**[2019] JMCA Crim 26**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 44/2013**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MR JUSTICE FRASER JA (AG)**

**DONOVAN BARNETT V R**

**Linton Gordon and Obika Gordon for the appellant**

**Miss Keisha Prince and Miss Kelly Hamilton for the Crown**

**8, 10 and 31 July 2019**

**MORRISON P**

[1] The appellant was indicted for an offence of murder allegedly committed on 27 March 2003. On 24 May 2013, after a trial in the Home Circuit Court before Straw J (the judge)[1] and a jury, he was convicted as charged. After a sentencing hearing conducted that same day, the judge sentenced the appellant to imprisonment for life, with a

[1] As she was then.

stipulation that he should serve a minimum of 20 years before becoming eligible for parole.

[2] The appellant applied for leave to appeal against both conviction and sentence. On 22 September 2017, a single judge of this court refused the application for leave to appeal against the conviction, but granted the appellant leave to appeal against sentence. The appellant's renewed application for leave to appeal against conviction and the appeal against sentence came on for hearing on 8 July 2019. On that date, the appellant's counsel, Mr Linton Gordon, advised the court that he would not pursue the application for leave against the conviction. However, the appeal against sentence was vigorously pursued.

[3] The appeal against sentence gives rise to a single point, which the single judge identified in her ruling as follows:

> "The Learned Trial Judge expressly stated that she was not concerned with the amount of time the applicant had spent in custody since this was a re-trial. Whether this was the proper approach ought to be considered."

[4] The issue arises in this way. During the sentencing hearing, it emerged that the matter before the court was a re-trial. As it turned out, the appellant had been convicted in the Home Circuit Court on 19 July 2004 for the same offence of murder. On that occasion, he was sentenced to imprisonment for life, with the stipulation that he should serve a minimum of 25 years in prison before becoming eligible for parole. The appellant

successfully appealed against the conviction and, in a decision given on 7 February 2011[2], this court ordered that, in the interests of justice, he should stand trial again.

[5] At the sentencing hearing before the judge, counsel who then appeared for the appellant advised the court that the appellant had been in custody since his arrest on the date of the murder in March 2003. On the basis that he had therefore been in custody for almost 10 years, counsel urged the judge to take this into account in arriving at the appropriate sentence. The judge was also asked to consider the appellant's age (62 years at the date of sentencing) and not to take into account his four previous convictions (the last of which had been entered in 1991).

[6] On the question of the time spent by the appellant in custody before his conviction, the judge said this[3]:

> "Now, this is your second trial so I'm not really concerned with the time that you spent because you did go through a first trial, you were convicted and on appeal a retrial was ordered, so I'm not too concerned with the amount of time. What I have to do now is to assess all the circumstances, the circumstance [sic] of this case, that you have been found guilty of murder and I do bear in mind, yes, that you have been in custody for some time, I do bear that in mind, but it is not something that is going to restrain me very greatly, bearing in mind the circumstances.
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> The sentence of this Court is, of course, life imprisonment and I'm going to recommend that you serve twenty years before parole is considered."

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[2] **Donovan Barnett v R** [2011] JMCA Crim 21
[3] Transcript, page 496-497

[7] Mr Gordon submitted that the judge erred in not taking into consideration the time spent by the appellant in custody since his arrest in March 2003, and that she should have credited him with either the whole or a part of the 10 year period of incarceration. In this regard, Mr Gordon referred us to the recent decision of this court in **Paul Brown v R**[4], perhaps the latest in the now long line of cases in which this court has applied the statement of the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen**[5] that "[t]he primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months and must state his or her reasons for not granting a full deduction or no deduction at all".

[8] Responding for the Crown, Miss Keisha Prince agreed that the judge ought to have given the appellant credit for the 10 years spent in custody before he was convicted the second time.

[9] We also agree with Mr Gordon. As the Sentencing Guidelines for Use By Judges of the Supreme Court of Jamaica and the Parish Courts[6] now indicate[7], "[i]n sentencing an offender, full credit should generally be given for time spent by him or her in custody pending trial". We are not aware of any qualification to this principle based on the fact that an offender has undergone a previous trial and that some of the time spent by him or her in custody before he or she is ultimately convicted is attributable to that fact.

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[4] [2019] JMCA Crim 3
[5] [2011] CCJ 6 (AJ), para. [26]
[6] Issued December 2017
[7] At para. 11.1. See also **Meisha Clement v R** [2016] JMCA Crim 26, para. [56]

Indeed, it seems to us that any such qualification would run directly contrary to the thinking which underpins the modern rule, which has to do with what the Board described in **Callachand and Another v The State**[8] as "the basic right to liberty".

