BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 13 of 2016

BETWEEN:

KERRY OMAR GIBBONS **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C. D. Gibson, KA, Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. William J. Chandler, Justice of Appeal, (Acting)

2018: November 22

2019: March 13

The Appellant in person

Ms. Krystal Delaney for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] On 28 September 2015, the appellant, Mr. Kerry Gibbons, was arraigned on an indictment containing 3 counts of uttering a forged instrument, contrary to **section 10** of the **Forgery Act, Cap. 133** (**Cap. 133**); 3 counts of obtaining

money on a forged instrument contrary to **section 23** of **Cap. 133**; and 1 count of money laundering, contrary to **section 5(1)(b)** and **(6)** of the **Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011-23**. The total sum involved was $9,900.00.

[2] The appellant pleaded guilty to all counts. He requested that 3 other charges be taken into consideration, namely, 1 charge of theft and 2 charges of money laundering. The bank involved was the Bank of Nova Scotia.

[3] On 8 December 2016, **Cornelius J** imposed the following sentences on the appellant, after giving him full credit for time spent on remand which was calculated as 394 days:

(i) On counts 1, 3 and 5, uttering a forged document: 2 years and 9 days;

(ii) On counts 2, 4 and 6, obtaining money on a forged instrument: 2 years and 9 days: and

(iii) On count 7, money laundering: 5 years and 9 days.

FACTS

[4] The facts as outlined by the prosecution reveal that on 28 June 2013, the appellant visited the Royal Bank of Canada, upper Broad Street branch, and presented a cheque issued by the Government of Barbados payable to him in the sum of $2,500.00. This cheque was cashed and the proceeds given to the appellant.

[5] Later that day the appellant returned to that branch with another cheque payable to him for the same amount of money. This cheque was cashed and the appellant again received the proceeds of the cheque.

[6] On 1 July 2013, the appellant returned to the same branch and presented a third cheque payable to him in the amount of $4,900.00. This cheque was also cashed and the proceeds given to the appellant.

[7] On 8 July 2013, the Manager of Client Care at the bank made a report to the police that the cheques which had been cashed by the appellant were counterfeit.

[8] Investigations were carried out by police officers and certain inquiries made at the Government Printing Department and the Treasury Department. The officers discovered that none of the cheques had been printed by the Printing Department nor had they been issued by the Treasury Department. A search conducted at the Electoral Department revealed that the ID number written on the back of the cheques was registered to the appellant.

[9] On 11 April 2014, the appellant was taken into police custody and was interviewed about the matter. He admitted knowledge of the cheques and that he had received the amounts involved, but denied knowing that the cheques were fraudulent.

[10] On 15 April 2014, the appellant was formally charged for the offences.

THE SENTENCING

[11] Prior to the sentences being imposed, the appellant, who was not represented by counsel, expressed remorse for his actions. He indicated that he was willing to take part in any programmes which the prison had to offer.

[12] Ms. Krystal Delaney, prosecuting counsel, then made her submissions on sentence. Ms. Delaney submitted that the offences were serious enough to warrant the imposition of custodial sentences. She highlighted the aggravating and mitigating factors and drew the court's attention to 2 cases where the defendants were sentenced to 5 and 7 years respectively for similar offences.

[13] In delivering her sentencing remarks, the judge stated that she had had regard to the aggravating and mitigating factors relating to the offence and to the appellant. She noted that the appellant had 29 previous convictions involving theft, possession of cannabis and fraud. These convictions were recorded between 2006 and 2015. The judge also stated that, according to the pre-sentence report, the appellant was assessed as a medium to high risk offender due to his criminogenic needs, low educational attainment, previous incarceration, unemployment and peer involvement.

[14] The judge selected a starting point of 5 years for the offences of uttering a forged document and for obtaining money on a forged instrument. For the money laundering offence the starting point was 8 years. The judge then

informed the appellant that he would receive a discount of 20% for his guilty plea and imposed the sentences which are now the subject of this appeal.

