[2018] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 76/2007

APPLICATION NOS 3 AND 53/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

STEVEN GRANT v R

Lijayasu Kandekore for the applicant

Mrs Christine Johnson Spence for the Crown

22 March 2017 and 15 June 2018

EDWARDS JA (AG)

Background

[1] In the usual course of events a person convicted of a criminal offence has the option to file an appeal at all the levels that are available to him. Once the appeal process has been exhausted, it is expected that there will be an end to litigation, whatever the outcome of the appeal. It is rare indeed, for a convict to apply to the Court of Appeal to reopen his appeal which has already been determined. However, this is what has occurred in this case.

[2] Steven Grant (the applicant) filed three applications before this court. These are:

i. an application to vary or discharge the order of a single judge filed on 5 January 2017;

ii. an application for an extension of time to appeal against sentence filed on 14 March 2017 and;

iii. an application for permission to appeal against sentence, filed on 14 March 2017.

[3] These applications have come six years after the determination of the applicant's last appeal filed against his conviction and sentence in this court. All three applications raise interesting, if not entirely novel, questions of law.

[4] The applicant is no stranger to the courts in this jurisdiction, and in fact, has been before the courts for upwards of 14 years. He was first convicted on 26 February 2003 for the offence of murder. The circumstances leading to his conviction are that on 18 April 1999, he shot and killed Kymani Bailey, who was 17 years old at the time. Master Bailey was shot a total of 11 times in his back. The applicant's defence was that he acted in self-defence, as he believed he was being robbed by Master Bailey. The jury rejected this defence and found him guilty. He was sentenced to life imprisonment with the stipulation that he serves 20 years before being eligible for parole. He was taken into custody upon his conviction. He appealed his conviction and sentence to this court which upheld the conviction and sentence. He thereafter appealed to the Privy Council.

On 16 January 2006, the Privy Council allowed his appeal and the matter was remitted to this court for the determination of whether there ought to be a retrial.

[5] On 7 March 2006, this court ordered that he be retried. The retrial was aborted on 7 November 2006, due to a mistrial. A third trial was convened on 16 May 2007. Following this third trial, the applicant was convicted on 31 May 2007. After a valiant plea in mitigation by his counsel, the judge imposed a sentence of life imprisonment on the applicant, with a stipulation that he spends a minimum of 17 years before being deemed eligible for parole.

[6] On 11 June 2007, by way of criminal appeal no 76/2007, the applicant filed a notice of application for permission to appeal against conviction and sentence. The applicant filed a total of five original grounds of appeal. Leave was thereafter granted to his attorney to argue 22 supplemental grounds. However, upon the hearing of the application for permission to appeal, the court found no reasonable justification for quashing the conviction on the grounds that were commended to it. As such, on 20 December 2010, the applicant's application for leave to appeal against his conviction and sentence was dismissed and it was ordered that his sentence should begin on 7 September 2007 (see [2010] JMCA Crim 77). The applicant is currently serving that sentence.

[7] On 28 June 2016, the applicant filed application no 124/2016 for an order "to Amend and Correct Errors in Sentencing". This application was purportedly made pursuant to section 61 of the Criminal Justice (Administration) Act (CJAA) and was

heard by a single judge of this court (Morrison P) (see [2016] JMCA App 32). Having heard the application, Morrison P dismissed it in a written judgment delivered on 10 November 2016. This decision of Morrison P is the subject of the application to vary or discharge the order of a single judge.

The applications before this court

Preliminary point

[8] When the applications came before us for hearing, permission was granted to the applicant to amend the application to vary or discharge the order of a single judge, in order to apply for an extension of time to apply for a rehearing of the application before this court, pursuant to rule 3.13 of the Court of Appeal Rules 2002 (CAR), as amended. That rule states that:

> "3.13(2) An appellant who is dissatisfied with the decision of the single judge may apply in form B6 for a re-hearing of the application by three judges of the court (who may include the single judge who refused the application).
>
> (3) If the appellant does not apply under paragraph (3) within ten days of the service of the notice under paragraph (1) the decision of the single judge is final."

It also meant, of course, that an extension of time to file that application also had to be granted and having heard the application for extension of time, we granted it pursuant to rule 1.7(2)(b) of the CAR.

[9] In all the subject applications collectively (application nos 3 and 53/2017) the applicant's principal contention is that counsel who represented him at his sentencing

hearing, as well as at the hearing of his appeal, failed to raise the necessary challenges to the sentence that was imposed by the sentencing judge. Counsel submitted that since the application before Morrison P, to amend the sentence as an error or defect, had been refused, the only remedy available to him was for this court to either vary or to discharge the orders of the single judge or rehear an appeal against sentence. For these reasons, the applicant has launched a challenge to the single judge's decision, as well as what amounts to an application to reopen his appeal.

Issues

[10] Given the facts as we know them, there are three main issues which arise from the applications, for consideration by this court. These are:

> (1) whether the single judge was correct when he ruled that he had no authority to make the order sought;
>
> (2) whether the Court of Appeal has the jurisdiction to reopen an appeal which has already been determined and if so what are the circumstances under which the court may do so; and
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> (3) whether, if the jurisdiction does exist, the circumstances of the applicant's case are such as to require the court's intervention to reopen his appeal against sentence.

The first two issues are based on the question of jurisdiction and the third will involve a consideration of the factual circumstances in this case.

The application to vary or discharge the order of a single judge

Issue 1: Was Morrison P correct when he ruled that he had no jurisdiction to make the orders sought

[11] The grounds on which the application to vary or discharge the order of a single judge was based are as follows:

> "a. The learned President has ruled that he has no authority to make the order requested and only the Court can make such an order;
>
> b. The Appellant has no other remedy and his incarceration continues despite his attempts to have his appeal against sentencing heard;
>
> c. The sentencing court erred when it thought that it had no choice but to sentence the Defendant to a mandatory life sentence;
>
> d. The sentencing Court erred when it failed to consider the appropriate principles to be applied when determining the period of time that must elapse before the Defendant becomes eligible for parole;
>
> e. The sentencing Court erred when it failed to give the Defendant credit for the time he had been incarcerated before the imposition of the current sentence."

The decision made by Morrison P on the application before him

[12] On 25 October 2016 Morrison P heard the applicant's application. The errors alleged by the applicant which he asked Morrison P to consider were:

> (1) The judge's imposition of a mandatory life sentence on the applicant.

(2) The stipulation that the applicant should serve a period of 17 years before being eligible for parole.

(3) The judge's failure to credit the applicant with time served in custody before sentence.

[13] The grounds on which the applicant sought to correct those alleged errors as set out in his application before the single judge were that:

> "a. The sentencing court erred when it thought that it had no choice but to sentence the [applicant] to a mandatory life sentence;
>
> b. The sentencing Court erred when it failed to consider the appropriate principle to be applied when determining the period of time that must elapse before the [applicant] becomes eligible for parole;
>
> c. The sentencing court erred when it failed to give the [applicant] credit for the time he had been incarcerated before the imposition of the current sentence."

[14] As stated earlier, this application was made pursuant to section 61 of the CJAA which states as follows:

> "The Court of Appeal may, if it shall think fit, amend all defects and errors in any indictment or proceeding brought before it under this Act, whether such amendment could or could not have been made at the trial, and all such amendments as may be necessary for the purpose of determining the real question in controversy shall be so made."

[15] Morrison P, in considering whether the application could properly be made pursuant to section 61 of the CJAA, looked at the history of the matter, the transcript of the sentencing hearing before the trial judge and the submissions made by counsel for

the applicant. Morrison P then made his decision on two bases; that of jurisdiction and the factual circumstances of the case.

[16] On the question of jurisdiction Morrison P held that, even assuming that the application could have properly been brought under section 61 of CJAA, a single judge would have no jurisdiction under that section. That section requires a hearing by the Full Court having granted a power to the Court of Appeal and not to a single judge. Morrison P also concluded that, in any event, there was no jurisdiction pursuant to section 61 of CJAA to make the orders sought in this application.

