REBUPLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cr S. No. 044 of 2008

Between

THE STATE

AND

DAVID HUGGINS

Mrs. Sabrina Dougdeen-Jaglal and Mr. Anslem Leander for The State.

Mr. Kevin Ratiram for David Huggins.

NOTE ON SENTENCING FOLLOWING PLEA OF "GUILTY"

[1] The prisoner, David Huggins, entered a plea of 'Guilty' to the offences of possession of a firearm and possession of ammunition at the San Fernando assizes on November 30, 2017. He had been indicted for those offences on June 9, 2008. These offences occurred 14 years ago, on November 22, 2003, since which date the prisoner had been in custody.

[2] November 22, 2003 was a Saturday. It was 'City Day' in San Fernando. The day was being marked and celebrated with parades accompanied by music trucks. David Huggins was participating in the merriment. He was positioned atop a music truck as it paraded along the street. Some twenty-nine days earlier, on October 13, 2003, a homicide had occurred. Naigel Singh had been killed. It would appear that David Huggins was a suspect in respect of that killing. The police were interested in locating him.

[3] Two police officers from the Homicide Bureau of Investigations were in San Fernando. They noticed David Huggins. They caused him to alight from the music truck where he had been perched. When David Huggins was searched he was found to be in possession of a revolver and 5 rounds of .38 ammunition. He did not have a Firearm User's Licence or other authorization to be in possession of that firearm and ammunition. He was taken into custody.

[4] Although David Huggins was of interest to the police in connection with a homicide investigation, the circumstances attendant on his arrest on November 22, 2003 resulted in the laying of charges of possession of a firearm and possession of ammunition. By the time he was taken before the magistrate on November 26, 2003 in respect of the firearm charges, the charge of murder had been laid against him. The magistrate having been made aware of the murder charge, he was remanded to custody.

[5] He was committed to stand trial on the firearm and ammunition charges on April 26, 2006. He was committed with bail. Perhaps because of the coexisting murder charge, he never accessed the bail which had been granted to him. He has had a trial in respect of the firearm and ammunition charges. A jury was unable to agree in October 2012 and a retrial was ordered. On February 13, 2009 David Huggins was convicted of murder in the killing of Naigel Singh. On July 12, 2012 the Court of Appeal allowed his appeal against conviction and ordered a retrial. It is in these circumstances that the prisoner has been in custody for 14 years.

[6] The prisoner having pleaded 'guilty' to the firearms charges, he fell to be sentenced.

[7] In providing sentencing submissions on the prisoner's behalf, counsel proceeded on the premise that the maximum penalty for these offences is 15 years. Even on this basis counsel for the prisoner submitted that he

should be immediately discharged in relation to these offences. Counsel submitted that given the fact that the maximum penalty of 15 years, in the circumstances of this case the prisoner would already have served any term of imprisonment that the court might consider appropriate to impose.

[8] Counsel for the State submitted that this court ought to impose a sentence, which should be ordered to commence from the date of his plea. This would involve ignoring the time that the prisoner had spent in custody. Additionally, counsel submitted that the prisoner was not entitled to the full one-third reduction in sentence that is normally accorded to a person who pleads guilty. The basis of this submission was counsel's contention that this cannot be regarded as a plea of guilty at the earliest opportunity – having regard to the fact that the prisoner has previously gone through a fully-contested trial which resulted in a hung jury. In relation to the first limb of her submission, counsel contended that the prisoner had remained in custody because of the murder charge pending against him, and not because of the firearm and ammunition charge. It followed, so counsel's submission ran, that any credit for time served should relate and be accorded to the murder charge, and not to the firearm and ammunition charge.

[9] At the core of the submissions of counsel on both sides is the issue of giving credit for time spent in pre-trial custody. This is an area of law that might ordinarily be regarded as being well settled, but perhaps because of the somewhat peculiar circumstances attendant on the prisoner's case, counsel's views diverge significantly. Having pleaded guilty to the firearms and ammunition charges, the first issue would appear to be whether he should receive credit for time spent in custody in circumstances where he was *admitted* to bail in respect of those charges, but did not *access* that bail (clearly because he was ineligible to be admitted to bail on account of the charge of murder which he also faced). The second issue relates to the

method of accounting for time spent in custody – especially where that time exceeds the maximum penalty that could be imposed for the offence to which the prisoner has pleaded guilty.