THE APPEAL

The Grounds of Appeal

[15] Before us the appellant has argued that the sentences imposed by the judge were excessive. The grounds are that:

(i) He did not receive full credit for the time spent on remand;

(ii) The percentage for the guilty plea was not fully applied for count 7;

(iii) The sentence imposed for count 7 was too high; and

(iv) He suffered prejudice as a result of the manner in which the judge dealt with the matters which he requested be taken into consideration.

[16] We shall now discuss the submissions made by the appellant and the respondent on each of these grounds.

DISCUSSION

Ground 1

[17] On this ground, the appellant argued that the judge did not take full account of the time which he spent on remand. Relying on the CCJ decision in **Romeo Hall v The Queen [2011] CCJ 6 (AJ) (Romeo Hall**), the appellant contended that during the period of his detention he was not serving a sentence and should have been credited with the entire period.

[18] Ms. Delaney, counsel for the respondent, countered the appellant's argument by submitting that sentences had been imposed upon the appellant by the magistrate's courts. Counsel contended that the appellant was therefore not entitled to have that period counted as remand time for the present offences.

[19] In our recent decision in **Veril Harewood v The Queen, Criminal Appeal No. 4 of 2016**, delivered 12 March 2019, we pointed out that in **Romeo Hall,** the CCJ stated at **para [18]** that a sentencing judge has a discretion not to give a defendant full credit for time spent in custody where the defendant was serving a sentence during the whole or part of the period spent on remand.

[20] The record discloses that the appellant was first admitted to prison on 16 April 2014. On 24 April 2015, he attended District "E" magistrate's court where he was sentenced to 358 days for the offence of theft. That sentence expired on 17 January 2016.

[21] On 31 August 2015, the appellant appeared in the District "E" magistrate's court where he was convicted of a number of theft charges and sentenced to 48 months consecutive to the 358 days sentence which had been imposed on 24 April 2015. This sentence expired on 17 January 2019. Clearly, the appellant was serving a sentence during the period of remand.

[22] The judge did not credit the appellant with the time during which he was serving the sentences imposed by the magistrate's courts. In our opinion, the

judge was entitled to exercise her discretion in this way and there is therefore no substance to the complaint under this ground.

Ground 2

[23] Here, the appellant's complaint is that, while the judge applied a discount of 20% for his guilty plea on counts 1 to 6, she did not do so in relation to count 7.

[24] In response, Ms. Delaney conceded that there was some merit in the appellant's complaint in that the judge, after selecting a starting point of 8 years for count 7, applied a 15% discount.

[25] We agree that the appellant did not receive a 20% discount on count 7. If he had, the notional sentence would have been reduced to 6 years 4 months and 24 days instead of 7 years as stated by the judge before the appellant's remand time was deducted. However, the appellant's sentence on count 7 would therefore have been 5 years 3 months and 25 days after deduction of the 394 days spent on remand and not 5 years and 9 days as stated by the judge. Consequently, it will be necessary to vary the sentence on this count.

Ground 3

[26] On this ground, the appellant contended that the judge, in determining that a sentence of 7 years was appropriate for count 7, did not give sufficient weight to the mitigating factors such as his cooperation with the police, his remorse, no prior convictions of this nature and his chronic asthma.

[27] In response, Ms. Delaney submitted that when all the various factors are taken into account, the appellant was fortunate to have received the sentence which he did.

[28] We note that Parliament has prescribed stiff penalties for the offences to which the appellant pleaded guilty. The maximum penalty for uttering a forged document is life imprisonment and for obtaining money on a forged instrument the sentence is 14 years. In relation to money laundering, the maximum sentence which can be imposed is life imprisonment.

[29] When all the aggravating and mitigating factors are taken into account, it cannot be said that the figure which the judge arrived at was excessive. We are of the opinion that the judge did not fall into error. We therefore find that there is no substance to this contention.

Ground 4

[30] The appellant argued on this ground that he suffered prejudice in that the judge sentenced him on a "3 count indictment" which was not before the court. He contended that the judge considered as aggravating factors that he was the mastermind behind the offences and a professional fraudster.

[31] Ms. Delaney acknowledged that it is clear from the record that there was some misunderstanding during the sentencing phase because initially, the judge purported to sentence the appellant on what she referred to as the "3 count

indictment" which was really the list of 3 matters to be taken into consideration.