[17] On the facts themselves, Morrison P considered, again on the assumption that the application could properly be brought under section 61 of CJAA, whether the jurisdiction had been triggered by the circumstances of the case outlined by the applicant. Morrison P took the view that the errors as alleged were not errors in proceedings as contemplated by the section. He also opined that, even if they could be considered errors in the proceeding, he was firmly of the view that the applicant's route would have to be under and by virtue of section 13(1)(c) of the Judicature (Appellate Jurisdiction) Act (JAJA). Morrison P also stated that whilst the sentencing judge did not give full credit for time spent on remand as is now the practice, he had no jurisdiction as a single judge, to address that issue on the application before him.

[18] Morrison P further considered whether the applicant could have brought the application under section 42L(2)(a) (of CJAA as amended in 2015). That section provides a mechanism for persons sentenced to the prescribed minimum penalty before

the appointed day of 30 November 2015, to apply to a single judge of the Court of Appeal for review. Morrison P determined that the application could not have been brought under that section.

[19] Morrison P found that, in the final analysis, the applicant had exhausted all avenues to appeal against his conviction and sentence and could not now revisit the issue of sentence before a single judge. This dismissal of his application by Morrison P led to the applicant filing the three applications set out in paragraph [2] herein.

Ruling on issue 1

[20] This court has jurisdiction to amend all defects and errors in any indictment or proceeding brought before it, pursuant to section 61 of CJAA. However, Morrison P was correct to hold that the single judge has no powers under that section. There is also no power given to a single judge under the CAR to do so. Morrison P was also correct to find that the applicant could not pray this section in aid, in order to secure the relief which he sought. The grounds on which the applicant claims relief do not disclose any error or defect in the indictment or the proceeding brought before this court under the CJAA. There is, therefore, nothing to amend. Neither is any amendment sought which is necessary to determine any real question in controversy before this court. What the applicant seeks is for the sentence imposed to be set aside and a new sentence ordered. This can only be done on an appeal of the sentence to the Court of Appeal by virtue of section 13 of the JAJA. Therefore, only the court, on a successful appeal, can set aside a sentence imposed by a trial judge. There is no basis therefore, to discharge or vary the orders of the single judge.

Applications for an extension of time to appeal against sentence and for permission to appeal

Issue 2: whether this court has any jurisdiction to reopen a concluded appeal

[21] Having failed in his bid to amend the sentence as an error or defect in an indictment or proceeding before Morrison P, the applicant also filed application for an extension of time to appeal against sentence and for permission to appeal along with his application to vary or discharge the orders of the single judge. The applicant having unsuccessfully appealed his conviction and sentence in 2007, whether he now succeeds in these applications depend largely on the second issue of whether there is in fact any jurisdiction in this court to reopen his appeal.

[22] The grounds on which the application for extension of time to appeal was made are as follows:

> "a. That at the sentencing hearing as well as at the hearing of my appeal my counsel failed to challenge the sentence imposed;
>
> b. That at the sentencing hearing as well as at the hearing of my appeal my counsel failed to challenge the trial judge's determination that she had 'no choice' but to sentence the Defendant to life in prison;
>
> c. That at the sentencing hearing as well as at the hearing of my appeal my counsel failed to challenge the trial judge's determination of the time before which the Defendant becomes eligible for parole is 17 years:
>
> d. That at the sentencing hearing as well as at the hearing of my appeal my counsel failed to seek the Court's determination that the defendant should be credited with the time spent in incarceration before conviction and sentence."

[23] The grounds on which the application for permission to appeal against sentence was made are as follows:

> "I. The sentencing court erred when it thought that it had no choice but to sentence the Defendant to a mandatory life sentence;
>
> II. The sentencing Court erred when it failed to consider the appropriate principle to be applied when determining the period of time that must elapse before the Defendant becomes eligible for parole;
>
> III. The Sentencing Court erred when it failed to give the Defendant credit for the time he had been incarcerated before the imposition of the current sentence."

[24] In his submissions before this court counsel for the applicant, Mr Kandekore, readily admitted that the jurisdiction of the court to reopen an appeal was a discretionary one and not one given pursuant to any legislative framework. Counsel submitted that this court had the discretion to reopen the appeal on the basis that there was an obvious error in the calculation of the time in which the applicant's sentence was to start. Counsel argued that whilst he had no issue with the 17 years imposed, both the sentencing court and this court had fallen into error. The sentencing judge erred, counsel submitted, in not giving credit for time spent in custody and this court erred in ordering that the sentence should commence from 7 September 2016.

[25] Counsel for the Crown, Mrs Johnson-Spence, argued that the issue of sentence had already been dealt with on appeal and so neither the single judge nor this court had any jurisdiction to deal with the issue of sentence again. Crown Counsel submitted that this application was without merit. Crown Counsel argued that if one were to examine the judge's language at the sentencing hearing from the transcript, the court

could draw the inference that the judge did take into account all that was necessary in sentencing the applicant. Crown Counsel further argued that the computation of the sentence should not be separated from everything else said by the judge; the entire sentencing hearing would have to be looked at. When that is done, according to counsel for the Crown, the sentence may appear to some to be too low. In any event, Crown Counsel stated, Morrison P had already dealt adequately with that issue.

Discussion and ruling on issue 2

[26] As was stated earlier, these applications present interesting questions of law because of their unusual nature and because counsel has taken this court in a different direction from that in which he took the single judge. In his affidavit filed in support of the application for an order extending time to appeal against sentence, counsel for the applicant deposed at paragraph 15, that "the Defendant now seeks leave to appeal against sentence and an extension of time within which to appeal against sentence". Then at paragraph 16 he stated that the appeal against sentence was not filed in a timely manner due to the decision of the applicant's appellate counsel and that the applicant had nothing to do with that decision as he had been unaware of his right to appeal against sentence, as well as conviction.

[27] These statements by counsel are surprising for two reasons. The first is that the application before the single judge proceeded on the assumption that the applicant had appealed against sentence. The second is the fact that the applicant did in fact appeal sentence in Criminal Form B1 (notice of appeal or application for permission to appeal against conviction or sentence), in criminal appeal no 76/2007. The applicant at that

time gave notice that he desired to appeal to the Court of Appeal against his conviction and sentence dated 8 June 2007. He filed five original grounds of appeal and at ground (e) he averred that the sentence was manifestly harsh and unjust.

[28] Counsel Mr Kandekore, ultimately accepted that there had been an appeal against sentence but argued that counsel who represented the applicant at his appeal hearing had failed to advance certain arguments in favour of the applicant and that he, in effect, wished for a second opportunity to do so. An application for an extension of time to appeal sentence, became necessary as six years have passed since this court upheld the applicant's conviction and sentence. The applicant having already appealed sentence, he has to cross the hurdle of showing that there is jurisdiction in this court to reopen his appeal against sentence, and that even if such jurisdiction does exist, his case has some merit so that this court will be moved to extend time for him to appeal sentence again and grant him leave to do so.

The jurisdiction to reopen an appeal which has already been determined

[29] The applicant not being a first time appellant, what then are the principles, if any which guide the court when an appeal has already been heard and determined and the applicant desires his appeal to be reopened?

[30] There are principles which govern relisting an appeal under what is generally known as the slip rule; principles which govern relisting an appeal which has been dismissed without a hearing on the merits; and there are principles which govern

reopening an appeal which has been determined on the merits. I will therefore examine these principles to see if they are applicable to this case and, if so, to what extent.

[31] There is power in this court, by virtue of its inherent jurisdiction to control its own process, to correct a clerical error or any error arising from an accidental slip or omission in its judgment or order. It is always within the competency of this court, if nothing has intervened to render it inequitable or inexpedient to do so, to correct an error on the record, in order for the judgment or order to reflect what the court intended to pronounce.

[32] This inherent jurisdiction to correct errors, generally referred to as the slip rule, has been considered and applied in several cases. I will refer only to two which were recently decided in this court. **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16 was an application for clarification or correction of an error arising from the judgment and order of this court. The basis of the application was that there was an inconsistency between the judgment delivered by the court and the order which was drawn up. Having heard the application, this court found that, notwithstanding that there was no rule in CAR which governed the issue (despite the fact that rule 42.10 of the Civil Procedure Rules 2002 deals with the slip rule) this court had an inherent jurisdiction in controlling its process, to correct clerical errors or errors arising from accidental slip or omission in its judgment or orders. This, it found, was subject to the rights of third parties having intervened.

