**[2016] CCJ 24 (AJ)**

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

**ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS**

CCJ Application No. BBCR2016/003
BB Criminal Appeal No. 5 of 2012

**BETWEEN**

**YURI FIDEL AGARD** **APPLICANT**

**AND**

**THE QUEEN** **RESPONDENT**

**Before the Honourables** **Mr Justice Saunders**
**Mr Justice Anderson**
**Mme Justice Rajnauth-Lee**

**Appearances**
Ms. Kristin C. A. Turton and Mr. Devon A. Jones for the Applicant
Mr. Elwood Watts and Ms. Krystal C. Delaney for the Respondent

**JUDGMENT**
**of**
**The Honourable Justices Saunders, Anderson and Rajnauth-Lee**

**Delivered by**
**The Honourable Mr Justice Adrian Saunders**
**on the 22nd day of December, 2016**

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*The Applications before the Court*

[1] Yuri Fidel Agard was convicted of manslaughter in 2012 and sentenced to a term of imprisonment of 7 years, 247 days. He appealed his sentence alleging that it was excessive. The appeal was dismissed on 14th March, 2016. He then applied for a) special leave to appeal to this Court, b) permission to extend the time for seeking special leave, and c) leave to appeal as a poor person.

[2] Agard's conviction resulted from a physical altercation that occurred on 26th March, 2006 at the Le Club nightclub in Bridgetown. Two brothers, William Greene and Justin Greene, were killed during the fracas. Agard was charged with their murder and remanded in custody on 29th March, 2006. He spent 87 days on remand before he was granted bail on 23rd May, 2006. He was again remanded on 17th February, 2007 after failing to meet his bail conditions. He remained in custody until his trial five years later.

[3] At the trial Agard pleaded guilty to manslaughter. He was sentenced on 16th March, 2012. The trial judge, Mr Justice William Chandler, imposed the sentence in an impeccable manner, faithful to the directions given by this Court in *Romeo Da Costa Hall v The Queen*[1]. The judge took account of all the aggravating and mitigating factors, arrived at a notional sentence of 13 years and then continued:

> "Having arrived at this notional sentence of 13 years, the evidence is that you were remanded in custody for 1943 days up until today. This is five years, 118 days. Applying the principles in *Romeo Hall* and giving full discount for this period of remand of 1943 days, the sentence of this Court is seven years, 247 days in prison. This sentence will commence from today. That is the sentence of this Court."[2]

[1] [2010] CCJ 6 (AJ)
[2] See Transcript of Sentencing Proceedings, pg 20, lines 15-22

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[4] Although Agard's appeal to the Court of Appeal listed a number of grounds, on the day of the hearing before that court, he decided to proceed solely on the ground that the notional sentence of 13 years was excessive. In a brief oral judgment delivered on 14th March 2016 the Court of Appeal dismissed the appeal and endorsed the trial judge's sentence. If Agard desired to appeal further to this Court he had 42 days within which to file his Notice of Appeal. He neglected to file any appeal within that time. Instead, on 25th October, 2016, he applied for the time to be extended, and (if the extension were granted) for special leave to appeal and leave to appeal as a poor person.

[5] Having examined the proposed grounds of appeal filed, this Court was unclear about Agard's precise complaint. In an effort to gain some clarity and simultaneously to consider the pending applications, we convened a hearing of the matter on 14th December, 2016. The Department of Public Prosecutions was represented by counsel at the hearing. The Court had before it Agard's Notice of Application which was supported by affidavits sworn to by Agard himself and by his counsel, Ms. Kristin Turton; the transcript of the Court of Appeal hearing; a letter from the Superintendent of Prisons which indicated Agard's actual and earliest release dates; and an Affidavit in Opposition sworn by Ms Delaney, a senior Crown counsel in the Prosecutions Department, to which was annexed a transcript of the sentencing proceedings.

