's defence to that charge continued to be that of alibi; a defence which the jury rejected. The jury accepted the evidence which placed the Applicant on the scene where the deceased was assaulted and stabbed with a knife. They were also convinced that the Applicant, who was the only person at the scene in possession of a knife, killed the deceased.

[14] These circumstances can be distinguished from those in *R v O'Connor*.[6] In *O'Connor*, the managing agent of a company owned a fishing vessel that sank at sea killing all six crew members. He was charged on an indictment containing six counts alleging manslaughter of each of the crew members. The particulars of the offence alleged criminal negligence in respect of the sinking of the vessel and in respect of the adequacy of life-saving equipment on board. The trial judge early on invited the Crown to amend because if it could not prove that the inadequate supply of life-saving equipment caused the death of all the crew members, the jury might not be able to find the accused responsible for the death of any individual crew member. Eventually after a no-case submission on the 27th day of the trial, the judge gave leave to amend the indictment to include a seventh count alleging that the accused unlawfully killed a person unknown, a member of the crew by failing to take care of their safety. The accused was convicted on the new seventh count and acquitted of the other six counts. On appeal, the Court of Appeal held that where the effect of an amendment at the close of the prosecution case was to allow the Crown to shift the factual basis of

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[6] Ibid, *O'Connor* (n 3).

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its case significantly and to confront the appellant with a different and more difficult case, the judge should not allow such an amendment.

[15] The facts of the instant case are far removed from those in *O'Connor*. The factual basis of the case against the Applicant in this case did not change significantly after the amendment. His defence remained the same. It cannot be suggested that the Applicant was confronted with a case of a substantially different complexion post-amendment. The Court of Appeal therefore rightly rejected this aspect of the unfairness of the trial as a ground of appeal.

[16] The second strand of the unfairness ground was that after a juror had been discharged she was later seen on the steps of the court taking pictures with her former jury colleagues. Counsel was also apprehensive that during the eight (8) weeks she spent on the jury panel she may have contaminated the remaining jurors.

[17] The Court of Appeal rightly dismissed this ground as having no merit. As regards the allegation of contamination by association, the learned judge exercised his discretion to continue the trial. It is trite law that the exercise of that discretion is not lightly reviewable by an appellate court.

[18] The approach of the learned judge when confronted with the potential contamination of the jury betrays no error. The learned trial judge conducted an enquiry with respect to the remaining jurors as to their fitness to continue with the trial. With regard to the photo session with the discharged juror, the judge again held an enquiry in which the remaining members of the jury were again questioned individually in the absence of one another. Counsel for both the accused and the prosecution were given an opportunity to put questions to each juror and to make submissions to the court. Based on the enquiries made the judge held that he could 'find no bias, appearance of bias or prejudice or appearance of any prejudice.' The Court of Appeal rightly found no fault with the judge's finding. No cogent ground has been suggested to this Court for reversing the judge's determination of the facts before him or the exercise of his discretion. Special leave to appeal on this ground is also refused.

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The alleged excessive sentence

[19] Counsel for the Applicant sought to persuade this Court to grant special leave on the further ground that the Court of Appeal wrongly determined that the sentence of 15 years was excessive and unlawful. This submission rested on two pillars: (i) that the learned trial judge made no reference to the sentencing guidelines laid down by the Court of appeal in *R v Lorde*[7] and (ii) that the Court of Appeal failed to make reference to and apply this Court's decisions in *R v da Costa Hall*[8] and *Burton v R*[9] 'thus continuing the imposition of a custodial sentence from the date of sentence and not from the date of remand.'

General sentencing guidelines

[21] Before embarking on a direct rebuttal of these submissions, it would be convenient to spell out the appropriate sentencing guidelines.

[22] In all sentencing cases, the trial judge should advert to the principles set out in section 35, 36 and 37 of the Penal System Reform Act,[10] ("the Reform Act") before imposing a custodial sentence. The effect of these sections is that before imposing a custodial sentence the sentencing judge should consider whether the seriousness of the offence justifies such a sentence and in the case of a violent or sexual offence whether a custodial sentence is necessary to protect the public from serious harm from the offender. The sentencing judge would indicate his opinion in this regard, give the reasons for his opinion and explain to the offender why a custodial sentence is being imposed. Section 37 of the Reform Act requires the judge to consider a pre-sentence report: see *Gittens v R*.[11]

[23] In cases of manslaughter such as the present, the judge would apply the guidelines in *Lorde* where the Court of Appeal derived, from previous cases, four sentencing bands which could be used as a guide in arriving at a starting point. These bands were set out in the following terms:

> [35] 1. In a contested trial where death was caused by a firearm and the facts are on the borderline of murder with no mitigating

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[7] (2006) 73 WIR 28.
[8] (2011) 77 WIR 66; [2011] CCJ 6 (AJ).
[9] (2014) 84 WIR 84; [2014] CCJ 6 (AJ).
[10] Cap. 139 of the Laws of Barbados.
[11] (2010) 76 WIR 126; [2010] CCJ 1 (AJ).

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> features, the range of sentence should be 25 years and upwards, including, in a proper case, life imprisonment.
> 2. 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.
> 3. 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.
> 4. In 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.

