BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 15 of
2008

BETWEEN:

ROMEO DA COSTA HALL **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Frederick L.A. Waterman, CHB, Justice of Appeal, the Hon. Sherman R. Moore, Justice of Appeal and the Hon. Sandra Mason, Justice of Appeal

2008: November 18

2010: March 12

Mr. Andrew Pilgrim for the Appellant

Ms. Manila Renée for the Respondent

DECISION

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Introduction

[1] **WATERMAN JA:** On 14 April 2008, the appellant Romeo Da Costa Hall, was charged on an indictment with (a) murder contrary to ***section 2*** of the ***Offences Against the Person Act, Cap. 141*** and (b) causing serious bodily harm with intent contrary to ***section 16*** of the said ***Act***. The appellant on arraignment pleaded not guilty to the first count but guilty to the second count. On 27 May 2008, ***Reifer J*** sentenced the appellant to six years' imprisonment. This appeal is from that sentence on the ground that it is excessive.

[2] During the course of the argument on this appeal this Court noted that the indictment as drafted joined the capital offence of murder with the non-capital offence of causing serious bodily harm with intent. However, this issue was not made a ground of appeal by Counsel for the appellant. Although the court recognised at the time the inherent difficulties which the drafting of indictments in this manner creates, the Court did not request that it be addressed on the issue whether an indictment which contains a count for murder may also contain counts charging offences, other than murder. In the circumstances, the Court has decided not to address this issue in the instant appeal.

Summary of Facts

[3] The appellant and the deceased were a step-brother and brother respectively of two individuals, Ryan Alleyne and Topek Wickham who were involved in a fight on 22 January 2005. On the night in question, Alleyne was gambling with some friends in front of a mini-mart in Newbury, St. George. Wickham and a friend subsequently arrived in a taxi and purchased drinks from the mini-mart. A verbal confrontation ensued between Alleyne and Wickham which escalated to a point where Alleyne struck Wickham on the mouth with a concrete block. Alleyne and Wickham then went their separate ways, with the bleeding Wickham being escorted to his mother's house.

[4] In retaliation, the deceased Ephraim Wickham and his brother Andrew Wickham armed themselves with a cutlass and knife respectively and went in search of Alleyne.

There was a confrontation and Ryan Alleyne, who was alleged to be armed with a cutlass, escaped after receiving several chops about his body from the cutlass, as well as cuts with the knife. The deceased and his brother were later attacked by Alleyne and the appellant. The appellant, from the evidence, confronted the deceased, took away his cutlass, and inflicted several wounds to the deceased. The deceased was subsequently taken to the Queen Elizabeth Hospital where he was pronounced dead on arrival.

[5] In his written statement given to the police, the appellant admitted disarming the deceased and then using the same cutlass to slap Andrew Wickham. The statement in part reads as follows:

> *"I ran across the road and grab 'Tall Man' (the deceased) and tek way the collins he had. 'Tall Man' then run and I run behind 'Tall Man' and hold him and me and 'Tall Man' start to scuffle. Then I see that he had a cut in his head and I let him go because he was not fighting back…I then slap 'Red Man' (Andrew Wickham) three times with my collins."*

The appellant also admitted to inflicting the wounds on the deceased in an oral statement given to Station Sergeant Dawson on 23 January 2005. Further, when asked by Dawson whether he had related all the events in his written statement, the appellant replied:

> *"I tell the truth in that statement, but I did not put in that I hit 'Tall Man' four times with the collins, one hit his head and one hit his back."*

The appellant was subsequently charged by the police with the offence of causing serious bodily harm with intent.

[6] The medical evidence disclosed that the nature of the injuries inflicted on the deceased was very significant. The post mortem found that the deceased's death was as a result of multiple lacerations to the head and back with haemorrhage and shock. The medical evidence also indicated that they were inflicted while the deceased's back was turned from the perpetrator.

[7] In the probation report, the appellant proclaimed himself to be innocent and unaware of how the deceased was injured. Despite his guilty plea, he denied committing the offence and maintained that he intervened to settle a dispute which involved his brother, the victim, and others. He maintained that he did not have any weapon during the incident and did not know that the victim was injured. He also expressed deep regret and remorse over the incident.

Grounds of Appeal

[8] The primary ground in the appeal was that the sentence of six years' imprisonment imposed by the judge was excessive. Counsel for the appellant contended that the judge erroneously sentenced the appellant for a case of grave manslaughter and not for serious bodily harm with intent. In support of this contention, Counsel cited ***R v Kirk Marshall No. 9 of 2007, R v Andrew Holder No. 1 of 2006, R v Catrina Dyer No. 640 of 2007, R v Gerald Clarke No. 91 of 2007*** and ***R v Carlos Millington No. 124 of 2007.*** In those High Court cases, the accused were charged with murder, pleaded guilty to assault with intent to maim, disfigure or cause serious bodily harm and were all sentenced by ***Chandler J*** to either two or three years' imprisonment suspended for two or three years. Counsel also argued that the judge's discount of the appellant's sentence by two years for the time spent in prison was inadequate, since the appellant had already spent 41 months in prison on remand at the time of the plea. Counsel submitted further that the entire period spent by the appellant on remand should have been subtracted from the sentence imposed by the judge.

