BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 479 of 2013
BETWEEN:

JEFFREY ALDOPHUS GITTENS	**PLAINTIFF**
AND	
THE SUPERINTENDANT OF PRISONS	**FIRST DEFENDANT**
THE ATTORNEY GENERAL	**SECOND DEFENDANT**

Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court

2013: March 28, May 31, June 20
July 5

Mr. Ralph Thorne Q.C. with Ms. Mechelle Forde for the Claimant
Mr. Wayne Clarke with Ms. Deidre Gay-McKenna for the First and Second Defendants

<u>DECISION</u>

INTRODUCTION

[1] The writ of *habeas corpus ad subjiciendum* is an ancient concept yet of immeasurable worth. It allows for the release of persons from unlawful detention, thus protecting that most cherished of human values, personal liberty. Understandably, its scope of

application is wide, though not unlimited. Lawton L.J. expressed the position, graphically, in ***Linnet v. Coles*** [1987] Q.B. 555, at 561, where he stated that the writ is a 'most cherished sacred cow … but the law has never allowed it to graze in all legal pastures.'

[2] In the case before me, the Claimant, Jeffrey Gittens, ("Mr. Gittens") seeks to secure his release from Her Majesty's Prison at Dodds, St. Philip where he has been sentenced to a term of imprisonment. He has filed an application for leave to appeal against that sentence, the hearing of which is pending before the Court of Appeal. Nonetheless, he contends before me, that the term of imprisonment has expired and that his continued incarceration is illegal.

[3] Mr. Gittens relies on the vehicle of *habeas corpus* as his transport from confinement. His contention that the sentence has expired is pivoted on an appeal to the seminal decision of the Caribbean Court of Justice ("the CCJ") in ***Romeo Da Costa Hall v R*** **[2011] CCJ 6**. In that case, the CCJ held that, as a general rule, when being sentenced, a convicted person should be given full credit for time spent on remand. Mr. Gittens' case is that when account is taken of that decision and his entitlement to a remission, the sentence has expired. However, I hold the view that a determination of Mr. Gittens' status as a convicted person who has a pending application for leave to appeal, is equally pivotal to the outcome of this case.

THE APPLICATION

[4] I will give further particulars of the application. The First Defendant is the Superintendent of Prisons. The Second Defendant is the Attorney General of Barbados. On 22 March 2013, Mr. Gittens' Counsel, Mr. Ralph Thorne Q.C. and Ms. Michelle Forde, filed an application for the issue of a writ of *habeas corpus* pursuant to ***Rule 57.3 (1)(a)*** of th***e Supreme Court (Civil Procedure) Rules 2008 ("the CPR")***. They claim that Mr. Gittens is detained in the defendants' custody. They sought to have them produce him to the High Court and required them to be prepared to state the day and cause of his detention, so that the Court may determine its legality. The application is supported by the affidavit of Mr. Gittens, sworn on 13 March 2013 and filed on 22 March 2013.

[5] The matter came before me on 28 March 2013. I gave directions for the hearing since notice of the application had been given to the Respondents. Pursuant to those directions, on 24 April 2013, the Defendants filed an affidavit in response to that of Mr. Gittens. That affidavit was sworn by Mr. Bentley Boucher, a senior Prison Officer with responsibility for the reception of prisoners.

[6] The Defendants assert that Mr. Gittens' detention is lawful. It is a matter of record that he was sentenced by the High Court to a ten year term of imprisonment on 25 January 2011 which was ordered to commence on that date.

BACKGROUND

[7] The history of Mr. Gittens' incarceration and the relating court proceedings is important for an understanding of his claim. He was first remanded to prison on 18 October 2004 for the capital offence of murder with respect to a homicide that occurred on 9 October 2004. He was convicted of that offence on 28 June 2007 and the trial judge imposed the mandatory death sentence. On 3 April 2009, the Court of Appeal set aside his conviction, substituted a verdict of manslaughter and imposed a sentence of 20 years imprisonment to commence from the date of his conviction.

[8] On 11 February 2010, the CCJ quashed Mr. Gittens' sentence and remitted the matter to the trial judge for a sentencing hearing. On 25 January 2011, the trial judge imposed the sentence of 10 years to commence from that date. Mr. Gittens filed a notice of application for leave to appeal against that sentence. He did so on 28 January 2011. The sole ground of the application is that the sentence is excessive but he has indicated on the application form that further grounds will be added. The appeal is pending before the Court of Appeal. As I understand it, it is scheduled for hearing on 11 July 2013.