[33] In **Dalfel Weir v Beverly Tree** [2016] JMCA App 6, this court again revisited the issue, on an application to vary an order made by this court, following the conclusion of an appeal involving the parties to the application. By a majority, this court granted the application and made an order amending the original order which it had made. Referring to the decision in **American Jewellery Company Limited and Others v Commercial Corporation Jamaica and Others**, this court accepted that by virtue of its inherent jurisdiction to control its process, it could correct a clerical error or an error arising from an accidental slip or omission in its judgment or order. It also decided that in considering whether it was necessary to make such a correction, this court ought to consider what the clear intention was at the time of pronouncement of the judgment or order and the clear intention must prevail.

[34] In **Dalfel Weir v Beverly Tree**, Morrison P, who concurred with the reasoning of Phillips JA (who gave the main judgment in the case), considered the decision of the House of Lords in **Hatton v Harris** [1892] AC 547, and at paragraph [17] said that:

> "This court has the power to correct errors in an order previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order."

[35] Phillips JA accepted that the order, as drawn up, did not reflect the court's intention and that if the error had been pointed out at the time of judgment it would have been corrected. Phillips JA also found that if there was no prejudice to third

parties, even the delay of years in making the application to correct the error would not deter the court from making the order to correct an obvious error.

[36] It is clear, therefore, that this court has the jurisdiction to correct a clerical error, accidental slip or omission in its judgment or order in the circumstances outlined above, but there is no jurisdiction to rehear an appeal or alter a judgment or order after it has been passed and entered, provided it accurately reflects the intention of the court. There is also no jurisdiction to reopen a concluded appeal to revisit an order the court intended to make but which it ought not to have made.

[37] There is power to order that an appeal be relisted where there has been an irregularity or something akin to fraud or mistake alleged of such a nature as to cause this court, in the exercise of its inherent jurisdiction, to declare the first order on appeal a nullity. Otherwise the court is functus officio.

[38] **R v Thompson** (1964) 6 WIR 381 was a case from the Parish Court in which the appellant had been convicted for unlawful wounding. He appealed but failed to appear personally or by his counsel as required by section 297 of the Judicature (Parish Courts) Act. His appeal was duly dismissed. He applied to have it re-listed and the Court of Appeal refused to do so, on the ground that his appearance was a condition, the breach of which would lead to a determination of the appeal. The appeal having been dismissed, the court was functus officio. The court also held per curiam that:

> "The court would not in future entertain applications for re-listing appeals which had been dismissed for nonappearance unless some irregularity or something amounting to fraud or mistake was

> alleged of such a nature that the court in the exercise of its inherent jurisdiction may declare the order a nullity."

[39] The matter may also be relisted even if the first order was not a nullity where there was a likelihood of an injustice being done to the applicant. This, however, is dependent on whether the order on appeal had already been recorded. See **R v Cross** [1973] 2 All ER 920 and **R v Daniel** [1977] 2 WLR 394.

[40] In **R v Cross** the court had allowed an appeal against sentence but later that day recalled the appellant regarding an issue with his character. The result was that the court set aside its original judgment and ordered a rehearing. At that rehearing it was agreed that the court had such a power to alter its judgment or order within limits. The outer limit of that power extended to the point at which the judgment is recorded or drawn up by the proper officer. Lord Widgery CJ in **R v Cross** said:

> "It is well recognized that a court of record has power to alter a judgment or order which it has made within certain limits. The limits set in general appear to be that the power to alter the judgment ceases when the judgment is, in the words of the civil courts, drawn up. In other words, the general principle seems to be that when once the judgment has been finally recorded, then the inherent power to vary it is lost. We are satisfied from the arguments before us, and indeed from our own experience, that that rule has been extensively applied in the criminal courts in the past."

[41] However, in **R v Daniel** leave to appeal was denied by a single judge and the applicant renewed his application to the Full Court. Due to administrative oversight the renewed application was relisted, heard and dismissed without notice to the applicant's lawyers. The order of dismissal was recorded. The appeal was heard and dismissed on

the merits but on the question of jurisdiction Lawton LJ held that **R v Cross** was not applicable to a case where the proceedings was a nullity. He also considered that outside of cases where the proceedings were a nullity the jurisdiction to relist depended on the likelihood of injustice having been done.

[42] In **R v Blackwood** [2012] 2 Cr App Rep 1, the appeal was allowed and the appellant discharged. The formal order was drawn up and sent out by the Criminal Appeal's office. The Crown then, much later, applied for an order for retrial. The court applied **R v Cross** and held that the order of the Court of Appeal had become final and that a verdict of acquittal having been entered by the Crown Court, the result was that the Court of Appeal could not order a retrial. The Court of Appeal accepted that the doctrine of nullity in **R v Daniel** was a valid doctrine but found that it was not applicable to the case.

[43] In the consolidated case of **Regina v Pedley; Regina v Martin; Regina v Hamadi** [2009] 1 WLR 2517, the Court of Appeal of England and Wales (Criminal Division), in considering the case of **Regina v Hamadi**, considered the very limited power it had to rehear a concluded appeal. It found that it had the power to relist an appeal, where, by administrative error, or otherwise, the appellant was deprived of a proper hearing so that the apparently concluded hearing could properly be described as a nullity. This, it said, included cases where the Court of Appeal failed to follow the rules or well established procedure. The Court of Appeal considered **R v Daniel** to be a good example and found that there was no exception in the case before it. The case of

Regina v Hamadi, it found, was simply a case where counsel had second thoughts and wished to argue a point not taken when the appeal was fully heard. In part, counsel in **Regina v Hamadi** wished to argue the same point argued previously. The Court of Appeal held that the jurisdiction to do so did not exist and, "if it did, every disappointed appellant could seek a second hearing or, it may be supposed, a third or a fourth".

[44] In **R v Yasain** [2015] EWCA Crim 1277, the Court of Appeal was asked to rule on its power to reopen an appeal to correct an error, which was said to have caused a real injustice, in that a sentence lawfully imposed by the Crown Court was quashed because of a perceived error. It was later discovered that the error was not in the judgment but in the transcript. The Court of Appeal held that once the judgment was entered and recorded it could not be amended. However, the Court of Appeal identified two exceptions to this general rule. The first was that the court does have the power to rehear an appeal, if, on a proper analysis, the previous order was a nullity or there was such a defect in the procedure that it may have led to some real injustice.

[45] Looking further afield, to the jurisdiction of New South Wales, notably similar principles apply. The case of **R v Burrell** [2007] NSWCCA 79 provides a detailed analysis of the factors that must be considered when assessing whether an appeal should be reopened. In **R v Burrell**, the Court of Criminal Appeal delivered its judgment dismissing an appeal that was brought. That order was entered by the Registrar of the Court of Criminal Appeal, without a request from the parties, on the

same day. The Crown thereafter, made an application to the court that it should, in the interests of justice, reopen the appeal on the basis that the understanding which the court had of evidence at the trial was, in some respects, incorrect.

[46] Mr Burrell submitted that the court, as constituted, did not have jurisdiction to entertain the Crown's application. He also submitted that "in order to avoid any apprehension of bias the Crown's application should be heard by a Court of Criminal Appeal differently constituted".

[47] McClellan CJ, opined that a review of the relevant authorities indicated that the extent of the jurisdiction of a Court of Appeal to reopen a matter which had been heard and orders made, had received consideration on a number of occasions. McClellan CJ observed that although there was a fundamental public interest in the finality of litigation, the courts have also been concerned to ensure that parties receive a fair hearing and a determination of the matter upon its merits. The Chief Justice noted however, that particular difficulties would arise when the orders have been perfected.

[48] In coming to the decision that the appeal was not finally determined because the matter was not determined in relation to the relevant evidence, McClellan CJ stated the following:

> "In this case the appeal has been determined and reasons published upon a false understanding as to some matters. The appeal has not been determined in relation to the relevant evidence. For that reason it has not been finally determined. If the matter is to be determined on its merits, that evidence, and that evidence only, must be considered. The circumstances of this case are exceptional. Public confidence in the criminal justice system

> depends upon courts making decisions which so far as possible are based upon the relevant facts to which the correct legal principles have been applied. In my opinion this Court should intervene, recognize the errors and determine the matter having regard to a correct understanding of the facts and provide reasons accordingly."

[49] The Chief Justice referred to a plethora of cases that may play a pivotal role in assisting the court in deciding whether the orders the applicant seeks in his several applications should be granted.

