BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 7 of 2008

BETWEEN:

TERRY WAYNE MOORE **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sherman R. Moore, CHB., The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal

2014: March 5

2014: March 20

Mr. Andrew Pilgrim, Q.C. and Mrs. Kristin Turton for the Appellant

Mr. Elwood Watts for the Respondent

DECISION

Introduction:

[1] **MOORE JA:** On 4 March 2008 the appellant pleaded guilty to the following 6 offences: importation of, possession of and trafficking in a controlled drug, namely 61 kilogrammes of cocaine, contrary to the **Drug Abuse (Prevention and Control) Act, Cap. 131;** possession of two firearms, namely, one .357 Magnum revolver and one .23 Glock .40 calibre pistol; and possession of 135 rounds of ammunition, contrary to the **Firearms Act, Cap. 179.**

[2] For possession of cocaine he was sentenced to 11 years imprisonment and for possession of the two firearms he was sentenced to 6 years imprisonment, the sentences to run concurrently.

Facts

[3] On Tuesday, 9th May 2006, the accused arrived at Port St. Charles on a yacht called "Leila". He booked a room at the Colony Club Hotel in St. James but did not take it up as he decided to stay on board his yacht. The Immigration Officer, Mrs. Natalie Scott, granted him permission to enter the Island at Port St. Charles Marina and he sailed the yacht down to the Heron Bay Beach in St. James.

On 10 May 2006, the following day, about 6:00 p.m. Station Sergeant Dwayne Griffith, Constable Blunt and other police officers were on duty along Heron Bay Beach. Pursuant to certain information, they saw the accused and another man carrying a very large plastic bag and heading out to sea in a dinghy.

The officers approached the accused, spoke to him and after they had spoken to him, they checked the plastic bag the accused was carrying and it was found to contain BDS. $57,300.00.

The accused was invited to the police station, and he voluntarily accompanied the officers. At the police station he was interviewed and the police searched the yacht on the 10th, but nothing was found on the yacht that day.

After the police had conducted an interview with the accused at the police station, the accused then voluntarily told the police officers that he had some drugs on the boat, but he did not wish the police to tear up his yacht and he would hand the drugs over to them. Whilst on board the yacht, the accused removed a section of the floor, took out the septic tank of the yacht and handed over to the police 61 packages of a white

substance. Those packages contained cocaine, which weighed 61 kilograms.

He also handed over to the police $19,360.00 United States currency in cash of which they then took possession. He told Sergeant Dwayne Griffith that he had the cocaine and he also had some guns. He handed over the two guns, a .357 Magnum revolver and a .23 Glock .40 calibre pistol and 135 rounds of ammunition.

The Appeal

[3] The appellant has appealed to this Court on the sole ground that the sentence imposed for the possession of cocaine was excessive. Counsel's first complaint on that ground is that "The sentence of the appellant ought to be reduced having regard to the fact that he suffers from skin cancer and is unable to access the necessary treatment while incarcerated." Counsel referred to **Walter Prescod v R Criminal Appeal No. 32 of 2001 (unreported) (Prescod)** in which one of the mitigating factors listed is "the mental and physical health of the offender".

[4] **Prescod** contains no guiding principles with respect to ill-health as a mitigating factor in the sentencing process. Paragraph 23 of the decision in that case merely states, inter alia:

> "[23] At the time of sentence a court must examine the total circumstances of the case and weigh the aggravating and mitigating factors respectively.
>
> **...** …
>
> Mitigating factors include:
>
> The mental or physical health of the offender;
>
> … ...."

