[2012] UKPC 21
Privy Council Appeal No 0026 of 2011

JUDGMENT

Ajay Dookee (Appellant) *v* State of Mauritius (Respondent)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Brown
Lord Mance
Lord Dyson
Lord Sumption

JUDGMENT DELIVERED BY LORD BROWN ON

28 May 2012

Heard on 26 March 2012

Appellant
Sanjeev Teeluckdharry
S. Tsang Mang Kin

(Instructed by MA Law (Solicitors) LLP)

Respondent
Satyajit Boolell SC DPP
Ms Sulakshna Beekarry

(Instructed by Royds Solicitors LLP)

LORD BROWN

1. This appeal is directed to sentence and, as will shortly appear, more narrowly still to the correct approach to be taken by both sentencing and appeal courts to the question of credit for time spent in custody whether on remand awaiting trial or, thereafter, pending appeal. In the present case the appellant spent 14 months in custody on remand, a further 31 months in custody pending the outcome of his appeal. It is necessary, however, to set this question in the particular factual context in which it presently arises and it is to this that the Board now turns.

2. The brutal killing of Mujeeb Mir, a wealthy Indian businessman, on the night of 31 January 2005, must rank amongst Mauritius's most notorious murders of all time. Four men were eventually convicted: three directly of murder: Takah, a security officer at Mr Mir's bungalow, Koonjul, a taxi driver and Mungrah, a gardener; the fourth, the appellant, involved during the night as a second driver, of aiding and abetting the murder,

3. Taking the facts at their simplest – and for the purposes of this appeal no elaboration is required – Takah obtained access to the bungalow for Koonjul on the pretence that the latter had come to check the alarm system; Takah and Koonjul then beat Mr Mir, tied him up and gagged him, stole his bank cards and mobile phone containing his pin code, and bundled him into the boot of his own red contract car. Koonjul then drove his taxi to pick up the appellant and bring him to the bungalow to drive the red contract car. Initially the appellant drove this car with Takah and Koonjul as passengers and with Mr Mir tied up in the boot, following Koonjul in his taxi. At some point, however, the drivers switched – the appellant's case being that when he heard noises from the boot and was told that there was a man inside he refused to drive further. Koonjul then drove the red contract car to a secluded spot where he, Takah and Mungrah committed the murder. Mr Mir was beaten, driven over and ultimately burned to death with his car left on top of him. Meanwhile, whilst the appellant was waiting elsewhere with Koonjul's taxi, he was questioned by police officers making a routine check and lied about why he was there.

4. Having killed Mr Mir, Konjul then phoned the appellant to bring his taxi to pick up the three killers and, when it arrived, himself drove all four men back to town (the appellant on one account being present when the deceased's bank card was then used at an ATM). There was evidence, it may be noted, of extensive phone contact between the appellant and Takah in the days before the killing.

5. The trial of the four men took place at assizes before Paul Lam Shang Leen J and a jury between 16 and 27 July 2007. On the first day Takah and Mungrah changed their pleas to guilty and were sentenced respectively to 32 and 26 years imprisonment. On 27 July Koonjul was convicted by a majority of 8:1 and sentenced to 30 years imprisonment; the appellant was convicted by a majority of 7:2 and sentenced to five years imprisonment. The judge's sentencing remarks in the appellants' case were brief indeed. Noting the appellant's youthful age and clean record the judge observed: "I know the jury didn't follow my direction, so five years imprisonment".

6. The direction to which the judge was referring appears in the summing-up thus:

> "As regards [the appellant], I direct you to acquit him of the charge levelled against him if you find that he did not know that when he drove the contract car for some 3.5km from the bungalow . . . [the other accused] were to murder the victim, you should return a verdict of not guilty for he drove the car without knowing that the person in the boot would be murdered. If you find that [the appellant] knew that the victim was to be murdered when he drove the car with the victim, gagged and tied . . . then you can find him guilty, but I have told you I doubt whether there is evidence."

It is not now suggested that there was insufficient evidence upon which the jury could properly convict the appellant as they did.

7. On 10 August 2007 the appellant appealed against his conviction. Five days later the DPP cross-appealed against the appellant's sentence. Koonjul too appealed against conviction and in his case too the DPP cross-appealed. The appeals were heard by the Court of Criminal Appeal (Y K J Yeung Sik Yuen CJ, S B Domah and N Matadeen JJ) on 28-30 May 2008, 10 June 2008, 29 July 2008 and 16 March 2009, judgment following, almost a year later, on 25 February 2010. The appeals against conviction were dismissed, those (by the DPP) against sentence allowed. Koonjul's sentence was increased from 30 to 38 years (the Court noting particularly that he lacked the mitigation of a plea of guilty), the appellants from 5 to 16 years.