[10] In any event, although the judge said that she would bear in mind that the appellant had been in custody for "some time", there is no indication on the record that she did in fact make any allowance in this regard.

[11] So the question which next arises is how should this court dispose of the matter? In the ordinary case of a determinate sentence, assuming that the period of imprisonment imposed by the sentencing judge was regarded by the court as appropriate to the circumstances of the case, the answer would simply be to deduct the 10 years spent in remand before conviction and to re-sentence the defendant accordingly.

[12] However, the matter is complicated in this case by the fact that the appellant appears to have been sentenced under the provisions of section 3(1)(b) and 3(1C)(b)(i) of the Offences Against the Persons Act ('OAPA'). Section 3(1)(b) prescribes, in the case of a defendant convicted of murder in circumstances other than those which potentially attract a sentence of death or imprisonment for life[9], a sentence of "imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years". In a case, such as this one, in which the court opts for a sentence of imprisonment for

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[8] [2009] UKPC 49, para. 9. See also the Constitution of Jamaica, section 14(1)(b) and (f).
[9] Which category, previously known as "capital murder", is dealt with under section 3(1)(a).

life, section 3(1C)(b)(i) provides that "the court shall specify a period, being not less than fifteen years … which that person shall serve before becoming eligible for parole".

[13] The significance of section 3(1C)(b)(i) of the OAPA is, as is well known, that were it not enacted, section 6(4)(a) of the Parole Act, which provides that a person who has been sentenced to imprisonment for life shall be eligible for parole after having served a period of not less than seven years, would apply. Section 3(1C)(b)(i) of the OAPA therefore evinces the clear intention of Parliament that a person convicted of murder falling within section 3(1)(b) and sentenced to imprisonment for life, should serve a minimum period of 15 years before becoming eligible for parole.

[14] With these provisions in mind, and on the assumption that the judge was correct to set the minimum period the appellant should serve before parole at 20 years, the court raised a further question with Mr Gordon. That is, is it permissible for this court to stipulate any period of less than 15 years before parole in order to take into account the 10 years already spent by the appellant on remand?

[15] After some initial hesitation, Mr Gordon ultimately agreed that, in the light of the clear language of section 3(1C)(b)(i) of the OAPA ("the court **shall** specify a period, being not less than fifteen years …"), and this court's recent decision in **Ewin Harriott v R**[10], the answer to this question is no. In that case, which was concerned with the analogous provisions of the Sexual Offences Act imposing a prescribed minimum sentence

[10] [2018] JMCA Crim 22

of 15 years' imprisonment for certain sexual offences, it was held that the court has no power to dis-apply a prescribed minimum sentence in order to make an allowance for time spent on remand pending trial. As Pusey JA (Ag) observed[11], "[t]he judge's sentencing discretion is curtailed by the statutory imposition of a mandatory minimum sentence".

[16] We would observe in passing that, as Pusey JA (Ag) also pointed out in **Ewin Harriott v R**[12], highlighting a clear lacuna in the current law of sentencing, this contrasts with the position in relation to an offender who pleads guilty to an offence which has a prescribed minimum sentence. In such a case, section 42D(3) of the Criminal Justice (Administration) (Amendment) Act, 2015 permits the sentencing judge to reduce the sentence below the prescribed minimum[13] and specify the period, not being less than the two-thirds of the sentence imposed, to be served before becoming eligible for parole[14]. It is to be hoped that, in the light of the clear policy of the modern law to give full credit to an offender for time spent on remand, the legislature will see it fit before too long to create a similar exception in the case of other prescribed minimum sentences.

[17] In the light of this difficulty, Mr Gordon then made a more fundamental submission. Pointing out that section 3(1C)(b)(i) was the result of a 2005 amendment to the OAPA[15]

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[11] At para. [15]
[12] At paras [16]-[17]
[13] Section 42D(3)(a)
[14] Section 42D(3)(b)

[15] Section 3(c) of the Offences Against the Person (Amendment) Act, 2005, Act 1 of 2005

and that the offence for which the appellant was convicted in this case occurred in 2003, Mr Gordon submitted that the appellant ought to have been sentenced in accordance with the pre-2005 provisions of the OAPA. The law as it then stood, it will be recalled, distinguished between capital and non-capital murder, the latter category embracing the category of murder now covered under section 3(1)(b) and 3(1C)(b)(i).

[18] In 2003, the relevant provision of the OAPA was section 3A, which was in the following terms:

> "(1) Subject to the provisions of this Act, every person who is convicted of non-capital murder shall be sentenced to imprisonment for life.
>
> (2) Notwithstanding the provisions of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court **may** specify a period, being longer than seven years, which that person should serve before becoming eligible for parole." (Emphasis supplied)

[19] In response to Mr Gordon's submission, Miss Prince merely enquired whether the appellant ought to have been sentenced under the law in force at the date of the offence or that in force at the time of sentencing.