Discussion – approach to time spent in pre-trial custody.

[10] A consideration of these issues must involve an examination of the approach that is appropriate in the exercise of the sentencing function where the prisoner has spent time in custody awaiting his trial. The appellant in ***Dookee v Mauritius***[1] was charged, together with others, in a killing that was stated to "rank amongst Mauritius's most notorious murders of all time." It is not clear from the report whether he was charged with murder, but he was convicted of aiding and abetting the murder. The killing occurred on the night of January 31, 2005, and the appellant was convicted on July 27, 2007 – some 2 years and 6 months, or 30 months after the killing. The appellant spent 14 months in custody on remand[2]. It would therefore appear that he was released on bail before his trial.

[11] Proceeding on the basis that there was a difference in the conditions of detention between a remanded and a convicted prisoner in Mauritius, the courts had settled on a practice of allowing a discount which ranged between one half and two thirds of the time spent on remand when passing sentence[3]. The Privy Council expressed the view that any differences in the conditions of remand prisoners, as opposed to those who had been convicted, were slight. The significant, more important and graver issue which they had in common was the loss of their liberty – which the Privy Council noted will have occurred in identical physical conditions. The Privy Council therefore concluded that the customary discount of one half to two thirds was not sufficient and not consistent with the approach that was

[1] [2012] UKPC 21

[2] He spent a further 31 months in custody pending the outcome of his appeal.

[3] A discount of one half was apparently the default position see [2012] UKPC 21 Official Transcript [16] per Lord Brown.

already acknowledged as being appropriate in respect of time spent in custody pending appeal[4]. The Board's conclusion was that credit should be given to the extent of 80-100% of time spent in custody on remand (with 80% being the default position).

Should the credit for time spent in pre-trial custody be less than full credit?

[12] It would appear that the Court of Appeal of Barbados had a similar view to that of the Court of Mauritius on the issue of credit for time spent in pre-trial custody. The appellant in ***Hall v R***[5] was arrested in January 2005 and charged with murder. A count of causing serious bodily harm (in relation to the same incident) was added in 2008. He pleaded guilty to causing serious bodily harm in April 2008. He had been in pre-trial custody for more than 3 years. In passing sentence, the judge made it clear that credit was not being given for the full time the appellant had spent in custody because 'it is reasonable in the circumstances that you would have spent some time on remand'. On the appellant's appeal, the Court of Appeal of Barbados considered that the judge had not erred in not giving full credit for the time spent on remand and that the discount of 2 years, which the judge had given, was reasonable.

[13] The appellant appealed to the Caribbean Court of Justice. The Caribbean Court of Justice concurred with the advice of the Privy Council in ***Callachand v Mauritius***.[6] In that case the Privy Council stated that the proper approach, having regard to the value ascribed to individual liberty, was that, where a person is convicted of an offence, the sentence imposed should be the sentence which is appropriate for the offence, and that any time spent in custody prior to sentencing should be fully taken into account

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4 In *Ali & Tiwari v Trinidad and Tobago* (2005) 67 WIR 309, [2005] UKPC 41, [2006] 1 W.L.R. 269.

5 (2011) 77 WIR 66.

6 [2009] 4 LRC 777, [2008] UKPC 49.

by an arithmetical deduction when assessing the length of sentence to be served.

[14] The Caribbean Court of Appeal recognized that there exists a residual discretion in a sentencing judge to depart from the primary rule; it listed 5 (non-exhaustive) circumstances where a sentencing judge might be justified in departing from the primary rule of giving full credit for time spent in custody:

(1) where the defendant has deliberately contrived to enlarge the amount of time spent on remand,
(2) where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced,
(3) where the period of pre-sentence custody is less than a day or the post-conviction sentence is less than two or three days,
(4) where the defendant was serving a sentence of imprisonment during the whole or part of the period spent on remand,
(5) where the same period of remand in custody would be credited to more than one offence.