[9] In sentencing Mr. Gittens, the trial judge considered a starting point of 17 years to be appropriate before having regard to the aggravating and mitigating factors. He was of the view, after weighing those factors, that a sentence of 15 years would have been adequate. He then went on to discuss the issue of a credit for the time spent on remand and pending the appeals. He noted that Mr. Gittens had been on remand since 2004 and formed the opinion that he should be given a discount of four years on this account. It appears that Mr. Gittens benefited from a further deduction of one year that is unexplained in the transcript but that is immaterial.

[10] In allowing Mr. Gittens some credit for the time spent on remand, it appears that the learned trial judge followed the law as it was understood to be in this jurisdiction at the date the sentence was imposed. However, two months and twenty one days after the sentencing, the CCJ gave its landmark decision which denounced that approach and mandated a different one.

[11] The decision in ***Romeo Hall*** was delivered on 15 April 2011. It has been explained, in some degree, by Peter Williams J.A. at **paragraphs 84 to 86** of his judgment in ***R v Richard Leon Hurley*****, DPP's Reference No. 2 of 2010 (date of decision 8 July 2011)**. He stated the ***ratio*** of the case, at **paragraph 85**, in this way:

> (i) upon sentencing, full credit should be given for any time spent in custody prior to sentencing (paragraphs [17], [18], [29] and [30] of the judgment);
>
> (ii) the effect of the credit is to reduce "the appropriate sentence" (paragraph [26]) or "the notional term" of imprisonment (paragraph [29]) i.e. the term of imprisonment that the judge would have imposed but for the credit; and
>
> (iii) the sentence imposed is the amount of time the offender is ordered to spend in prison from the date of imposition of the sentence **after** full credit has been given for the pre-sentence time spent in prison (paragraphs [23], [26] and [29]).

[12] I will merely add the rider that the CCJ indicated that the rule mentioned by Peter Williams J.A. at (i) above is a primary rule but that a sentencing judge has a residual discretion to depart from it in appropriate circumstances. Nelson JCCJ, delivering the judgment of the majority, provided a non-exhaustive list of such circumstances, at paragraph 18. I need not reproduce it here.

[13] I shall return to ***Romeo Hall***. At this stage, I need to set out the rule relating to the remitting of sentences in order to make that aspect of Mr. Gittens' claim readily comprehensible. ***Rule 41(1)*** of the ***Prison Rules, 1974*** (**"the *Prison Rules*"**) provides that a prisoner who is serving a period of imprisonment of more than one month, "by good conduct and industry", may become eligible for discharge "when a portion of his sentence not exceeding one-fourth of the whole sentence has yet to run." Simply put, a prisoner may gain a remission of up to one-quarter of his sentence, on account of his good behaviour and industry.

THE BASIS OF THE UNLAWFUL DETENTION CLAIM

[14] I turn to the basis on which Mr. Gittens claims that his continued incarceration is unlawful. He contends that he should have been released from prison "about April 2012". He demonstrates how he has arrived at this conclusion at paragraphs 7 and 8 of his affidavit where he states:

> 7. "I am advised and verily believe that I ought to benefit from a ruling of the Caribbean Court of Justice that my time on remand ought to be taken into account in the calculation of the time that I have been sentenced to serve in prison and that in the event that the law so favours me that I ought to have been released from prison on or about April, 2012 calculated as follows:
>
> Sentence of ten (10) years = 90 months
>
> 90 months from October 2004 = April 2012
>
> 8. That I have calculated the foregoing time on the basis that one year in prison is calculated ordinarily at nine (9) calendar months on the basis of demonstrated good behaviour and that I am a beneficiary of the said system of good behaviour."

THE EVIDENCE

[15] Mr. Gittens' evidence can be briefly stated. He deposed that he is a 41 year old Barbadian citizen. He narrated the history of his criminal proceedings. He deposed

further that other prison inmates have benefitted and continue to benefit from the ***Romeo Hall*** decision "on the basis of the system that takes time spent on remand into account in the calculation of the sentence." He stated that he believes he is being treated unequally before the law.