[20] Mr Gordon raises a point which lies close to the cornerstone of our constitutional arrangements, which is that, generally speaking, laws should only take effect prospectively. In the area of sentencing, the principle is captured in section 16(11) of the Constitution of Jamaica, which provides that "[n]o penalty shall be imposed in relation to any criminal offence … which is more severe than the maximum penalty which might

have been imposed for the offence … at the time when the offence was committed …". However, section 16(12) goes on to say that if, at the time of sentencing for a particular offence, "the penalty prescribed by the law for that offence is less severe than the penalty that might have been imposed at the time when the offence was committed, the less severe penalty shall be imposed at the time of sentencing". In other words, while the sentence imposed on an offender cannot exceed in severity the sentence which was prescribed at the time of the offence, the offender must be given the benefit of any reduction in the severity of the sentence which has come about in the period between the date of the offence and the date of sentencing.

[21] The upshot of all of this is that, upon his conviction in 2013, unless the 2005 amendments to the OAPA brought about a reduction in severity of the prescribed sentence for murder falling within section 3(1)(b), the appellant should have been sentenced under the provisions of section 3A of the OAPA, which was the provision which applied at the date of commission of the offence in 2003.

[22] As has been seen, section 3A of the OAPA as it stood in 2003 provided for a penalty of imprisonment for life, coupled with, at the discretion of the court, the specification of a period longer than seven years which the offender should serve before becoming eligible for parole. On the other hand, section 3(1)(b) of the OAPA, as amended in 2005, provides for a penalty of imprisonment for life and section 3(1C)(b)(i) provides that the court "shall" specify a period of at least 15 years which the offender should serve before becoming eligible for parole.

[23] In one sense, it may be said that the penalty for murder falling within section 3(1)(b), which remained imprisonment for life, was not altered by the 2005 amendment. However, while section 3A of the pre-2005 version of the OAPA gave the sentencing judge a clear discretion whether or not to specify a period, "being longer than seven years", to be served before becoming eligible for parole, section 3(1C)(b)(i) of the OAPA as amended, mandates the sentencing judge to specify a period of not less than 15 years to be served before parole. In other words, while a person convicted of murder under the pre-2005 version of the OAPA faced the possibility that, in addition to imprisonment for life, the sentencing judge might order a period in excess of seven years before he or she would become eligible for parole, a person in the same position under the post-2005 version faced the certainty that the judge was bound to order that he or she should not become eligible for parole before serving at least 15 years.

[24] To this extent, it accordingly seems to us that the penalty for murder falling within section 3(1)(b) of the post-2005 version of the OAPA is plainly more severe than that under section 3A of the earlier version, which was the version in force at the date of the offence in this matter. We therefore consider that the appellant should have been sentenced under section 3A of the OAPA as it stood in 2003, that is, the year in which the murder was committed. So the remaining question is how then to give effect to the 10 years spent by the appellant on remand before his conviction in 2013?

[25] Unfortunately, unlike section 3(1)(b) of the OAPA as it now stands, section 3A of the pre-2005 version of the OAPA did not give the sentencing judge the option of a fixed

term of imprisonment as an alternative to imprisonment for life. Such an option would obviously have provided a ready means of making the necessary allowance for the time spent on remand before conviction in this case. So the only method available under section 3A would have been to make an adjustment in the time to be served before becoming eligible for parole. In so saying, we recognise that this is in a way an imperfect solution, given that the grant of parole is not a right and is ultimately dependent on the Parole Board being satisfied that the criteria set out in section 7 of the Parole Act have been met. However, it is clear that this was the only area of flexibility which a sentencing judge would have had at the time of the offence in 2003. It also accords with the current practice of sentencing judges when seeking to give credit for time spent on remand in cases of imprisonment for life under the OAPA.

[26] We will therefore dismiss the application for leave to appeal against conviction, but allow the appeal against sentence in part. The sentence of imprisonment for life must of course remain undisturbed. Although Mr Gordon suggested that the judge did not have sufficient regard to the appellant's relatively favourable antecedents in fixing the period of 20 years to be served before parole, we think it is fair to say that this was not the main burden of his challenge to the sentence. In any event, this was a matter entirely for the judge in the exercise of her sentencing discretion and no good reason has been shown why we should disturb it.

[27] We accordingly approach this aspect of the matter on the basis that the judge's stipulation of 20 years was warranted by the circumstances of this case. However, in

order to give effect to the time spent by the appellant on remand before his conviction in 2013, we will set aside the period of 20 years and substitute therefor an order that the appellant should serve a minimum of 10 years before becoming eligible for parole.

[28] The appellant's sentence is to be reckoned from 24 May 2013.