[15] In contending that the prisoner should not receive credit for the time he has spent in custody, counsel for the prosecution in the instant case placed express reliance on the second circumstance listed by the Caribbean Court of Justice: where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced. For reasons which are set out below I consider it unnecessary to decide the point.

How should the time spent be accounted for?

[16] Wit J of the Caribbean Court of Justice delivered a separate judgment from the majority in ***Hall v R***.[7] While he agreed that time spent in pre-trial custody should be fully taken into account when calculating the length of a custodial sentence, he differed from the majority as to the appropriate method by which credit should be given for time spent in custody.[8] The majority favoured the method of reducing the sentence to be imposed by the amount of time spent in pre-trial custody; Wit J expressed the view that the appropriate method of accounting for the time spent in pre-trial custody was to impose the proper sentence while giving credit for time already served by declaring that time spent in custody will count as time served under the sentence. Having regard to my observations (at [5]) regarding the time that the prisoner has already spent in custody and to the maximum sentence that may be imposed for the offences before this court (discussed at [17 – 24]), it would appear that the differences in approach between Wit J and the majority have no effect on this aspect of the issues to be resolved in the instant case because the prisoner has already served more than the maximum sentence that may be imposed for this offence. What is clear beyond peradventure is that, baring certain exceptional circumstances, full credit should be given when passing sentence for any time spent in pre-trial custody.

Retrospectivity and the appropriate sentence

[17] As noted above, this offence was committed on November 22, 2003. The prisoner is charged with possession of a firearm and possession of ammunition contrary to s 6(1) of the Firearms Act, Ch 16:01. The penalty for contravention of s 6(1) is set out at s 6(3) of the Act. That penalty was increased from 10 years to 15 years by s 6(b) of the Firearms (Amendment) Act, 2011. The Firearms (Amendment) Act came into operation on

[7] (2011) 77 WIR 66.
[8] (2011) 77 WIR 66 [30].

February 25, 2011 by Proclamation of the President of the Republic. The issue which arises is whether, on a plea of 'Guilty' in 2017, the prisoner ought to be exposed to the 10-year penalty or the 15-year penalty. Putting it another way, the issue is whether the 2011 amendment, which increased the penalty, had retrospective effect.

[18] The Firearms (Amendment) Act expressly states that its provisions are to have effect despite the fact that they are inconsistent with sections 4 and 5 of the Constitution of Trinidad and Tobago. The Act does not state that any of its provisions are to have retrospective effect. It is regarded as an established principle of the common law that a statute will not be interpreted so as to create a retrospective increase in penalty without express statutory language to that effect.[9]

[19] In *Attorney-General's Reference (No. 48 of 1994) (R. v. Jeffrey)*[10], the 40-year old offender was charged with buggery. The victim was a 68-year old male resident of a home for the elderly and mentally infirm where the offender worked as a nurse. The victim suffered from Alzheimer's and had been diagnosed with senile dementia. The offender was arrested and charged on October 21, 1991. The offence was alleged to have occurred on October 16, 1991.

[20] The charge was buggery, contrary to s 12(1) of the Sexual Offences Act 1956. Despite the fact that the charge had been laid in October 1991, the trial was delayed on account of several issues; it did not commence until November 1, 1994. On November 3, 1994, the Criminal Justice and Public Order Act came into force.

[9] P.J. Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice,* (Sweet & Maxwell 2017) ¶ 5-486
[10] 16 Cr.App.R.(S.) 980

[21] Section 12 of the Sexual Offences Act 1956, under which the offender had been charged, drew no distinction between consensual and non-consensual buggery. The Sexual Offences Act 1967 had altered the law by decriminalising certain homosexual acts; while imposing a maximum punishment of 10 years for non-consensual buggery with a man aged over 16 years. The Criminal Justice and Public Order Act 1994 redefined non-consensual buggery as rape. The maximum sentence for rape in England was life imprisonment. The effect of the Criminal Justice and Public Order Act was therefore, to increase the maximum sentence for non-consensual buggery (which was now defined as rape) from 10 years to life imprisonment. The additional effect of the re-classification of non-consensual buggery as rape was that s 12 of the 1956 Act applied only to consensual buggery. By s 143, the Criminal Justice and Public Order Act decriminalised consensual buggery in private, while s 144 revised the penalty for buggery contrary to s 12 in respect of a man aged 18 or over; the maximum punishment was reduced to 2 years.