[50] The starting point is **Grierson v The King** (1938) 60 CLR 431. In **Grierson** the High Court opined that "no court has authority to review its own decision pronounced upon a hearing *inter partes* after the decision has passed into a judgment formally drawn up". **Grierson v The King** was considered in **Jones v The Queen** (1989) 166 CLR 409. The problem as seen in **Jones v The Queen** was that the appellate court had not considered all of the appellant's arguments. The argument in the High Court on an application for special leave to appeal proceeded on the footing that, because the order of the Court of Criminal Appeal had been perfected, it was not possible to again move the Court of Criminal Appeal to determine grounds of appeal which had been left undetermined. The High Court however, expressed regret that the Court of Criminal Appeal had not been approached before the order had been perfected, granted special leave to appeal, and remitted the matter to complete the hearing and determine the appeal.

[51] The question was again considered in **Pantorno v The Queen** (1989) 166 CLR 466. In that case special leave to appeal to the High Court was sought on a ground

which had not been argued in the court below. The High Court emphasized that failure to argue a point before a court of criminal appeal would present a considerable obstacle to an applicant seeking special leave to argue it in that court. The court recognized that a court of criminal appeal:

> "may have to give further consideration to issues which were relegated to the margin of attention during the argument, though it is not required to consider new grounds which counsel abstained from raising on the appeal."

The court ultimately held that a failure to consider the additional grounds had the consequence that the appellant had been denied natural justice.

[52] In **R v Lapa (No 2)** (1995) 80 A Crim R 398, the applicant complained that the Court of Criminal Appeal had not determined one of the grounds of appeal. That application had been made before the order had been entered. However, entry of the order occurred after the application was made. The Court of Criminal Appeal was satisfied that it could review its judgment at any time until its order had been perfected. It further held that the power of the court was not lost by the administrative act which perfected the order, after the application to reopen had been made.

[53] In **R v Gust** [2000] NSWCCA 287, it was held that the court had the power to grant an application to reopen the hearing of an appeal if an applicant could show that he had been denied procedural fairness, even after the judgment had been perfected. The appellant in **R v Giri (No 2)** [2001] NSWCCA 234 argued that he had been denied natural justice by the Court of Criminal Appeal. He applied to have the appeal reopened

and further submissions considered. Although the court rejected the application, Heydon JA held that:

> "It is clear that an appellate court may reopen a case which has already been decided if it was decided on a point on which the losing party has, without personal fault, not been heard: *Autodesk Inc v Dyason (No 2)* (1993)... It is also the case that an appellate court may reopen a case which has already been decided on other grounds: *Autodesk*...
>
> It was however emphasized that:
>
> > 'according to *Wentworth v Woollahra Municipal Council* 1982… in practice the circumstances: **'are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution**'." (Emphasis added)

[54] McClellan CJ in **R v Burrell** noted that in **R v Reardon** [2004] NSWCCA 197, Hodgson JA reviewed several authorities and expressed the view that:

> "what was said in **Jones v The Queen** and **Pantorno v The Queen** was insufficient to displace the binding order of **Grierson v The King** to the effect that, once an appeal has been heard and determined, and the order perfected, there is no jurisdiction to reopen the appeal."

[55] It was stated however that the above ratio:

> "… is subject to the slip rule, and the possibility of separate proceedings to set aside orders obtained by fraud. It also accepted that the 'principle applies when an appeal has been heard and determined; and leaves open the possibility that if there are grounds of appeal which are not determined at all, it could be said that the appeal has not been determined'."

[56] In **R v Carrion** [2002] NSWCCA 21, in considering the problem in the context of a "slip", the court carried out a comprehensive review of the authorities. This included the decision of the Queensland Court of Appeal in **R v Allen** [1994] 1 Qd R 526. In that case the court held that it had inherent jurisdiction to vary an order which it had originally made so as to allow an appellant to argue a further ground of appeal. This was done, although the order on appeal had been perfected. Wood CJ recognized that the court's jurisdiction which he described as 'inherent' lay in the fact that "the interests of justice required the court's intervention".

[57] In the civil arena, the principles articulated in the case of **Sarah Brown v Alfred Chambers** [2011] JMCA App 16 are particularly instructive. Although a case dealing with civil litigation, **Sarah Brown v Alfred Chambers** has highlighted the fundamental principles to be considered when assessing whether or not a court is empowered to reopen an appeal to make changes after a final judgment or order has been made. The issue that was to be determined in that matter was whether the court was empowered to extend time after a final judgment or order had been made. The facts are that on 20 December 2010, the Court of Appeal dismissed an appeal by the appellant Mr Alfred Chambers, and ordered, inter alia, that the respondent Mrs Sarah Brown should quit and deliver up possession of all that parcel of land known as number 22 Cedar Valley Road, Kingston 6 in the parish of Saint Andrew to Mr Chambers, on or before 31 March 2011. On 30 March 2011, Mrs Brown made an application for the time within which to quit and deliver up possession of the property to be extended to four months.

[58] In paragraphs [5] and [6] of the judgment delivered by Harris JA, she stated the law as follows:

> "[5] …[I]t is common ground that the pronouncement of the court on 20 December is a final order. As a general rule, once a judgment or order is perfected it brings litigation to an end. It follows therefore that a court cannot revisit an order which it has previously made. The extent of the court's jurisdiction does not go beyond that which is pronounced in its final order. Despite this, certain exceptional circumstances may arise which may cause the court to revisit a prior order. In the Australian case of **Bailey v Marinoff**, Barwick CJ, speaking to the foregoing principles, at page 530 said:
>
> > 'Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding, apart from any specific and relevant statutory provision, is at an end in that court and is in its substance, in my opinion, beyond recall by that court. **It would, in my opinion not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed.** In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court.'
>
> [6] At page 539 Gibbs J said:
>
> > 'It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it … **The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction**

> **to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court**.'

In **Gamser v The Nominal Defendant**, in addressing the principle, Barwick C. J said:

> '**I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it. It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation.** However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand. In my opinion it is desirable that the Court of Appeal should have a discretion – however guardedly it might have to be exercised – to reopen its judgments in cases such as that in which the needs of justice require it. I agree, however, that the decision in **Bailey v Marinoff** (5) shows that the Court of Appeal lacks that inherent power'." (Emphasis added)

[59] The issue is therefore not without precedent. The general principles to be gleaned from the cases are that:

(a) Generally, there is no power to relist or reopen an appeal which has been determined and orders made outside of any relevant statutory provisions and the slip rule.

(b) There is limited jurisdiction in the Court of Appeal, based on its inherent jurisdiction to control its process, to relist or reopen an appeal and alter the order of the court before the order is perfected on the record.

(c) Where the appeal has been determined and the order of the Court of Appeal has been perfected, there is generally no power to reopen an appeal.

(d) An appeal, which has been determined and the order perfected, will not be relisted or reopened unless there has been a defect in procedure or an irregularity amounting to fraud or mistake which had caused the previous hearing to be a nullity.

(e) The court has the jurisdiction only in exceptional cases, to reopen a determined appeal where it considers that there is a likelihood of substantial injustice to the appellant, if it does not intervene. Those exceptional cases include but are not limited to circumstances where:

    (i) the appeal was decided on a point on which the applicant was not heard;

    (ii) there were grounds of appeal which were argued but were not determined by the

court so as to raise the issue of whether
the appeal was finally determined or not.

(iii) the appeal was a procedural nullity.

(f) neither a change in the law or fresh evidence by themselves
will be sufficient for the appellate court to reopen the case.

[60] The general principle therefore, subject to the limited exceptional circumstances, is that an appellate court has no authority to review its own decision pronounced after a hearing inter-partes where the decision has passed into a judgment which is formally drawn up. This principle is one that is strictly enforced and is deviated from, in limited exceptional circumstances only. The applicant must not only place himself in one of the limited exceptional circumstances but the injustice which would be meted out to him if his appeal is not reopened must be so substantial as to far outweigh the public interest in the finality of litigation.

[61] It being established on the authorities, that this court has the jurisdiction to reopen a determined appeal, even after the judgment and orders of the court has been perfected, in limited exceptional circumstances, the only question remaining is whether the applicant's case falls within one of the categories of cases in which that jurisdiction ought to be invoked in his favour.