[16] Mr. Boucher's affidavit states the year of the sentencing as 2012. This is an error. The parties accept that the date is 25 January 2011. He deposed that the sentence was expressed to commence from the date of imposition and that, when an inmate is sentenced, the term is calculated from the date the sentence is imposed, unless the court specifies otherwise.

[17] Mr. Boucher's further evidence is that "a prisoner's estimated date of release is calculated on the basis of twelve (12) months with the eligibility of earning remission for good behaviour." He deposed that Mr. Gittens' behaviour is such that "had he been serving a sentence he would have earned remission for good behaviour."

[18] At paragraph 11 of his affidavit, Mr. Boucher deposed that whether or not any prisoner should benefit from the decision in ***Romeo Hall*** is "entirely" up to the sentencing court. I understood this to mean that the prison authorities do not, in any way, modify sentences imposed by the court on the basis of the CCJ's decision.

[19] At the start of the hearing, Mr. Thorne expressed a desire to cross-examine Mr. Boucher. Ultimately, however, the parties agreed that Counsel for the defendants, Mr. Wayne Clarke would provide further affidavit evidence addressing the specific questions Mr. Thorne intended to ask. On the final day of the hearing, Mr. Clarke produced a memorandum signed by the Superintendent of Prisons, which he, Mr. Clarke, represented to contain the answers to the questions raised by Mr. Thorne. Mr. Clarke gave an undertaking to file the affidavit and the parties agreed to proceed on the basis of the content of the memorandum.

[20] The Superintendent indicated that other inmates have benefitted from the decision in ***Romeo Hall*** "on the instructions of the Law Courts". He emphasised that the courts determine who would benefit from the ruling. He explained that, if it is so minded, the court would request a status report on the time spent in prison on a particular charge. He explained ***Rule 41(1)*** of the ***Prison Rules*** and indicated that prisoners on remand are not monitored for good conduct or industry since that rule does not provide for the remittance

of sentences with respect to prisoners on remand. He stated that on 25 March 2011, the prison received documentation from the Supreme Court which directed that Mr. Gittens should be treated as a prisoner awaiting trial since he had appealed to that court.

SUBMISSIONS AND DISCUSSION

[21] Both parties filed written submissions. At the hearing, I asked Counsel to address the question of the status of a prisoner pending the hearing of an appeal against sentence. I queried whether the answer to that question might not be determinative of the issue as to whether Mr. Gittens' sentence has expired and I invited Counsel to file and exchange further submissions on this question. However, I have received nothing from them in this regard. I will review their submissions before returning to this critical question.

[22] The submissions and related discussion can be conveniently subsumed under the following subheads: (1) the appropriateness of habeas corpus in the circumstances of this case; (2) the retrospective effect of ***Romeo Hall;*** (3) the applicability of ***Romeo Hall***; and (4) the status of the sentence.

The Appropriateness of Habeas Corpus

[23] I will start by examining the circumstances in which a court will exercise the jurisdiction of *habeas corpus* with respect to a sentence imposed in criminal proceedings. In this respect, I detected no divide between Mr. Thorne and Mr. Clarke as to the relevant principles.

[24] Mr. Thorne submitted that Mr. Gittens is not challenging the correctness of the sentence imposed by the trial judge, before this Court. He maintained that his client's contention is that the sentence has expired and that, in such a circumstance, *habeas corpus* is the appropriate mechanism by which to secure his immediate release.

[25] Mr. Clarke, who appeared for the Defendants with Ms. Deidre Gay Mckenna, submitted that *habeas corpus* is not available where a statute confers jurisdiction on an appellate court to correct the errors of a lower court. He submitted further that a court should not allow *habeas corpus* proceedings to be used as a means of circumventing the appeal process. Counsel cited passages from ***R v. Ross*** **2011 CarswellSask 335**; ***R v Pringle*** **[1972] S.C.R. 871;** and ***R v Gamble*** **[1988] 2 S.C.R. 595** in support of this submission.

[26] In ***Ross***, at paragraph 5, Jackson J.A. reproduced paragraph 44 of the decision of the Supreme Court of Canada in ***May v Ferndale Institution,*** **[2005] 3 S.C.R.**

809, **2005 SCC 82**. In that paragraph, the court identified applications in criminal law where a statutory appellate process exists to correct errors, as one of the instances in which a provincial court might decline to exercise its *habeas corpus* jurisdiction.