[22] The offender was convicted on November 8, 1994. When he came to be sentenced on December 6, 1994 his counsel submitted that, as at that date, the maximum sentence for an offence of buggery contrary to s 12 of the 1956 Act was 2 years. The trial judge accepted the defence submissions and sentenced the offender on the basis that the maximum sentence that could be imposed was one of 2 years.

[23] On the hearing of the Attorney General's reference, which contended that the sentence imposed had been too lenient, counsel contended that the approach of the trial judge had been wrong. The argument, which prevailed, contended that Parliament intended the new provisions to apply only in respect of offences committed *after* the commencement of the Act and did not intend to make them retrospective. This contention was founded on the presumption against retrospective operation of Acts. When

it passed the Criminal Justice and Public Order Act on November 3, 1994, Parliament's intention clearly was not to reduce the maximum sentence for non-consensual buggery but to increase it. Such an increased maximum sentence would clearly apply to offences committed after the Act came into force. Equally clearly, Parliament could not have intended that an offence of non-consensual buggery (such as that with which the offender was charged) that was committed before the commencement of the Act could be charged after the Act came into force as male rape. This would have meant that a person would be liable to conviction of the offence of male rape, which did not exist at the time he committed the buggery. It would also have meant that such a person would be exposed to a penalty of life imprisonment for an offence that was punishable by imprisonment for a maximum of 10 years at the time of its commission. The result therefore was that the trial judge should have passed sentence on the basis of the maximum penalty of 10 years that applied at the time of commission of the offence, not a penalty that became applicable after the Act came into force (even though the latter penalty was lower).

[24] In the circumstances of the instant case, the offence occurred on November 22, 2003. The Firearms Act was amended with effect from February 25, 2011. There being no contrary intention expressed in the amending Act, I take the view that the common law presumption against retrospective application of the amending Act will apply. The result is that the maximum penalty to which the prisoner may be sentenced is the penalty that was applicable at the time of commission of the offence – a term of 10 years' imprisonment.

The sentence to be imposed

[25] In the context of sentencing, the factual substratum is the possession of a revolver and 5 rounds of ammunition. It is recognized as an aggravating

factor that illegal firearms have become too prevalent in our society and that gun violence has become too pervasive. It was submitted on his behalf that the prisoner was not engaged in the commission of an offence at the time that the firearm and ammunition were found. Being in possession of an unlicensed firearm is itself an offence; the point which counsel made was that the prisoner had not used the firearm to carry out a robbery or to wound or injury another person. The court has been informed that the firearm, which is the subject of the instant plea of 'Guilty', is not the same as was used in the murder of which the prisoner stands charged. It is possible to regard that fact as telling against the prisoner, however the presumption of innocence compels me to simply regard that fact as indicating that the firearm was not used in the commission of another offence.

[26] In the circumstances of this case I form the view that an appropriate starting point for the sentence that ought to be imposed would be 6 years. Having regard to the circumstances under which the firearm and ammunition were kept by the prisoner and the fact that they were not used in the commission of another offence I accord a discount of 6 months, leaving a period of 5 years and 6 months, or 66 months. This is not a plea at the earliest opportunity – the prisoner having undergone a fully-fledged trial at which a jury failed to agree. The prisoner is therefore not entitled to the full discount of 1/3 as has come to be acknowledged upon a plea of guilty.

[27] This is not a case where the prosecution contended that the firearm and ammunition were found in a vehicle or a room which the prisoner was in control of – where the underlying facts which might form the basis of the fact of possession could be contested. The accepted facts clearly set out that the firearm and ammunition were found in the prisoner's pocket. There could hardly be clearer evidence of possession; perhaps only in circumstances where the loaded firearm was in the hand of the prisoner –

which would itself result in greater aggravating features of the offence. Because of the fact that he has fully contested his guilt at his previous trial and has belatedly chosen to plead guilty to the charge I form the view that this is a circumstance where the normal or usual 1/3 discount ought not to be accorded. Having regard to the facts of the possession of the firearm and ammunition, and regarding this as a belated, tactical plea of guilty, I consider that the appropriate discount which ought to be accorded the prisoner on his plea of guilty is one of 20%. This amounts to 14 months, rounded upwards. This leaves a period of 52 months, or 4 years and 4 months as the appropriate sentence to be imposed in the circumstances of this case.