[5] However, guidance on the relevance of ill-health in the determination of sentence may be had from the following English cases:

1. In **Basil Mortimer Bernard [1997] Cr. App. R. (S) 135** the following four principles were distilled:

(i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily was not a reason for the Court of Appeal to interfere with an otherwise appropriate sentence, although it might be a matter for the Home Secretary to consider in relation to his powers of release;

(ii) the fact that an offender was HIV positive or otherwise had a reduced life expectancy is not generally a reason which should affect sentence;

(iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;

(iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

2. In the earlier case of **Archibald Moore (1990) Cr. App. R. (S.) 384** Lord Lane said at p. **386:**

"We have no medical evidence as to the length of life expectancy. Nevertheless, assuming that such evidence exists, we do not consider that it is the function of this court to base its decision upon possible medical considerations of this sort. We do not know what the future may hold. We do not know what the future may hold with regard to medical science and medical expertise. We do not know what the future may hold with regard to this particular appellant. If the time should come when it is no longer possible for practical reasons or for reasons of humanity to hold this appellant in prison because of his physical condition, then that is the job of the Home Office who have at least two methods by which they can take action in circumstances of this sort, as this court has reason to know

from past experience. If such a situation does arise, that is the proper method of dealing with it. It is not for this Court or indeed the court of trial to do otherwise."

3. In **Stark (1992) 13 Cr. App. R. (S.) 548** the English Court of Appeal upheld a sentence of four years imprisonment for possessing heroin with intent to supply, although the appellant was suffering from AIDS and had a limited life expectancy. He had been HIV positive for a number of years, but it was not clear from the report whether he had developed AIDS between the time of sentencing and the appeal. In giving the judgment of the court, Jowitt J. at 550, drew attention to the distinction to be made between altering a sentence as an act of mercy because of a heart condition and radically changing a perfectly proper sentence.

[6] In the instant case there is no medical evidence as to the state of the appellant's health. On 9 May 2006, the appellant arrived in Barbados and was arrested. He stated that he had been diagnosed as suffering from skin cancer in 2007. This appeal has been adjourned numerous times between 16 October 2008 when it first came on for hearing and 5 March 2014 when it was heard. These adjournments were mainly at the request of counsel for the appellant in order for him to gather information from the United States of America and to obtain a medical report on the state of the appellant's health**.** No such information or medical report has been filed with this Court. Instead, on 28 January 2014, the appellant filed an affidavit in which he deposed to the state of his health.

[7] In her sentencing remarks, the sentencer, relying on the assertion of counsel for the appellant and in the absence of medical evidence, adverted to the appellant's "physical health" before imposing sentence. Five years and five months have elapsed between 16 October 2008 when the appellant first appeared before this Court and 5 March 2014 when his appeal was argued.

[8] Taking into account the level of sophistication used in the commission of this crime – transhipment by yacht of a large quantity of cocaine, the possession of high calibre guns and ammunition and the careful concealment of the contraband - we are of the view that the sentence of 11 years imprisonment was proper. It is not for this Court to tinker with a

sentence that in all circumstances is appropriate. If indeed the appellant's health is critical, then it is a matter for the Executive.

[9] Counsel's second complaint is that "The Learned Trial Judge erred in law by failing to give the appellant full credit for the time which he spent on remand." In support of this contention counsel cited **Callachand and another v The State [2008] UK P.C. 49, Romeo Dacosta Hall v R (2011) 77 W.I.R 66 CCJ (Hall); Jones v SOS for Social Services [1972] AC 944; Jermaine Hazell v R Criminal Appeal No. 24 of 2008 (unreported) (Hazell)** and **Professor Belle-Antoine, Commonwealth Caribbean Law and Legal Systems, 2008, Routledge Cavendish, 2nd ed., pp 128, 131 to 132**. In particular, counsel argued that **Hall** is a precedent of the **CCJ** which operates with retrospective effect and that, consequently, the appellant in this case should be given full discount for time spent on remand awaiting trial.

[10] There is no doubt that the decision in **Hall** heralded a major departure from what had previously been considered to be established principle in sentencing when that case laid down that full credit be given for time spent on remand. However, that case did not consider and did not decide the question of whether this new principle was to apply retrospectively or, if it did, the extent to which it would so apply. Those points were not argued before the **CCJ** and the decision gives no express assistance on those points.