Issue 3: Are the circumstances of the applicant's case such that it requires the intervention of this court to reopen his appeal against sentence?

[62] The applicant is seeking to reopen his appeal which has already been determined and orders drawn up so that this court to may hear arguments which were not previously raised. There is no suggestion that this resulted from any procedural failure by this court. The applicant, through his attorney, simply failed to file and argue those grounds at his appeal. This raises the question of whether this court ought to reopen the applicant's appeal to accommodate arguments that were not previously raised at his appeal. The authorities suggest that this is not a basis to reopen a determined appeal.

[63] One of the complaints of Mr Kandekore is in regard to the approach of the trial court at the sentencing hearing for the applicant. This should have been made a ground of appeal and argued on appeal but it was not. Even though the applicant applied for permission to appeal sentence on the ground that it was manifestly excessive, harsh and unjust, no submissions were made to the court, in that regard, at the appeal hearing.

[64] The second complaint made by Mr Kandekore was that this court, having upheld the applicant's conviction and sentence, did not follow the correct procedure in pronouncing the period from when the sentence should run.

[65] As previously highlighted, an appeal against both sentence and conviction was filed on 11 June 2007. However, as averred by Mr Kandekore, no submissions were advanced at the appeal hearing on the issues now raised.

[66] It appears, prima facie, that counsel who represented the applicant in appeal no 76/2007 did not, for whatever reason, advance any arguments on the grounds of appeal filed relating to sentencing. As Morrison P stated, at paragraph 19 of his judgment in the application to amend and correct errors in sentencing:

> "…other matters complained of as regards the sentence imposed on the applicant, was a matter for the discretion of the judge. It could well be in recognition of the court's traditional reluctance to interfere with the exercise of such a discretion that the applicant's legal advisors did not see fit to advance any argument in support of the appeal against sentence when the matter was last before the court in 2010."

[67] Whatever the reason counsel at the time had for not advancing any arguments regarding the issue of sentencing, there is no indication in the judgment of the court that the appeal against sentence was abandoned. The determinative factor for whether the applicant will be allowed an extension of time to file appeal against sentence and be given permission to appeal, is if it can be shown that he will suffer substantial injustice because: (a) his appeal against sentence was not finally determined on the merits; (b) this court fell into error procedurally in its order as to when the applicant's sentence should commence after dismissal; and (c) the interests of justice requires the court's intervention.

[68] Whether or not the applicant will suffer any injustice if his appeal is not reopened can be determined by looking at the merits of his case. I bear in mind that there is no complaint that the applicant's concluded appeal was a procedural nullity or that procedural unfairness resulted from any act or omission by this court.

[69] Section 16(1)(3) of the JAJA provides that:

> "Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court."

[70] The discretion to grant an extension of time to lodge a notice of appeal or an application for leave to appeal is a discretionary one, which must be judicially exercised. The court is usually guided by considerations of common sense and justice. See **Pollard George v R** (1995) 47 WIR 185, **R v Percival Moore** (1972) 12 JLR 809 and **Robert Edward Wynyard Jones (No 2)** (1972) 56 Cr App Rep 413. Normally good cause has to be shown for this court to hear and determine a case. Where the liberty of the subject is at stake the provisions governing extension of time to appeal are usually given a liberal interpretation. As long as the non-compliance is not willful and it is in the interests of justice, this court will grant an extension of time and leave to appeal. These cases however, all concern convicted persons who had not yet exercised their right of appeal.

[71] In the case of an applicant seeking to reopen his already determined appeal, in our view, any application for an extension of time to lodge an appeal and for permission to appeal must begin with an assessment of the delay. Six years have elapsed since this matter was last before the court. Any order of this court would have long been perfected. This is not a case involving any clerical error, accidental slip or omission in the court's judgment or orders. Therefore, in order to succeed in having his appeal reopened, the applicant must show that the appeal which was determined was a nullity

or that his appeal against sentence was not finally determined or that the judgment or order of the appellate court rested on false assumptions leading to manifest injustice. We will therefore, examine the merits of the applicant's arguments in that regard.

[72] Whilst counsel Mr Kandekore, was bereft of authorities regarding this court's jurisdiction to reopen the appeal, he was not so hampered in his submissions regarding the merits of his case.

On the question of the merits of the applicant's case, this court has to determine:

> (a) Whether this court made an error in setting the period when the applicant's sentence should commence and whether if so, that is a procedural error which has resulted in substantial injustice to the applicant bearing in mind no argument was heard by this court on the issue before pronouncement.
>
> (b) If so, is the injustice to the applicant so manifest that his appeal should be reopened?
>
> (c) Whether the sentencing court failed to give full credit for time served and if so, was it a defect in the process which caused the appellate court's judgment and orders to rest on a false assumption leading to any substantial injustice to the applicant so manifest that his appeal ought to be reopened,

bearing in mind that he appealed his sentence but failed to raise this as a ground of appeal?

(d) Whether the sentencing court failed to apply proper sentencing principles in sentencing the applicant and, if so, whether the failure to do so was a defect in procedure requiring this court to reopen the appeal to allow the applicant to argue this as a ground of appeal.

Did this court make an error in setting the period from whence the sentence of the applicant was to commence?

[73] Counsel filed a bundle of supplemental authorities in support of his three applications before this court. The first authority in that supplemental bundle is **Leslie Tiwari v State** [2002] UKPC 29 which dealt with the issue of the treatment of the time spent in custody while awaiting appeal. The second is **Ali v The State**; **Tiwari v The State** [2005] UKPC 41, in which the Board gave guidance on the issue of how appellate courts ought to determine the date from when the sentence of an unsuccessful appellant who had been in custody, should commence.

[74] In this case the applicant's sentence was ordered to commence from September 2007, three months after his conviction. Amongst Mr Kandekore's principal submissions is that the Court of Appeal fell into error when it did so.

[75] On the question of when time begins to run subsequent to an appeal, section 31(3) of the JAJA is instructive. This section indicates that subject to any directions

which may be given by the court, if the appellant is in custody, time is deemed to resume or to begin to run, as the case requires, from the day on which the appeal is determined. This is what the section provides:

> "The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into a correctional institution under the sentence."

[76] The practical effect of this section is that, unless this court directs otherwise the sentence of an appellant will be deemed to begin to run from the date on which his appeal is dismissed. Section 31(3A) of the JAJA provides that the court is to take into account any "election made by the appellant under the rules under the Corrections Act to forego any special treatment accorded to the appellant pursuant to those rules".

[77] Morrison P (Ag) (as he then was), in **Tafari Williams v R** [2015] JMCA App 36 outlined that any directions to be given pursuant to the section, remains a matter entirely for the discretion of the court, with consideration given to the danger of potential injustice to an applicant/appellant arising from, not only delays in the production of the transcripts of their trials, but also the sometimes unavoidable delays in the actual hearing of appeals. At paragraph [7] he highlighted that:

> "Prior to November 2013, in recognition of this danger, the practice of the court was (i) in the case of a single judge refusing an application for leave to appeal, to direct that sentence should run from a date six weeks after the original date of sentence; and (ii) in the case of a refusal of an application for leave to appeal by the court itself, to direct that the sentence should run from a date three months after the original date of sentence. This practice, although having no basis in either statute or common law, was the court's attempt to mitigate any potential injustice caused by delays which were in no way attributable to the applicants/appellants themselves. This court's current practice, substantially influenced by the decisions of the Privy Council in **Tiwari (Leslie) v The State** [2002] UKPC 29, (2002) 61 WIR 452 and **Ali v Trinidad & Tobago** [2005] UKPC 41, is now to order that such sentences should in general run from the date of sentencing at trial. However, the matter remains ultimately a matter for the discretion of the court, to be dealt with in accordance with the circumstances of each case."

[78] As noted by Morrison P in **Tafari Williams v R**, in this court, in large part due to the Privy Council's decision in **Leslie Tiwari v The State** and the joint appeals in **Ali v The State; Tiwari v The State**, the practice is now to order the sentence to commence from the date of the sentence at trial. In the applicant's case, the order made by this court on the 20 December 2010 was in keeping with the practice of this court as it stood in 2010. Therefore, the commencement date of the applicant's sentence (7 September 2007) was in fact 3 months from the original date of sentence, that being 7 June 2007.