Discount for Time Spent on Remand

[9] With respect to the adequacy of the trial judge's discount for the time spent on remand, it is not uncommon in this jurisdiction that a judge passing a custodial sentence on an offender frequently deals with a person who has already spent time on remand in custody awaiting trial. The United Kingdom position on this issue is governed by statute, namely ***section 9*** of the ***Crime (Sentences) Act (1997),*** which provides that if an offender spends time in custody awaiting trial and/or sentence, the court shall direct that the number of days for which the offender was remanded in custody in connection with the offence shall count as time served by him as part of the sentence. This may sometimes mean, in cases where the sentence is short, that the term has already been served by the date on which it is imposed, so that the accused is released immediately after sentencing. This policy also holds true for a suspended sentence, therefore a judge passing a suspended sentence should also take into account any time spent by the offender on remand when fixing the length of the term that is to be suspended, see ***Practice Direction (Crime: Suspended Sentence) [1970] 1 WLR 259.*** This is because if the suspended sentence were later to be activated, the reduction would have an impact on the length of that sentence.

[10] This was said to be the *"normal"* approach by **Lawton J** in ***R v Scalise (1985) 7 Cr App R (S) 395***. However, there are instances where the entire amount of time spent on remand may not be deducted. In ***R v Stone (1997) 1 Cr App R(S) 151***, the Court of Appeal of the United Kingdom upheld the judge's decision to take only part of the period into account, in view of the offender's challenge to extradition proceedings.

[11] It would appear that in Barbados, where there is an absence of statutory provisions similar to those in the United Kingdom, that at common law the trial judge has the discretion to take all, part of, or even none of the time spent on remand into account when sentencing. This determination is dependent on the particular circumstances of each case. This Court notes the dicta of ***Simmons CJ*** in ***Mark Rohan Jack v The Queen, Criminal Appeal No. 9 of 2008***. ***Simmons CJ*** remarked at para [21] of the appeal:

> "Contrary to anecdotes and perceptions among some members of the public, the High Court and Court of Appeal do, as a matter of routine, take into account periods spent on remand when sentencing.

[12] We are not persuaded by Counsel for the appellant's contention that the trial judge erred by not taking the entire time spent by the appellant on remand into account and deducting it from his subsequent sentence. The judge's discount for the period of time spent on remand was reasonable in the circumstances and we are of the view that the judge properly exercised her discretion.

Decision

[13] The principal issue in this appeal is whether it was proper for the trial judge in sentencing the appellant for the offence of causing serious bodily harm with intent to use the guidelines established for sentencing for a case of grave manslaughter.

Trial Judge's Remarks on Imposing Sentence

[14] Before passing the sentence, the trial judge stated:

> "I have looked to our Court of Appeal as they have provided these courts with guidance on sentencing, and have repeatedly advised these courts to adopt sentences that discourage violence and the adoption of a culture that promotes the resolution of differences by non-violent means. The case of **Pierre Lorde v R,** an unreported case of our Court of Appeal of February 2006, while dealing with guidelines for sentences in manslaughter cases provided useful guidance on this matter. On an

objective scale, assessing the gravity of this offence, I find this case in effect to be akin to the lower end of the scale of a case of manslaughter. The argument by Counsel for the defence that the Crown accepted this lesser plea because it did not believe this matter to be as serious as manslaughter gained no support from the Crown. In **Pierre Lorde,** following the earlier guideline of **Bend v Murray,** the Court of Appeal confirmed that the bottom of the scale for a grave case of manslaughter without the use of a firearm is 16 years and the top of the scale is 20 years. The Court of Appeal also stated that an early plea of guilty in this type of case will reduce the range of sentence to 10 to 14 years. I have used the bottom of the scale for a grave case of manslaughter as my starting point. I have discounted it by six years in consideration of the guilty plea and a further two years in recognition of the other mitigating factors, and by a further two years for the time spent on remand. I therefore sentence you to six years in jail. This sentence will start from today's date, and you may take him away."

[15] We agree with the trial judge that this was a serious offence requiring a custodial sentence that is a deterrent to conflict resolution by violent means. However, the judge may have erred in her reasoning in using the sentencing guidelines laid down in ***Pierre Lorde v R (Criminal Appeal No. 11 of 2003, unreported decision of 24 February 2006)*** and ***Bend and Murray v R (Criminal Appeals Nos. 19 and 20 of 2001, unreported decision of 27 March 2002)***. These guidelines are normally used as sentencing guidelines for manslaughter and not the offence for which the appellant was charged and to which he subsequently pleaded guilty.

[16] In light of the fact that a person convicted under ***section 16*** of the ***Offences Against the Person Act*** is liable on conviction to imprisonment for life there is no doubt that this offence merited a custodial sentence. The trial judge considered the mitigating and aggravating factors. The judge also gave a discount on the sentence for the time spent on remand. The result arrived at was reasonable in the circumstances even if the methodology used by the judge may have been flawed somewhat. We have given careful consideration to the submissions made by Counsel on behalf of the appellant for a reduction in sentence, but we are constrained from interfering with the actual sentence imposed unless it was wrong in principle or excessive. We do not find, in light of all the circumstances of this matter, that the sentence of 6 years was either wrong in principle or excessive, see ***Steve Marquinston Pond v R (Criminal Appeal No. 27 of 2002)*** in which this Court imposed a similar sentence for a similar offence.

Disposal

[17] In the result, the appeal against sentence is dismissed. The sentence is affirmed as six years' imprisonment to run from the date of conviction on 27 May 2008.

Justice of Appeal

Justice of Appeal

Justice

of Appeal