[32] According to the record, on 3 November 2015, the list containing the matters to be taken into consideration was handed to the court. That list was duly signed by the appellant. The appellant was asked by the clerk to enter pleas and he pleaded guilty to each matter. The facts were then outlined by the prosecutor.

[33] On 8 December 2016, after the judge had sentenced the appellant on the 7 count indictment, she proceeded to sentence him in respect of a "3 count indictment". At this point the prosecutor drew the error to the judge's attention. The judge then apologised for what had transpired. The judge stated that (i) the appellant had not been arraigned on a "3 count indictment" and would only be sentenced on the 7 count indictment; and (ii) the 3 matters would be taken into consideration.

[34] Thereafter, **Cornelius J** repeated the sentences which she considered appropriate for the offences and after deducting the time spent on remand sentenced the appellant.

[35] The practice of taking offences into consideration is one of long standing. In the United Kingdom, it received the approval of the Court of Criminal Appeal in **Rex v Syres (1908) 25 T.L.R 71**. According **to para 5-160** of *Archbold, Criminal Pleading, Evidence and Practice 2013*, the practice has no statutory

foundation, although it has been recognised in a number of statutory provisions.

[36] In **R v Batchelor, 36 Cr. App.R. 64**, Lord Goddard described the practice as:

> "simply a convention under which if a court is informed that there are outstanding charges against a prisoner who is before it for a particular offence, the court can, if the prisoner admits the offences and asks that they should be taken into account, take them into account, which means that the court can give a longer sentence than it would if it were dealing with him only on the charge mentioned in the indictment."

[37] It is important to note that the sentence passed by the court is only for the offences in the indictment, and there is no conviction in respect of the offences taken into consideration.

[38] Undoubtedly, there are good reasons for such a practice. From the defendant's point of view, it has the advantage of clearing up his record and getting rid of any outstanding matters which might otherwise bring him before the court again. From the court's point of view, it saves the court time in hearing separate cases involving other offences and contributes to the reduction of backlog in the criminal justice system.

[39] We adopt as the correct approach the procedure set out by Scarman LJ in **R v Walsh, unreported, March 8, 1973 CA**. Essentially, the procedure is as follows:

1. A list is drawn up of the offences to be taken into consideration and the defendant signs the list.

2. Once the defendant has pleaded guilty, the prosecutor will mention to the judge that the defendant wishes to have other matters considered and the list is passed to the judge.

3. The clerk will ask the defendant in open court whether he admits the matters and whether he wants them taken into consideration.

4. If the defendant answers the clerk in the affirmative, the prosecutor then provides the judge with brief details of any of the offences taken into consideration.

5. When determining the starting point for the conviction offence, the judge should not have regard to offences taken into consideration but should generally treat them as an aggravating factor in relation to the offender.

[40] The taking into consideration of an offence does not, as a matter of law, amount to a conviction. Therefore, a defendant would not be able to resist a subsequent prosecution for the offence by relying on a plea of *autrefois acquit*. In practice, however, prosecutions should never be brought for offences which have been taken into consideration.

[41] In this case, contrary to the accepted practice and procedure, the appellant was asked to enter pleas in relation to the offences which were to be taken into consideration. He entered guilty pleas and the judge purported to sentence him on a "3 count indictment". After the matter was drawn to the judge's attention, the necessary corrective remarks were made by the judge. However, the guilty pleas ought also to have been vacated but they were not.

[42] With respect to the appellant's argument that the judge considered as aggravating factors that he was the mastermind, we have examined the record and there is no evidence to suggest that the appellant was the brains behind this criminal enterprise. However, having reviewed all the circumstances and the sentences which the judge imposed, we have concluded that the appellant was not prejudiced in any way by this characterisation of his actions.

[43] As to the complaint that the appellant is a professional fraudster, while it is true that the appellant had convictions for other offences, a large number of his previous convictions were for offences of fraud. This complaint cannot be sustained.

DISPOSAL

[44] The appeal is dismissed. The sentence imposed for count 7, that is the offence of money laundering, is quashed and a sentence of 5 years, 3 months and 25 days substituted therefor. The guilty pleas entered by the appellant to the 3 matters which were taken into consideration are vacated.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)