[79] This issue raises two questions; the first being whether, following the decision of the Privy Council, in which the prescriptions laid down by the Board were not immediately followed by this court, and in light of section 31(3) of JAJA, this court made an error in ordering the applicant's sentence to commence from 7 September

2007? The second question being, if this court did make such an error, is the applicant entitled to have his appeal reopened because of that error?

[80] In **Leslie Tiwari v The State** the Board was considering provisions in the Trinidad and Tobago statute which were similar to our section 31(3) provision. The Board in hearing arguments was not impressed with the submissions of counsel for the State that prisoners who were appealing their sentences were accorded greater privileges in custody than other prisoners and held that those considerations were far outweighed by the fact that the appellant had lost his liberty and was confined in prison. Their Lordships at paragraph [42] held that:

> "Their Lordships appreciate that a convicted prisoner in custody who has served notice of appeal is given a considerable number of privileges which are withheld from a convicted prisoner who has not appealed, but it appears to their Lordships that this consideration is greatly outweighed by the fact that an appellant who has served notice of appeal and who has not been admitted to bail has lost his liberty and is confined in prison, albeit with a number of special privileges. Their Lordships also appreciate that the distinction between a convicted prisoner who appeals and one who does not is a distinction recognized by section 48(1) and by the Prison Rules, but nevertheless section 49(1) expressly gives the Court of Appeal a discretion to direct that the time in custody after service of notice of appeal shall count as part of the term of imprisonment. In these circumstances their Lordships consider that there is much force in the Appellant's submission that time that is spent in prison in Trinidad and Tobago awaiting determination of an appeal should, as in England, count as part of the term of imprisonment passed on the Appellant, unless the appeal is one devoid of any merit."

[81] The Board took the view that time spent in custody awaiting appeal should count as part of the term of imprisonment passed on the appellant although section 29 of the English provision in the 1968 Act is directly opposite to the provision in Trinidad and

Tobago. The Board seemed to have accepted the submission of the appellant's attorneys that it was only right and proper that the Court of Appeal should exercise its discretion under section 49 to achieve the same results achieved by section 29 of the English Act. The Board remitted the matter to the Trinidad and Tobago Court of Appeal for a rehearing on the issue of the exercise of the discretion under section 49(1). The issue was revisited by the Privy Council in **Kumar Ali v The State and Leslie Tiwari v The State.**

[82] In examining the consolidated appeals of **Ali v The State; Tiwari v The State**, the Board made it clear that it was laying down guidelines for jurisdictions with provisions similar to section 49, which would in fact include this jurisdiction. The Board began with a broad statement that they were conscious that it was a matter for the legislature in each jurisdiction to enact its own rules, which reflect conditions in its own state. It held that in jurisdictions with provisions similar to section 49(1) in Trinidad and Tobago, the appellate court should start with the statutory injunction regarding loss of time. In considering whether to exercise its discretion to backdate the sentence the appellate court should take account of the relevant facts of each case. The exercise of the discretion should be consistent and in accordance with proper principles.

[83] The Privy Council stated that, bearing in mind the rationale and objective of the provisions, it was proposed that appellate courts take the following approach:

(1) The backdating of sentences to the date of conviction should not be restricted to exceptional cases.

(2) Lack of remorse or the heinous nature of the crime should not be taken into account as these are only relevant when the original sentence was passed.

(3) No account should be taken of the prisoner's record or the leniency of the sentence.

(4) No account should be taken of the prisoner's conduct since conviction except in so far as it is relevant to his state of mind in applying for leave to appeal;

(5) The decision on loss of time should be proportionate in that it should penalize the initiation and conduct of frivolous applications in order to discourage the waste of the court's time without inflicting an unfairly long extension of imprisonment upon the applicant.

[84] The Board also found that loss of time orders should be made with regard to the abuse they were designed to curb and should not exceed a few weeks in the majority of cases. The Board held also that in backdating, each case should be considered on its merits to decide if the application was devoid of merit and was an attempt to subvert the criminal justice system. Ultimately, the Board found that the full time spent between conviction and appeal should count towards sentence.

[85] The order of this court that the applicant's sentence should begin three months after his conviction was in keeping with the practice at the time. No objection was taken to it by the applicant's counsel at the time of the appeal hearing. Backdating to three months after conviction was designed to curb any possible injustice caused by delays in the system. The decision by this court to so pronounce was not a procedural error which would cause the appeal to be a nullity. We accept that it did take some time for this court to begin applying the guidelines laid out by the Privy Council.

[86] In the instant case, the appeal having been determined and the order perfected approximately six years ago, the applicant has not shown how the failure by this court to order his sentence to commence from the date of conviction resulted in his appeal being a nullity. Neither as he shown, at the very least, that it has led to a wholly disproportionate result and is therefore, manifestly unjust. The time lost in **Leslie Tiwari** was three years. In the case of **Kumar Ali** the time lost was four years and three months with the result that he would have served a period which exceeded the maximum sentence which could be imposed for the offence for which he was convicted.

[87] The Board accepted in **Leslie Tiwari** and **Kumar Ali** that appellate courts were entitled to exercise their discretion in the manner they think appropriate as long as it was consistent and done in accordance with proper principle. The Board also declined to prescribe what an appropriate loss of time may be as it was felt that it was a matter for each appellate court to determine. It was also opined that any loss of time order should not exceed a few weeks in the majority of cases. In this case, the period of

backdating in the case of the applicant was consistent with the orders of the court which were applied to the majority of applicants at the time. It was an order which was not disproportionate and did not inflict an unfairly long extension of imprisonment upon the applicant, it being 12 weeks. We, therefore, take the view that there is no substantial injustice to the applicant of such a nature as would call for the intervention of the court to reopen his appeal for that reason only.

The failure to give credit for time spent on remand

[88] Counsel submitted that the sentencing court erred when it failed to give the applicant credit for the time he had been in custody before the imposition of the current sentence of 17 years. Counsel's contention is that the 17 years that the sentencing judge ordered should elapse before the applicant becomes eligible for parole should be calculated from when he was first remanded in custody. This was not a ground of appeal filed in the applicant's appeal heard and determined in this court.

[89] There is no statutory provision governing the grant of credit for time spent on pre-sentence remand. It is now the current practice of our courts to give a defendant full credit for the time spent in custody and the procedure for doing so is now clearly set out in the new sentencing guidelines developed for the use of Jamaican judges in 2017. However, this was not always the practice. The issue has always been governed by the common law, unlike in the United Kingdom where it is governed by statute. It has always been that a judge has the discretion as to how to treat with time spent on remand. Counsel for a convicted man would, as part of their mitigation at the sentencing hearing, ask the judge, when determining what sentence should be

imposed, to consider that an accused had spent some time in custody. The judge would then indicate that they have taken that into account as a factor in determining the sentencing, but hitherto there had been no defined parameters as to how this was to be done. It was the practice of trial judges, in this jurisdiction, to indicate that they had taken the time spent in custody into consideration in passing sentence but no more would be said as to how that translated when the time came to calculate the actual sentence to be imposed.

[90] It was, in contrast, the practice in the United Kingdom for judges, when imposing a sentence, to credit a defendant with the full time he has spent in custody awaiting trial and to indicate clearly, as a mathematical calculation how that time spent would impact the sentence actually passed. At the time of the applicant's sentencing in 2007, the practice in the United Kingdom of giving full credit for time spent on remand was not the practice of our courts.

[91] In **Callachand and another v The State** [2008] UKPC 49, a decision of the Privy Council on appeal from the courts of Mauritius, the Board held that save in exceptional circumstances or where a difference in local conditions of detention on remand and after sentence existed, the proper approach, having regard to the value ascribed to individual liberty, was that:

> "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 fully taken 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 the sentence."

[92] Since 2008 therefore, save in exceptional circumstances, following on the approach taken by the Privy Council in **Callachand v The State**, the correct approach by sentencing courts in this jurisdiction should be to grant full credit for time spent on remand. The Caribbean Court of Justice (CCJ) took the same approach in the case of **Romeo Da Costa Hall v The Queen** [2011] CCJ 6, a case on appeal from Barbados. In **Romeo Da Costa Hall v The Queen** the sentencing judge only gave credit to two of the four years spent in custody by the accused before trial. The Court of Appeal, in upholding the sentence, took the view that the sentencing judge had a discretion in deciding what portion of the time spent on remand should be credited towards the actual sentence, depending on the particular circumstances of the case.