[24] Having determined the appropriate starting point, the sentencing judge should then apply the decision of this Court in *da Costa Hall* which laid down the rule that a convicted person is *prima facie* entitled to full credit for the time spent on remand awaiting trial. As stated in *da Costa Hall*:

> [26] 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.

[25] In laying down this method of giving credit for time spent on remand in both *da Costa Hall* and later in *Burton*, the Court was conscious of the fact that this method would not permit time spent on remand to count for the purposes of remission under the Prison Rules. If time spent on remand were said to be included in the sentence pronounced remission would be calculated on the gross sentence pronounced, whereas by the Court's method, remission would operate only on the net sentence pronounced by the sentencing judge[12].

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[12] See *Burton v R* (n 9) at [31] – [32]

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The Appellant's sentencing submissions

[26] In the present application, the Applicant submitted that the court erred in 'continuing the imposition of a custodial sentence from the date of sentence and not from the date of remand.'

[27] In *da Costa Hall*, the Court emphasized that any sentence imposed was to run from the date of sentence.[13] Both the trial judge and the Court of Appeal seem to suggest that the sentencing judge should first determine the maximum sentence applicable to the offence, discount the time spent on remand and then consider any aggravating or mitigating factors.[14] Although the lower courts erred in their approach to the Applicant's sentence, even by the application of the correct test the sentence imposed will remain unchanged as we shall endeavor to demonstrate.

[28] However, the Court of Appeal correctly considered the starting point on the facts of this case to be band 3 of the *Lorde* guidelines (16-20 years). This band was previously treated as applicable by this Court to a stabbing death in the decision in *Burton.* Thus the Court rejects the Applicant's contention that the proper band is band 4 (8-12 years).

[29] The Court further considers that neither the trial judge nor the Court of Appeal erred in treating the Applicant's lack of remorse as an aggravating factor. This absence of contrition persisted even after his conviction notwithstanding his right to defend the charge and to appeal against conviction and sentence. He was at all times free to court the risk that upon conviction or dismissal of his appeal his lack of remorse would be considered an aggravating factor. It therefore does not avail the Applicant to seek to attack the decision of the lower courts on this basis.

[30] The Applicant also raised the question whether *da Costa Hall*, decided after his sentencing hearing but during the pendency of his appeal to the Court of Appeal, applied to his case. A similar point arose in *Burton* where Anderson JCCJ held that the judicial discretion to grant credit for time spent on remand was rooted

[13] Ibid, *Da Costa Hall* (n 8) at [29].
[14] Ibid, Court of Appeal decision (n 5) at [97]; see transcript of sentencing hearing at page 349 of the Record.

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in the common law and that *da Costa Hall* was simply declaratory of the common law. Further, once a higher court changed the law, the law as restated applied to all cases working their way through the judicial system: *Kleinwort Benson Ltd. v Lincoln City Council*.[15] It followed that *da Costa Hall* applied to the instant case.

[31] However, the Court was satisfied that even if *da Costa Hall* were properly applied to the facts of this case, the result would nonetheless be a sentence of 15 years on the basis that the agreed figure for the time spent on remand was six (6) years.

[32] The proper computation would be as follows:

If the starting point were 20 years, it would be reduced to 18 for mitigating factors such as age and lack of previous convictions. If the figure 18 were increased for aggravating factors such as lack of remorse to 21 and then the time spent on remand (agreed at 6 years) were then deducted the figure of 15 years would be arrived at.

[33] Accordingly, since the result would be the same if the correct method were applied, the Applicant has failed to demonstrate that the sentence was excessive, despite the fact that the method of calculation used by both the trial judge and the Court of Appeal was incorrect. In the circumstances, there has been no miscarriage of justice such as to justify the grant of special leave.

[34] The Applicant also contended that the lack of any express reference to the *Lorde* guidelines or to the provisions of the Reform Act indicated that the trial judge had failed to observe those judicial and statutory guidelines. We agree with the Court of Appeal that the trial record revealed that both counsel for the prosecution and the defence addressed the court on the *Lorde* guidelines and the provisions of the Reform Act. The sentencing judge prefaced his remarks by noting that he had listened carefully to their submissions, thereby implying that his decision was informed by a consideration of those guidelines and statutory provisions. This Court accepts the Court of Appeal's conclusion that the trial

[15] [1999] 2 AC 349; [1998] 4 All ER 513.

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judge considered all the relevant factors and applied the principles of judicial sentencing contained in the Reform Act and the *Lorde* guidelines. The Applicant is therefore not entitled to succeed on this ground.

Conclusion

[35] Where an applicant for special leave can point to no genuinely disputable point of law and invites this Court to reject the assessment of facts by the lower courts without pointing to a clear miscarriage of justice, the Court will not treat an application for special leave as arguable. In the result, the applications dated January 4, 2016 are dismissed. Having failed to meet the threshold for the grant of special leave, it follows as a matter of logic, that the application for leave to appeal as a poor person, would naturally fall away since Rule 10.17(1)(b) expressly requires there to be an "arguable ground of appeal".

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

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