[27] At **paragraphs 33 to 43** of ***May***, the court discussed the emergence of a limited judicial discretion to decline the exercise of its *habeas corpus* jurisdiction. At **paragraphs 35** to **37**, the court considered the limitations in criminal law. Lebel and Fish JJ, delivering the opinion of the court, stated:

> 35. Courts have sometimes refused to grant relief in the form of *habeas corpus* because an appeal or another statutory route to a court was thought to be more appropriate. The obvious policy reason behind this exception is the need to restrict the growth of collateral methods of attacking convictions or other deprivations of liberty … So far, these situations have primarily arisen in two different contexts.
>
> 36. Strictly speaking, in the criminal context, *habeas corpus* cannot be used to challenge the legality of a conviction. The remedy of *habeas corpus* is not a substitute for the exercise by prisoners of their right of appeal …
>
> 37. Our Court reaffirmed this in *R. v. Gamble*, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595.

The court concluded at paragraph 44:

> 44. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only

> in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (i.e. *Gamble*).

[28] In ***Gamble,*** Wilson J., delivering the decision of the majority, stated at **paragraphs 56** and **57**:

> 56. The principle objection to the availability of *habeas corpus* in this case is based, I believe, on a misunderstanding of the appellant's claim. Watt J. concluded at trial that to entertain the appellant's claim "would be to transform the present proceedings by way of *habeas corpus* from a jurisdictional inquiry to an appeal on the merits" of both the conviction and the sentence. If this were indeed the case, the appellant would most likely be denied relief by way of *habeas corpus* because of this court's decisions not to allow *habeas corpus* to be used to circumvent the ordinary appeal procedures established in the Criminal Code: …
>
> 57. The respondent also argued that the review sought amounted to a form of collateral attack on the sentence which is impermissible under this court's decision in *Wilson v R* [1983] 2 S.C.R. 594…

[29] These passages demonstrate that while there is a role for *habeas corpus* in criminal law, a court will decline jurisdiction where an appellate process is available and appropriate to the circumstances. With copious reference to authorities, Farbey and Sharpe summarise the legal position accurately in ***The Law of Habeas Corpus***. At **page 165**, they identify the types of cases in which *habeas corpus* may be available in relation to criminal sentences. They state:

> While the English Courts are hesitant to allow convicted prisoners to apply for habeas corpus, there can be little doubt that it is available where the applicant alleges that he or she is being detained longer than is legally warranted by a sentence. It may be contended, for example, that a series of sentences was intended to run concurrently rather than consecutively; that the prison authorities have incorrectly interpreted the legal effect of the sentence; that the prisoner has improperly been denied statutory remission, is entitled to mandatory release on parole, or simply that the sentence has expired.

[30] At **page 166**, the authors point out that this category of cases must be distinguished from those in which a convicted prisoner is questioning the legality of the sentence itself. In such cases, courts have generally disallowed prisoners from having their sentences reviewed on *habeas corpus*.

[31] Consequently, the issue as to whether the Court should exercise its *habeas corpus* jurisdiction, in this case, is dependent on substance of Mr. Gittens' case. He contends that his sentence has expired. If this is so, he is entitled to be released without delay and *habeas corpus* would be an appropriate means by which to secure that result.

RETROACTIVE EFFECT OF ROMEO HALL

[32] Hence, I turn to Mr. Gittens' expiry argument. His contention is that when account is taken of ***Romeo Hall*** and his entitlement to remission, the sentence has expired. Counsel expended much time and energy debating whether the principle expressed in ***Romeo Hall*** could apply to Mr. Gittens. It was a debate as to whether the decision has retrospective or prospective effect.

[33] Mr. Thorne submitted that ***Romeo Hall*** applies retrospectively and that the decision applies to Mr. Gittens, though his offence and sentencing predated it. Counsel submitted further that the CCJ applied the law as expressed in ***Romeo Hall*** in determining the appropriate sentence in that case, though the date of the offence and that of sentencing would have preceded that decision. Consequently, he urged, the ***Romeo Hall*** principle took effect from 22 January 2005, the date of Hall's offence, or, 27 May 2008, the date on which Hall was sentenced by the trial court.