*The application for an extension of time*

[6] The two formidable hurdles Agard had to overcome were a) to satisfactorily excuse the lateness of his application and b) to demonstrate that he had an arguable case. On the first issue, the rules of Court make provisions for granting extensions of time[3], but there must be a cogent explanation for the failure to comply with the rules[4]. Several reasons were given here for the delay in filing the notice of appeal. It would appear that Agard's former attorney failed to contact him following the Court of Appeal decision in March and this led him to secure new legal representation. Agard met with

[3] The Caribbean Court of Justice (Appellate Jurisdiction) Rules 2015 rule 5.4
[4] Somrah v The Attorney General of Guyana [2009] CCJ 5 (AJ)

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his present attorney on 29th August, 2016 and a Legal Aid Certificate was issued on 31st August, 2016. Counsel for Agard attributed the further two month delay to "in depth research" on what turned out ultimately to be an abandoned ground of appeal. Counsel also cited, as excuses for the delay, counsel's illness and her heavy travel commitments.

[7] The Court was not satisfied that the above reasons demonstrated the degree of cogency that the rules require. But rather than dismiss the appeal on this ground without more, the Court went on to examine the substance of the application for permission to appeal.

*The application for special leave to appeal*

[8] The Court has repeatedly stated that in considering whether to grant special leave in a criminal matter, it has to be convinced that there is a possibility of a serious miscarriage of justice. At minimum, an arguable case to this effect must be made out. In making this determination, the Court principally looks at the proposed grounds of appeal against the background of the judgment of the Court of Appeal, the trial judge's summation and counsel's filed submissions[5].

[9] The problem in this matter was that it was difficult to discern what exactly was the substantive ground of appeal in Agard's Notice of Application. On reading the document, it first appeared as though he proposed to argue that the principles in *Hall* had not been applied to him. This submission was very easily contradicted by the explicit words of Justice Chandler quoted above at paragraph 3.

[10] It was then suggested that the Superintendent of Prisons was not calculating properly Agard's earliest possible release date. Agard had calculated that date to be 15th August 2016 while the Prison authorities had suggested that it was 18th December 2017. This matter too was clarified by the report obtained from the Superintendent. The report confirmed that, in keeping with the decision in *Hall*, the Superintendent had applied eligibility for remission only to the *actual* sentence and not to the entirety of the

[5] Vincent Leroy Edwards and Richard Orlando Haynes v The Queen [2015] CCJ 17 (AJ) para 3

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*notional* sentence of 13 years. Agard's earliest release date by simple arithmetical calculation was indeed 18th December, 2017.

[11] Finally, it appeared that it was counsel's intention to argue that *Hall* should be reconsidered. Agard wanted the Court to reverse the judgment of the majority in that decision and instead embrace the minority judgment of Justice Wit in *Hall*. Justice Wit's pragmatic view was that what is now regarded as the notional sentence should be treated as the actual sentence thus entitling a prisoner to be eligible for remission on the period spent on remand.

[12] The difficulty with this submission is that it was made and rejected by this Court in *Jeffrey Burton and Kemar Nurse v The Queen*[6] a mere two and a half years ago. At that point, the Court stated:

> "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."[7]

[13] The Court also added:

> "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…Moreover, such reversals are ideally undertaken by the Full

[6] [2014] CCJ 6 (AJ)
[7] Ibid para 32

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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."[8]

[14] The point is that for us again to accede to counsel's view on this matter we must be satisfied that there are indeed compelling reasons or exceptional circumstances to do so and counsel has failed to show either in this case. When pressed for some basis on which it might be said that this case fell into that category counsel cited the alleged prejudice that was being occasioned to Agard. It was contended that Agard would be prejudiced because he is obliged to spend more time in custody than he would or might have spent if remission is not applied to the time spent on remand. That circumstance can hardly qualify as being exceptional. It is a consequence that is the inexorable result of the decision in *Hall* to disallow remission on time spent on remand.

[15] Looking at this case in the round, the Court notes that Agard pleaded guilty to being responsible for the deaths of two persons. The trial judge's approach to the sentencing exercise was flawless. No one can fault the judge for the manner in which he exercised his discretion in relation to the sentencing issues in this matter. In all the circumstances, and in particular, given the lack of cogency in the reasons adduced for the failure to apply promptly for special leave to appeal, the Court had little hesitation in dismissing the applications before it.

/s/ A. Saunders

**The Hon Mr Justice A Saunders**

/s/ W. Anderson

**The Hon Mr Justice W Anderson**

/s/ M. Rajnauth-Lee

**The Hon Mme Justice M Rajnauth-Lee**

[8] Ibid para 33

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