8. Subject to the question of credit for time spent in custody prior to the increase in his sentence, the appellant has no justifiable complaint about that increase. For aiding and abetting a murder as horrendous as this, a sentence of five years was not merely unduly lenient; it was derisory. Indeed, as already suggested by the sentencing judge's own remarks, it is clear that he was piqued by the jury having taken a less benevolent view than he had of the weight of evidence against the appellant. The judge in short was not loyal to the jury's verdict. Sixteen years, substantial as such a

sentence undoubtedly is, was beyond criticism for aiding and abetting this particular murder.

9. When granting the appellant leave to appeal against his sixteen year sentence, the Judicial Committee of the Privy Council (consisting of three members of the Board as presently constituted) expressly did so "having regard in particular to the fact that no credit was given for the 45 months that the appellant spent on remand". That no such credit was given is, indeed, expressly accepted by the DPP.

10. How, then, should these 45 months be brought into account? This is by no means an entirely novel question. The first time it appears to have been considered with any care was in Lord Carswell's judgment for the Board in *Ali and Tiwari v The State* [2005] UKPC 41, conjoined appeals from the Trinidad and Tobago Court of Appeal concerned with determining the date from which an unsuccessful appellant's sentence should run. The governing law of Trinidad and Tobago – section 49(1) of the Supreme Court of Judicature Act, in terms virtually identical to those of section 16(3) of the Criminal Appeal Act of Mauritius – provides in effect that, unless the Court of Appeal gives express direction to the contrary, any time spent by an appellant in custody pending appeal (assuming he is "specially treated as an appellant" – section 49(1) of the Trinidad and Tobago Act; "is specially treated under this section" ie "in like manner as prisoners awaiting trial" – section 16(1)(3) of the Mauritian Act), is not to count as part of his sentence. Rather that sentence is to begin to run from the date of the determination of the appeal.

11. The Board decided in *Ali and Tiwari* – contrary, it appears, to previous practice, that "the making of orders backdating sentences to the date of conviction should not be restricted to exceptional cases". It further decided that any loss of time imposed by way of "penalty for bringing or persisting with a frivolous application" should be "proportionate", ie it should "fairly reflect the need to discourage wasting the Court's time". Such loss of time orders "should be made with regard to the abuse which they are designed to curb and [the Board] would not expect them to exceed a few weeks in the large majority of cases". All these quotations are from para 17 of the judgment. At para 20, their Lordships concluded "that the Court of Appeal ought to have directed in the case of each appellant that the full period of time spent between his conviction and the disposition of his appeal should count towards his sentence".

12. I may note at this stage that the DPP has conceded from the outset of this appeal that the appellant is similarly entitled to credit for the whole of the 31 months spent in custody pending his appeal in the present case. The real question arising here is how to deal with the 14 months earlier spent by the appellant in custody awaiting trial. This question, as to the proper approach to time spent in custody awaiting trial, was considered by the Board in *Callachand v The State* [2008] UKPC 49. The following passages from Sir Paul Kennedy's judgment for the Board are now in point:

"9. The Board is not concerned in the present case with time spent by a person in custody as an appellant. So their Lordships need not consider the need to deter frivolous appeals. But they are concerned with the basic right to liberty. In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing. We find it difficult to believe that the conditions which apply to prisoners held on remand in Mauritius are so much less onerous than those which apply to those who have been sentenced that the time spent in custody prior to sentence should not be taken fully into account. But if that is thought to be the position there should be clear guidance as to the extent to which time spent in custody prior to sentence should not be taken fully into account because of the difference between the prison conditions which apply before and after sentence. That is something which, as [it] seems to their Lordships, should now be considered by the Supreme Court, as it is familiar with local conditions and will be able to apply its own knowledge to this case.

10. Their Lordships recognise that there may be unusual cases where a defendant has deliberately delayed proceedings so as to ensure that a larger proportion of his sentence is spent as a prisoner on remand. In such a case it might be appropriate not to make what would otherwise be the usual order. . . .

Conclusion

11. The Board invites the Supreme Court of Mauritius to consider in the light of . . . this judgment whether, and if so to what extent, the time spent by the appellants in custody prior to sentence should count towards their sentences, to explain the reasons for its decision for the benefit of the appellants and the assistance of all sentencing judges and in the light of that decision to sentence the appellants anew . . .".

13. Following the Board's decision in *Callachand*, section 135 of the Criminal Procedure Act was amended by Act No 30 of 2008 to provide:

"Where an accused has been in custody or has been imprisoned under a warrant or process before his trial for an offence of which he has been convicted, the Court or judge in passing sentence shall take into account the time spent by the accused in custody and may sentence the accused to a term less than the minimum by a term not exceeding the aggregate of the term of imprisonment already served".

14. The next, and indeed last, decision to which the Board must refer is that of the Court of Civil Appeal (Y K J Yeung Sik Yuen CJ, S Peeroo J) in *Mbokotwana v The Commissioner of Prisons* 2010 SCJ 310 dated 27 September 2010. The following passages in the judgment are those most particularly to be noted:

"While it may be a good thing, for the sake of transparency, to resort to some form of arithmetical deduction for time spent on remand, such deduction would not necessarily represent the time actually spent on remand. There are other factors which could have a bearing on the deduction to be granted in each individual case.