[34] With respect to the date of the offence, Counsel urged that a sentence must pertain to the penalty which is legally permissible at that date. As to the date of sentencing, he submitted that in substituting the new sentence, the CCJ exercised its powers under ***section 14*** of the ***Criminal Appeal Act, Cap. 113A***. That provision empowers an appellate court to quash a sentence which it thinks ought not to have been passed at the trial and substitute "such other sentence authorised by law…as it thinks ought to have been passed." Thus, Mr. Thorne submitted that the application by the CCJ of the law pronounced in ***Romeo Hall*** in determining the sentence in that case, is indicative of the retrospective effect of the decision. Mr. Thorne also referred to ***section 18(4)*** of the ***Constitution of Barbados***. He submitted that the provision permits the imposition of a penalty that is less severe in degree or nature than the most severe penalty that might have been imposed for the offence, at the time when it was committed.

[35] Mr. Clarke submitted that eligibility for full credit for time spent on remand applies only to persons sentenced after the date of the decision in ***Romeo Hall.*** Hence, he urged, Mr. Gittens could not benefit from the decision. He cited the cases of ***R v Valentas et al*** **Cr. App. R. (S) 73**; ***R v Christiana Boakye et al*** **[2013] 1 Cr. App. R. (S) 2**; and ***R v Graham*** **[1999] 2 Cr. App. R. (S) 312** in support of his submission that changes in sentencing law do not have retrospective effect.

[36] I did not find these cases to be useful. They relate to sentencing guidelines issued by the Sentencing Council in the United Kingdom, statutory alterations in minimum or maximum sentences and changes in sentencing tariffs. None of them concerned the operative date of a change in sentencing law pronounced by a court in exercising its common law powers, as was the case in ***Romeo Hall***.

[37] I agree with Mr. Thorne that ***Romeo Hall*** applies retrospectively and must be considered to have been the law at the date of Mr. Gittens' sentencing. However, I do not agree that the date of the appellant's offence or sentencing is relevant. Jurisprudentially, the principle in ***Romeo Hall*** has always been the law of this country.

[38] ***Romeo Hall*** is a precedent from this country's highest court. As a general rule, judicial decisions that set a precedent have retrospective effect. In ***Birmingham Corporation v West Midland Baptist (Trust) Association*** **(1969) 3 All ER 172,** at **page 180 (letter B),** Lord Reid stated: "[w]e cannot say that the law was one thing yesterday but is to be

something different tomorrow. If we decide that the rule…is wrong we must decide that it always has been wrong…" More recently, in ***R v Governor of Brockhill Prison, Ex P Evans (No. 2)*** **[2001] 2 AC 19**, Lord Hope expressed the position tersely, at **page 36 (letter G)**. He stated that "[t]he working assumption is that where previous authorities are overruled decisions to that effect operate retrospectively".

[39] In ***A v The Governor of Arbour Hill*** **Prison [2006] IECS 45; [2006] 4 IR 99,** Murray C.J. addressed the point more elaborately. He stated:

> Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same wrong or a wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.

[40] In ***Hurley***, the Court of Appeal applied ***Romeo Hall*** to circumstances arising before that decision. Mr. Hurley committed a homicide sometime in February 2006 and had been sentenced for manslaughter on 23 March 2010. Indeed, ***Romeo Hall*** was decided after the arguments in ***Hurley*** had been presented before the Court of Appeal. Nonetheless, I am satisfied that ***Romeo Hall*** has retrospective effect. It does not follow, however, that I can apply ***Romeo Hall*** in this case or that the decision has the effect contended for by Mr. Thorne. I shall move on to discuss those issues in considering whether Mr. Gittens' claim that his sentence has expired can be sustained.

HAS THE SENTENCE EXPIRED?

[41] Despite the force with which Mr. Thorne advanced his arguments, I am not persuaded that it is open to this Court to apply ***Romeo Hall*** or to find that Mr. Gittens' sentence has expired.

[42] In response to a question from the Court, Mr. Thorne indicated that Mr. Gittens does not contend that the prison authorities can make any adjustment to the sentence or its court-ordered commencement date, on the basis that it is applying ***Romeo Hall.*** Unlike the issue of remission for good behaviour and industry, the application of the full credit rule is not an administrative function. It is a judicial function.