How is credit to be given for the time spent in pre-trial custody?

[28] As noted at [16] above, it is clear that a prisoner ought to receive full credit for the time he has spent in custody awaiting trial. The method by which this time should be accounted for and deducted remains subject to debate. But in the circumstances of the instant case, the prisoner having spent 14 years in pre-trial custody, and this court having come to the conclusion that the sentence which ought to be imposed on the prisoner is one of 4 years and 4 months, is there any method, any circumstance in which it would be appropriate to not accord the prisoner the full credit for the time he has spent in custody?

[29] Counsel for the State contends that these facts fall squarely within the second circumstance where the Caribbean Court of Justice recognized that it is appropriate to depart from the primary rule of giving full credit for time spent in custody, in that the prisoner was on remand for the offence of murder, under circumstances unconnected with the facts of the instant charge. In effect, counsel's contention is that, because the prisoner was on remand for the murder, the time he has spent on remand should apply

(exclusively) to a sentence to be imposed for that offence of murder. I pause to recall that the appellant in *Hall v R* was originally charged with murder; he was eventually convicted of causing grievous bodily harm (admittedly arising out of the same incident).

[30] The appellant in *Hall v R* having pleaded 'guilty' to the offence of causing grievous bodily harm, could not, thereafter, be convicted of the murder because both offences arose out of the same incident. The prisoner, on the other hand, remains indicted for the murder. There therefore remains (with due respect to the presumption of innocence) the distinct possibility of a separate sentence being imposed on the prisoner in respect of the murder. In my view, even in the circumstances where the prisoner faces two separate sentences, arising out of distinct offences, the underlying fact of the time he has spent in custody should not simply be ignored. Equally, it is not in my view appropriate to take the view that the time spent in custody should apply only in respect of the offence (murder) in respect of which he had been remanded without bail.

[31] I therefore conclude that the full time of 4 years and 4 months, which is the appropriate sentence to be imposed, should be fully credited to the prisoner – with the effect that he is to serve no further time in respect of this charge of possession of firearm and ammunition. In taking this approach, I respectfully align myself with and adopt the approach favoured by Witt J of the Caribbean Court of Justice in *Hall*[11], that the approach to accounting for time spent in pre-trial custody should be for the court to impose the proper sentence for the offence while declaring that the time spent in custody will count as time already served under the sentence, with the result that a specified amount of time remains to be served.

[11] (2011) 77 WIR 66 [30] and see the reasoning at [42].

[32] This is not the end of the matter, however. All the members of the Caribbean Court of Justice were agreed in *Hall* that it would be an abuse if the crediting process were to lead to double discounting of pre-sentence time.[12] The Privy Council has expressed the same proposition, in *Callachand v Mauritius*[13] - that a defendant who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once.

[33] In the circumstances, and for the reasons expressed above, I sentenced the prisoner to 4 years and 4 months imprisonment for the offences of possession of a firearm and possession of ammunition to which he has pleaded guilty. In view of the fact that he has been in custody from the date of his arrest for these offences, that sentence must be credited as being fully served. That time having been credited in respect of these offences, I order that a copy of the sentencing order in this matter be placed in the court's file in the prisoner's murder charge, so that in the event of a plea of guilty or a conviction in that matter, the period of time for which the prisoner may receive credit for time spent in custody is to be lessened by the deduction of 4 years and 4 months which has been credited in these charges and which cannot again be credited to the prisoner in respect of any other charge.

Dated this 16th day of April, 2018

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HAYDEN A. ST.CLAIR-DOUGLAS
Judge

[12] (2011) 77 WIR 66 [18], [50].
[13] [2009] 4 LRC 777 [10].