The Law Lords themselves [in *Callachand*] asked a question about the equality of treatment afforded to a detainee on remand as compared to a convicted prisoner. If conditions on remand are significantly less rigorous, the deduction should reflect this fact.

. . . Since conditions are not the same, there is a case for debate that a point-to-point arithmetical deduction would not apply. Indeed, from the affidavit evidence of the Assistant Commissioner of Prisons, the conditions of applicant whilst on remand from 4 January 2002 to 5 August 2003 appear significantly lighter than conditions applicable to him after his conviction. They are set out in List A and List B respectively:

<u>List A</u>

<u>Conditions of applicant whilst on remand</u>

(a) applicant was kept separate from convicted detainees. The sleeping conditions were the same as for convicted detainees.

(b) applicant did not have to work whilst on remand.

(c) applicant was allowed up to one visit per week.

(d) applicant could write as many letters as he wishes to his relatives/friends.

(e) applicant was wearing civilian clothing.

(f) applicant was allowed to purchase canteen goods for an amount not exceeding MRU1,000 per week from private cash.

(g) applicant was not compelled to have his hair cut or to shave.

List B

Conditions of applicant as convicted detainee

(a) applicant is compelled to work (about 40 hours a week) in the workshops at the Prisons and entitled to an earnings scheme.

(b) applicant is restricted to two visits per month. He could only write two letters per month.

(c) applicant has to wear prisons uniform.

(d) applicant is allowed to purchase canteen goods for an amount not exceeding MRU200 weekly from private cash.

(e) applicant is required to have regular haircuts and shaving.

Furthermore, a subjective appreciation of the percentage which would be open to each individual trial Court to deduct from the time spent on remand could create havoc and uncertainty since no sentencing guidelines exist. We propose to cure this to a certain degree as we shall expatiate later. . . .

While it would be advisable, following *Callachand*, that henceforth trial Courts mention the sentence they would normally have imposed and

> then deduct what they consider a fit allowance for the time spent on remand therefrom, we believe that the old formula whereby the trial Court imposes the sentence to be served in the light of the time already spent on remand does not contain any intrinsic flaw. Considering that detention on remand is a deprivation of liberty prior to a finding of guilt, and considering equally the difference in the conditions of detention between a remand prisoner and a convicted one as we have seen outlined in Lists A and B, we believe that it would be fair to allow a discount of between one half to two thirds of the time spent on remand when passing sentence. We also believe that a scale must exist to take into account individual situations, like for example rights of visit which may not be exercised effectively where the detainee is a foreign national for example and the family lives abroad. It is such individual situations which would influence on the scale of discount between one half to two thirds as we have mentioned above."

15. Their Lordships confess to some difficulty with that judgment. When one comes to analyse the differences in the conditions imposed respectively on remand prisoners and convicted prisoners these really seem to amount to very little, certainly compared to the altogether graver conditions which they have in common: their loss of liberty (in, be it noted, identical physical conditions). The right to wear one's own clothing, to four rather than two visits a month, to write more than two letters a month, not to work, to grow one's hair and not shave, to spend (if one has it) MRU1000 instead of only 200 in the canteen: these are minor benefits indeed compared to the fundamental fact of confinement in prison.

16. In the Board's view a discount of only one half to two thirds (half being apparently the default position) cannot properly be regarded as sufficient or, indeed, as consistent with the approach rightly recognised to be appropriate in the case of time spent in custody pending appeal. The value of liberty demands greater credit than this for time spent in custody on remand.

17. The Board's conclusion, therefore, is that, the differences in conditions notwithstanding, credit should ordinarily be given for time spent in custody on remand to the extent of 80-100% (80% being the default position unless, for example, the detainee is a foreign national whose family lives abroad and cannot visit).

18. It is important too that this credit be given in such a way as properly gives effect to the fact that, as the Board understands it, all determinate sentences save in drugs cases attract remission of one-third of the sentence imposed. Assume, therefore, that the appropriate sentence is six years imprisonment and the defendant has spent 15 months on remand in custody awaiting trial. He should (save in an exceptional case) be given 12 months credit for the time spent in custody and his sentence should be

backdated by a year. That way he will obtain the full two years remission on his six year sentence. Were the sentencing judge instead to sentence him to five years imprisonment to start at the date of sentence, the sentence would attract only 20 (instead of 24) months remission.

19. The result in the present case is that the appellant is entitled to credit for 31 months plus 80% of 14 months (say 12 months) namely 43 months in all. His enlarged sentence of 16 years imprisonment should accordingly be deemed to have been begun on 27 July 2006 (ie 12 months before he was actually first sentenced).