[11] Confronted with this lacuna in the **Hall** decision, counsel sought to rely on a statement of **Professor Antoine** outlining the classical explanation of the declaratory theory of the doctrine of judicial precedent**.** That statement reads:

> "Thus, when a higher court overrules a decision, it has essentially found the correct statement of law and declared it, with the effect that the previous principle to the contrary is deemed to be based on a misunderstanding of the law. Henceforth, the earlier correct principle is deemed never to have existed."

[12] Counsel extrapolated from this statement the conclusion that, in his words: "[T]he decision made by the Learned Trial Judge in this matter must now be deemed to have been based on a misunderstanding of the law and the principle of law enunciated in **Romeo Hall** applied to the appellant's sentence." Put another way, counsel's argument is

that this Court is bound to apply **Hall** in this case as a result of the operation of the classical declaratory theory of judicial precedent.

[13] In the English House of Lords decision in **Kleinwort Benson Ltd v Lincoln City Council et al [1999] 2 AC 349** at **358** Lord Brown-Wilkinson had this to say of that theory:

> "The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said in the article "The Judge as Law Maker" (1972-1973) 12 J.S.P.T.L. (N.S) 22, a fairy tale in which no one any longer believes".

[14] The House of Lords in that case articulated a "realistic" and limited theory of judicial precedent. Bascially, this theory asserts that judicial changes in the law operate retrospectively to the limited extent that the changes apply to all cases coming before a court whether or not the events in that case occurred before or after the judicial pronouncement of the changes. Lord Brown-Wilkinson explains it as follows at **358**:

> "In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world. But whilst the underlying myth has been rejected, its progeny - the retrospective effect of a change made by judicial decision-remains. As Lord Goff in his speech demonstrates, in the absence of some form of prospective overruling, a judgment overruling an earlier decision is bound to operate to some extent retrospectively: 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 Court of Appeal decision was overruled."

[15] **Kleinwort** was a civil case, not a criminal case, and therefore did not have to consider the specific difficulties that this reformulation posed in criminal cases or more specifically in relation to sentencing. In fact, the **Kleinwort** reformulation presents significant difficulties in applying it to **Hall**. One such difficulty is: what is the appropriate date from which the **Hall** principle is to apply? Is it the date when the High Court – the sentencing court - imposed the sentence? Or, is it the date when the appeal is heard by the Court of Appeal – the reviewing court? Another difficulty is: how is **Hall** to be applied to those who are already undergoing a sentence but have not lodged an appeal in time as was the case in **Jerry Anderson Weekes v. The Queen AL 0011 of 2011 (Weekes)**? Yet another difficulty is: what are the implications of the **Hall** principle for habeas corpus proceedings as the High Court had to confront in **Jeffrey Adolphus Gittens v. The Superintendent of Prisons and The Attorney General High Court Suit No. 479 of 2013** (date of decision 5 July 2013)? It is necessary to resolve these difficulties, for as Lord Goff noted at **p. 378** in **Kleinwort,** when a significant judicial change is made to existing principle, it becomes necessary to ensure that that change takes its place as a congruent part of the common law as a whole.

[16] It is clear, then, that the law on the application of **Hall** is far from clear and that it is only the **CCJ** which can give clarity to the application of **Hall**. Those knotty questions were not addressed in **Hazell** and so this Court, applying the well known exception to the *stare decisis* rule, is not bound by **Hazell** which has misinterpreted **Hall,** see, e.g. **Holden and Co v Crown Prosecution Service [1941] 2 K.B. 134.** Therefore counsel's submission that this court should follow **Hazell,** a decision in which this Court exercised its discretion and gave the appellant a full discount for the time spent on remand awaiting trial, is not sustainable.

[17] The unsettled state of the law on the application of **Hall** is evident in **Weekes,** an application before the **CCJ** for leave to appeal out of time where **Nelson J** opined *obiter*:

> "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 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."

In our view, this obiter is correct in relation to **Hall**, for it is undesirable that a sentence, lawful when imposed, should have to be set aside as having been imposed in error as a result of a judicial decision only subsequently made, especially where that decision is silent as to its effective date.

Disposal

[18] In the circumstances this appeal is dismissed and the sentence is affirmed.

Justice of Appeal

Justice of Appeal **Justice of Appeal**