[43] Mr. Thorne submitted that it is for this Court to recognise that Mr. Gittens is entitled to full credit for his period on remand and, in recognising that principle, to hold that Mr. Gittens' sentence commenced from the date of remand. This submission meets a number of obstacles.

[44] The application of the principle in ***Romeo Hall*** is, first and foremost, if not exclusively, the function of a sentencing court. ***Romeo Hall*** was an appeal against sentence. The CCJ framed the issue in the case at **paragraph 1** in this way:

> The present appeal raises an important issue as to how a sentencing court should treat time 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.

[45] It seems to me that, however framed, any submission that rests on a premise that a sentencing court has not applied ***Romeo Hall*** invites a review of the legality of the sentence. The ***Criminal Appeal Act, Cap. 113A*** provides an appellate process for convicted persons. ***Section 3(3)(c)*** permits such persons, with the leave of the Court of Appeal, to appeal against a sentence that is not specifically fixed by law. Indeed, Mr. Gittens has taken steps in this regard. He cannot question the legality of the sentence in these proceedings.

[46] But, Mr. Thorne maintained that Mr. Gittens is not challenging the legality of the sentence. I think he is. Nonetheless, I will consider Mr. Thorne's contention that, if account is taken of the principle in ***Romeo Hall*** and Mr. Gittens' entitlement to

remission, the sentence has expired. I have grave difficulty with this submission for a number of reasons.

[47] Firstly, Counsel ignores the fact that, in arriving at the sentence, the trial judge allowed four years credit for the period Mr. Gittens spent on remand. Hence, if I hold that the sentence commenced from the date of remand, I would be affording Mr. Gittens a benefit beyond that permitted by ***Romeo Hall***. If the ten year sentence were to be backdated, it would have to commence on 18 October 2008, four years after the remand date. In such an event, the sentence would not yet have expired.

[48] More fundamentally, ***Romeo Hall*** does not require that a sentence commence from the date of remand. Indeed, that approach was expressly rejected by the CCJ. That court considered the manner in which credit should be given at **paragraphs 21 to 26**. It identified three possible approaches: (i) "to backdate the commencement of the sentence to the date on which the offender was taken into custody"; (2) "to count time in custody as time already served under the sentence"; (3) "to reduce the term of the sentence". The majority determined that only the third approach was appropriate. The court opined that to backdate the sentence required the sanction of statute which, it held, is not provided for under the laws of this country. In the guidelines set out at paragraph 26, the court stipulated that, at the end of the process, the sentencing court must impose a term of imprisonment which takes account of the credit for time on remand.

[49] Hence, it is not open to me to hold that, based on ***Romeo Hall***, Mr. Gittens' sentence commenced on the date of remand. To do so, would be to display a heretical approach characterised by the utmost disregard for a precedent of binding force. It would require me to vary the order of the trial judge, as to the date of the commencement of the sentence, and to be in conflict with the decision in ***Romeo Hall***. I can do neither without falling into error.

THE STATUS OF A CONVICTED PERSON PENDING APPEAL

[50] There is an even more fundamental reason why Mr. Gittens' claim that the sentence has expired is unsustainable. Having filed an application for leave to appeal against the sentence, he has not been serving the sentence during the period that the application remains unheard. I base this conclusion on a consideration of the provisions set out below.

[51] Mr. Gittens' appeal to the Court of Appeal is one for leave to appeal against sentence, as provided for under ***section 3(1)*** of the ***Criminal Appeal Act. Section 2*** of the ***Criminal Appeal Act*** defines an "appellant" as including a person who has given notice of application for leave to appeal. Therefore, Mr. Gittens is an appellant for the purposes of that statute.

[52] **Section 21(2)** provides that, if it thinks fit, the Court of Appeal may admit an appellant to bail, pending the determination of his appeal. The section stipulates that:

> [a]n appellant who is not admitted to bail shall, pending the determination of his appeal, be treated **as a prisoner awaiting trial** [emphasis mine].

[53] ***Rules 114 to 120*** of the ***Prison Rules*** prescribe a special regime for the treatment of convicted persons who appeal against conviction or sentence. ***Rule 115*** provides that ***Rules 99 to 112*** which relate to the treatment of untried prisoners, should apply to convicted appellants, with necessary modifications and adaptations**.** ***Rule 119*** provides for the application of the general prison rules to such prisoners but to the extent only that they are not inconsistent with rules ***114 to 120***.