[93] The CCJ held that there was a prima facie rule of full credit and that there was no evidence on the record of any compelling factors that would displace the prima facie rule of full credit for time spent in pre-sentence custody. The CCJ made reference to the case of **Callachand v The State** and endorsed the position taken by the Privy Council in that case. The CCJ also set out circumstances which it felt may justify a dissent from the prima facie rule of full credit for time served as follows:

(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 sentencing of imprisonment during the whole or part of the period spent on remand.

(5) Generally, where the same period of remand in custody would be credited to more than one offence.

[94] Referring to the procedure a sentencing judge should follow in giving credit the CCJ at paragraph [27] said that:

> "In the interests of transparency in sentencing and in keeping with the principles relating to the imposition of custodial sentences in the Penal System Reform Act, Cap. 139 a sentencing judge should explain how he or she has dealt with time spent on remand in the sentencing process. As indicated above, if the judge chooses to depart from the *prima facie* rule of substantially full credit for time served prior to the sentence, he or she should set out the reasons for such departure. See also *Callachand* at [11]."

[95] In this instant case, it is true that there was no stated arithmetic deduction of the time spent in custody. The applicant had been in custody on remand for approximately four and a half years before his sentence in June 2007. The judge in sentencing him, followed the usual practice at the time. The applicant's attorney at his sentencing hearing made a full and complete plea in mitigation on his behalf. Counsel asked the court to take into consideration several factors in the applicant's favour including the fact of the time he had spent in custody. The attorney indicated on no less than three occasions that the applicant had been in custody on remand for four and a half years. The trial judge in sentencing said she took the plea in mitigation into account and said she had to weigh the various factors in order to be fair to the applicant. However, contrary to the practice as it stands now, the judge did not specifically state whether or not she was crediting him for time spent on remand or give reasons for not doing so.

[96] However, this was not a ground of appeal in the applicant's appeal against sentence. This is not surprising as the procedure considered in **Callachand v The State** and in **Romeo Da Costa Hall v The Queen** was not the practice in 2007 when the applicant was sentenced. This court now has to consider whether the failure by the sentencing court to conduct an arithmetic deduction of the time spent in custody, as is now the practice, but was not then, and the failure of the appellate court to consider this fact although it was not raised on appeal, has resulted in such manifest injustice being done to the applicant, that it calls for the court's intervention to reopen the appeal, even after six years have passed.

[97] Counsel cited the case of **R v The Governor HM Prison Brockhill ex parte Michelle Carol Evans – In the Matter of An Application for Judicial Review** [1998] Lexis Citation 2442, (Transcript: Smith Bernal), which relied on the principle that any authoritative decision of the courts stating what the law is, operates retrospectively. The case held that a later decision does not only state what the law is from the date of the decision, it states what it has always been. That case determined what was the true interpretation of the provisions in sections 33, 41 and 51 of the United Kingdom's Criminal Justice Act 1991 and sections 67 and 104 of the Criminal Justice Act 1967, as amended by the Police and Criminal Evidence Act 1984, as to how the prison authorities are to calculate time spent in custody on remand after a person is convicted and sentenced to concurrent sentences.

[98] There had been two lines of cases in the English courts as to how the calculation should be done, until the decision of the divisional court in **Regina v Secretary of State for Home Department, Ex parte Naughton** [1997] 1 WLR 118 when the divisional court authoritatively decided on which calculation was correct. In **Regina v Governor of Brockhill Prison**, **Ex parte Michelle Carol Evans (No 2)** [1999] QB 1043 the Governor of the prisons had followed the old law in calculating the release date, as a result of which the appellant spent 59 days more than she should in prison. The Court of Appeal held that she was entitled to damages for unlawful imprisonment despite the fact that the Governor was not at fault for following the law as it then was. The decision went to the House of Lords as **Regina v Governor of Brockhill Prison, Ex parte Evans (No 2)** [2000] 3 WLR 843. The House of Lords considered the right to

damages for false imprisonment where there was a miscalculation of the release date based on authoritative judicial decisions which have been subsequently overruled. It upheld the ruling of the Court of Appeal.

[99] The principle being relied on by the applicant, therefore, is that where previous authorities are overruled the decisions to that effect operate retrospectively. This is understood to be different from decisions which "indicate an alteration in the court's practice or which are designed to lay down guidelines for the assistance of judges [which] operate prospectively as from the date of their pronouncement", per Lord Hope of Craighead at page 856 B.

[100] However, these cases cited by the applicant are of no help to his case as there is a distinction between acting on a valid order of the court, which remains valid until set aside and acting on one's own accord based on an interpretation of the law. An order sentencing a convict is a valid order until an appeal against it is successful. It is an order which must be obeyed. A warrant to the prison to detain under such an order must be obeyed and no action for false imprisonment can arise from it. In **Ex parte Carol Evans** the Governor was not acting under an order of the court but acted under his own powers in calculating the release date, which he did on a misinterpretation of the relevant provisions.

[101] The question of retrospection was marginally considered by the Privy Council in **Ruddock v The Queen** [2016] UKPC 7. There, in its decision to overrule the case of **Chan Wing-Sui v The Queen** [1985] AC 168 and to restate the law on foresight and

intent with respect to secondary parties, the Board considered the impact this change in the law might have on past convictions. It said that the effect of putting the law right was not to render invalid all convictions which were arrived at over many years by faithfully applying the law, as it was laid down in **Chan Wing-Sui v The Queen**. It also held that where convictions had been arrived at by faithfully applying the law as it stood at the time, it could only be set aside by seeking 'exceptional' leave to appeal to the Court of Appeal out of time. The Board at paragraph 100 observed further that:

> "[The Court of Appeal] has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been appreciated, have been charged with a different offence. An example is *Ramsden* [1972] Crim LR 547, where a defendant who had been convicted of dangerous driving, before *Gosney* (1971) 55 Cr App R 502 had held that fault was a necessary ingredient of the offence, was refused leave to appeal out of time after the latter decision had been published. The court observed that alarming consequences would flow from permitting the general re-opening of old cases on the ground that a decision of a court of authority had removed a widely held misconception as to the prior state of the law on which the conviction which it was sought to appeal had been based.....Likewise in *Mitchell* (1977) 65 Cr App R 185, 189, Geoffrey Lane LJ re-stated the principle thus:
>
> > 'It should be clearly understood, and this court wants to make it even more abundantly clear, that the fact that there has been an apparent change in the law or, to put it more precisely, that previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction'."

[102] In this instant case, the question of retrospection arises because judicial decisions, since the applicant's case was decided, now state that a judge must give full credit for time spent in custody and if the judge is departing from the principle of full credit, he or she should give reasons. We take the view however, that this change by itself is not sufficient ground to reopen a determined appeal unless the applicant can show that as a result of the change, he would suffer substantial injustice if his case was not reopened.

[103] This court is satisfied however, that it has not been demonstrated that the applicant has suffered or will suffer any substantial injustice as a result of this change in the law at the sentencing stage. We have also taken account of the fact that the applicant was sentenced following a retrial. At the first trial he was sentenced to life imprisonment with the possibility of parole after 20 years. The second trial took place approximately three years later during which time he remained in custody. The sentencing judge at the second trial sentenced the applicant to life imprisonment with the possibility of parole after 17 years, which was also three years less than the previous period. He was, therefore, not prejudiced by a greater sentence than previously imposed, in the sense that the period ordered to be spent before parole, after conviction on the second trial, did not have the result of extending the period of incarceration to a longer period than that ordered on the first trial by the failure to take time spent in custody into consideration.

[104] This court is also satisfied that the period before which he would become eligible for parole was not manifestly excessive and therefore, any failure to credit for time serve would not have resulted in him spending more time in custody than the range of sentences for that type of offence, the 17 years being on the low side of the range, in any event. The applicant has failed to show that the circumstances of his case are so exceptional or that he has suffered such substantial injustice as a result of the failure to credit him for time spent on remand, as to cause this court to reopen his appeal for that reason.

Did the sentencing court fail to consider the proper principles of sentencing?