[54] ***Section 33*** of the ***Criminal Appeal Act*** is also germane. It provides as follows:

> 33(1) The time during which an appellant pending the determination of his appeal is not detained in custody does not count as part of any term of imprisonment under his sentence.
>
> (2) Subject to subsection (3), 6 weeks of the time during which any appellant is in custody pending the determination of his appeal or the whole of that time if less than six weeks does not count as part of any term of imprisonment under his sentence.
>
> (3) Subsection (2) does not apply where leave is granted or any certificate mentioned in subsection (2) of section 3 has been given for the purpose of the appeal.

(4) In any other case, the Court may direct that no part of the time referred to in subsection (2) or such part thereof as that Court thinks fit, whether shorter or longer than 6 weeks, shall be disregarded as mentioned in that subsection.

(5) Subject to subsections (1) to (4), the term of any sentence passed by the Court in substitution for a sentence passed on the appellant in the proceedings from which the appeal is brought begins, unless that Court otherwise directs, to run from the time when it would have begun to run if the sentence were passed in those proceedings; and references in this section to any sentence to which the appellant is for the time being subject shall be construed accordingly.

[55] The status of a prisoner pending appeal depends on the construction of these provisions**.** ***Sections 21*** and ***33*** of the ***Criminal Appeal Act*** and ***Rules 114*** to ***120*** of the ***Prison Rules*** provide a scheme for the treatment of convicted persons who appeal or apply for leave to appeal but are not released on bail pending the hearing of the appeal. Such a prisoner must be treated as a prisoner awaiting trial (***section 21(2)*** of the ***Criminal Appeal Act***). The application of the general prison rules as prescribed in the ***Prison Rules*** is subject to a special regime that applies to such prisoners (***Rules 114*** to ***120 of the Prison Rules***). The appellate court has a discretion to determine the date from which the appellant's sentence should run (***section 33(4) and (5)*** of the ***Criminal Appeal Act***).

[56] Similar schemes have been considered in the cases of ***R v Belgrave (No 2)*** **(1972) 19 WIR 14**; ***Jagessar et al v The State (No. 2)*** **(1990) 41 WIR 373**; and ***Tiwari (Leslie) v The State (2002)*** **61 WIR 452**. In ***Belgrave*** the Barbados Court of Appeal considered the provisions of ***regulations 26(1) and 27(2)*** of the ***Federal Supreme Court Regulations 1958*** and ***Rules 340 to 354*** of ***Glendairy Prison Rules***, ***1936. Rule 26(1)*** was similar in terms to ***section 21(2)*** of the ***Criminal Appeal Act***. However, in that case, the court made no determination as to the status of a prisoner pending appeal.

[57] In ***Jagessar***, the Court of Appeal of Trinidad and Tobago considered the meaning and effect of section 48(1) of the Supreme Court of Judicature Act of Trinidad and Tobago,

which is in ***pari materia*** with **section 21(2)** of the ***Criminal Appeal Act.*** Rules 297 to 302 of the Prison Rules of Trinidad and Tobago prescribed the manner in which convicted prisoners awaiting appeal were to be treated. Section 49(1) of the Supreme Court of Judicature Act dealt with computation and commencement of sentence. It read:

> The time during which an appellant, pending the determination of his appeal, is admitted to bail, and **subject to any directions which the Court of Appeal may give to the contrary on any appeal**, the time during which the appellant, if in custody, is to be treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment, under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Appeal, it shall, subject to any directions which may be given by the Court of Appeal, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and if not in custody, as from the day on which he is received into prison under the sentence. [Emphasis mine].

[58] This provision is not identical to ***section 33(5)*** of the ***Criminal Appeal Act.*** However, like the latter provision, it gives the appellant court discretion to determine the time from which a sentence would run. The court of appeal of Trinidad and Tobago considered that provision and section 48(1) in holding that a convicted person was not serving his sentence during such period as he was awaiting the hearing of an appeal. It stated at **page 384**, **letters (d) to (e)**:

> We take the view that the case of Mr Jaggessar and Mr Nandal has had to be looked at against the background of both sections 48(1) and 49(1) of the Act and the Prison Rules. Since at the time when their appeals were determined they were persons who (up to then) had fallen within section 48(1) and further since they were appellants for leave (see sections 43(b) and 50) they became (to all intents and purposes) persons in custody who were specially treated as appellants for the purpose of the sentence.

> Moreover, since up to that time, they were in custody pending the determination of their appeals and were up to then being treated as prisoners awaiting trial (section 48(1) they could not, in our view, be said to be serving the sentence during this period.

[59] Later, at **page 386, letters (a) to (d)**, the court stated with respect to section 48(1):

> It seems clear from the provisions of section 48(1), the Prison Rules and the affidavit of Mr. Hercules, the Commissioner of Prisons, that both Mr. Jaggesar and Mr. Nandhal are persons in custody who have not commenced their sentence. In other words, having appealed on the very day that they were convicted…they were treated from that day (and up to the present time have been treated) as 'prisoners awaiting trial's since they have not served a single day of their prison term to date;…

[60] In ***Tiwari***, the Privy Council opined, at paragraph 42 that the Trinidad Court of Appeal should, generally, in the exercise of its discretion, direct that time spent pending an appeal should count as part of a sentence. However, the court said nothing to cast any doubt on the correctness of the conclusion that had been drawn by the Court of Appeal as to the status of the prisoner pending appeal. The Board remitted the question of the exercise of discretion under section 49(1) to the Court of appeal of Trinidad and Tobago for consideration. It later reviewed that court's exercise of the discretion in the conjoint appeals of ***Ali v The State*** and ***Tiwari v The State*** **[2006] 1 WLR 269**.

[61] I return to the case before me. Mr. Gittens filed an application for leave to appeal on 28 January 2011, three days after the sentence was pronounced. ***Section 21(1)*** of the ***Criminal Appeal Act*** mandates that, pending the determination of his appeal, he be treated as a prisoner awaiting trial. In that regard, ***the Prison Rules*** prescribe a regime that is different in respects from that prescribed for persons serving a sentence. The Superintendent of Prisons' statements about remission suggest that Mr. Gittens is being treated as a prisoner on remand. I draw a similar inference from Mr. Boucher's statement that Mr. Gittens would have earned remission for good behaviour "had he been serving a sentence." The clear implication from the Prison Officer is that he is not. Indeed, the

prison authorities received a notice from the Supreme Court on 25 March 2011 that he should be treated as a prisoner awaiting trial.

[62] This analysis demonstrates that, far from having served the period of imprisonment imposed by the trial judge, Mr. Gittens is considered a prisoner awaiting trial, pending the determination of his application for leave to appeal. He cannot be said to be serving a sentence during this period. That being so, the sentence could not have expired.

REMISSION OF SENTENCE

[63] In view of the above, Mr. Gittens' claim to an entitlement of thirty months remission on his sentence cannot be sustained. ***Rule 41(1)*** of the ***Prison Rules*** was correctly explained by the Superintendent of Prisons. The rule applies to a prisoner who is serving a sentence. Mr. Gittens is not serving a sentence and, therefore, could not have qualified for remission.

[64] With respect to this aspect of the case, Mr. Clarke referred me to a passage contained at **paragraph 28** of ***Romeo Hall*** and submitted that Mr. Gittens had taken an incorrect approach to the issue. That passage reads:

> 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.

[65] I do not find it necessary to consider this submission but it does not appear to me that Mr. Gittens adopted the approach identified by Counsel. Despite what may be suggested by the manner in which he set out his computation, it seems to me that Mr. Gittens allowed for a sentence of ten years with credit for full remission. He did not contend that his years on remand were greater on account of a "grossing up" of prison years to calendar years. That, however, is a moot point.

DISPOSAL

[66] The sentence imposed by the trial judge on 25 June 2011 has not expired. In the circumstance, Mr. Gittens is not entitled to be released by this Court by means of *habeas corpus* procedure. It is open to him to question the legality of his sentence on appeal and he has done so. It seems to me that, in essence, this application can be conceived as such a challenge. He cannot circumvent that process by this application. Review of the legality of a sentence is not a pasture in which the cherished sacred cow - *habeas corpus* - is allowed to graze.

[67] For the foregoing reasons, the application fails. Having heard Counsel in this respect, I make no order as to costs.

Olson DeC. Alleyne

Judge of the High Court