[105] Mr Kandekore maintains that the sentencing court was not reminded or alerted by counsel to the "principles and policies of the jurisprudence" dealing with the specific time in which an offender must remain in prison before being eligible for parole. The principles and policies, according to Mr Kandekore, were designed to protect the public from the defendant, while the remainder of the sentence was designed to have a deterrent and retributive effect on the offender. In that regard, Mr Kandekore submitted that the period before parole should not be excessive. Counsel maintains that if the court had been reminded, the period imposed on the applicant would have been significantly less.

[106] Again, these arguments were not made at the applicant's appeal. There is no general jurisdiction to reopen an appeal to argue grounds which were not argued in the appeal. In any event, the offence committed by the applicant was particularly

aggravated. The sentencing judge had these very considerations in mind when she lamented that:

> "… I have to weigh the various factors and try to be fair not only to you Stephen Grant as you stand before me, but I have to bear in mind the offence that you have been convicted of. A seventeen year old man is dead, eleven gunshot injury was to his back. You admitted to firing those shots and I must admit Mr. Grant, as I look back at the evidence, I was wondering if you appreciate what it is that happened there that night for you addressed the jury and I look back at the evidence. You maintained that you acted to defend yourself. I wonder if you forgot what you did that night and how hard it was for a jury to understand how you can be under attack and your attacker ends up with eleven shots in his back. Even the Privy Council, the learned Law Lords in their wisdom maintain that 'proliferation to the back of the deceased was a problem for you to overcome...'
>
> Your attorney asked me in the first instance to let you serve seven years. The justice of this case, to my mind, does not allow me to do that."

[107] The judge also considered the defence raised by the applicant at his trial which was rejected by the jury and the fact that although he showed no remorse to the jury, there was some regret shown thereafter. The judge also considered the impact of the offence on the family of the deceased. In this regard I am satisfied that the sentencing judge did consider the relevant factors to be assessed when administering her sentence, given the seriousness of the offence.

[108] Whilst counsel at the sentencing hearing cited no cases with regard to the period of time before which the applicant ought to be eligible for parole, this court cannot but note that counsel's plea in mitigation spanned 16 pages of the transcript, and covered all the spectrums involving the principles of sentencing. The sentencing court described

it as 'excellent'. We see no reason to disagree with that description. The focus of the plea was to ask the court not to set a period before which parole should be considered so that the applicant would spend only seven years in prison.

[109] Mr Kandekore cited authorities to this court with regard to the period to be served before being considered for parole. The first was **Gregory Grant v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 29/2005, judgment delivered 4 May 2007, where the victim was shot three times during a robbery. The appellant was the lookout man and getaway driver. On appeal his sentence of 20 years was reduced to 15 years. This case is not applicable to the applicant's case. The second case cited by counsel was **Regina v Quammie Samuels** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 65/1998, judgment delivered 20 December 1999, where the period of 40 years was reduced on appeal to 25 years. This court in that case did not refer to the facts but seemed to have agreed that the sentence was "excessive in all the circumstances".

[110] In none of these cases cited by counsel, were the circumstances of the murder as aggravating as the crime for which the applicant was convicted.

[111] Morrison P, in **Meisha Clement v R** [2016] JMCA Crim 26, outlined the factors to be considered on an appeal against sentence. He stated at paragraph [43] that:

> "On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is

> usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[112] Bearing in mind the principle of finality in sentencing, two circumstances come to mind in which an offender may petition a court to reopen his case to have his sentence varied. The first is where the sentence imposed is unlawful and was imposed by mistake. In such a situation the sentence may be corrected under the slip rule. In **R (on the application of Trigger) v Northampton Magistrate's Court** [2011] EWHC 149 the statutory authority of the magistrate's court to reopen a matter in the interest of justice, so as to vary or rescind an invalid sentence imposed by mistake was considered. It was highlighted that a court may vary or rescind a sentence or other order imposed or made by it on an offender, if there was a mistake and under the slip rule. The power to vary or rescind a sentence must be exercised in order to impose a sentence which could have been and ought to have been imposed at the original sentence hearing. However, as was highlighted in **Ruddock v The Queen** and the **R v Burrell** line of cases, it will only be done when there is a risk of substantial injustice and will not be done only because the law has changed.

[113] The second situation that comes to mind is one where Parliament enacts a new legislation that allows an offender to retroactively challenge a sentence that has been imposed so that his sentence coincides with the practice of the day. This enactment is one similar to the amendments done to the CJAA, notably section 42L which now allows persons who were sentenced to a prescribed minimum penalty before 30 November

2015 to apply to a judge of the Court of Appeal for a review of that sentence. We however hasten to add that the applicant does not fall in the category of persons who may use this provision to have their sentences reviewed.

[114] Section 13(1)(c) of the JAJA allows for an appeal with the leave of the court against the sentence imposed on conviction, unless such sentence is one fixed by law. The applicant had every opportunity to appeal sentence but chose not to put forward any arguments against the sentence at his appeal hearing. There was no denial of procedural fairness at his appeal with regard to his appeal against sentence. The appeal was not a nullity. There is no basis shown for this court to permit the applicant to launch a second appeal to raise arguments he failed to raise in his appeal. In any event, the period set before which the applicant would become eligible for parole is at the low end of the range of sentences given for offences of such an aggravated nature.

Did the sentencing judge err when she said she had 'no choice' but to sentence the applicant to a mandatory life imprisonment?

[115] The applicant is currently serving a sentence for murder. Section 3(1) of the Offences Against the Person Act provides that-

> "Every person who is convicted of murder falling within
>
> (a) ….
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

[116] Section 3(1C)(b) provides that where a court imposes a sentence of life imprisonment, the court shall specify a period of not less than 15 years which the

offender should serve before being eligible for parole. For any other sentence of imprisonment the court shall specify a period of not less than 10 years. The sentencing court in this case, specified a period of 17 years, which, although the sentence was appealed no argument was advanced in support of it. Again we must reiterate that there is no jurisdiction to reopen an appeal to allow for arguments which were not previously raised.

[117] Counsel cited to this court the case of **R v Secretary of State For the Home Department Ex parte Venables Regina v Same Ex parte Thompson** [1997] 3 WLR 23, from the English courts. That case arose from judicial review proceedings brought by the appellants against the actions of the Home Secretary. The appellants were vicious child murderers and complained that the Home Secretary, who had acted under section 35 of the Criminal Justice Act 1991, in fixing the tariff (actual length of detention necessary to meet the requirements of retribution and deterrence) took into account petitions from the public and his exercise of his discretion was thereby unlawful.

[118] Counsel commended the statements of Lord Browne-Wilkinson in **Ex parte Venables**, submitting that the sentencing 'system' therein described, is the same as that to be applied to Jamaica. Counsel maintained that the sentencing judge's error in thinking she had no choice but to impose a mandatory life sentence deprived the applicant of a determinate sentence which would give the parole board the right to

determine the period of his release. This error or defect in sentencing, he says, warrants correction by this court.

[119] As regards counsel's contention, I agree with the views of Morrison P, as outlined in application no 124/2016. It is clear from the context of the sentencing hearing and the long submissions in mitigation, that the sentencing judge, in saying that she had no choice but to sentence the applicant to a mandatory life sentence, was merely indicating that, given the aggravated nature of the offence in this particular case, it warranted nothing less than a sentence of life imprisonment, although section 3(1) of the Offences Against the Person Act also permits a sentencing court to impose a term of imprisonment which in his/her view is appropriate. It was within the discretion of the sentencing judge to determine that life imprisonment with a period to be served before parole was the more appropriate sentence. The applicant having failed to raise the issue at his appeal, cannot launch a second appeal in this regard. In any event, there is no merit in this complaint.

[120] The applicant has not presented any evidence to show that his case falls into any of the accepted jurisdiction of this court to reopen a finally determined appeal. He has presented no evidence to suggest that his appeal was a nullity either on the basis that the order on appeal was obtained irregularly akin to fraud or mistake, or that there was procedural unfairness or defect or error in the process. Furthermore, his appeal against sentence was fully determined and the order of the court has been long perfected. The errors complained of in the sentencing process were not made grounds of appeal and

argued at his appeal hearing and they do not now result in such substantial injustice as to cause this court to reopen the applicant's appeal.

The public interest in finality of litigation

[121] There is a principle that there should be an end to litigation. This principle has been expressed and followed both in the civil and in the criminal arena. For example the English Family Court in **S v S (Ancillary Relief)** [2002] 3 WLR 1372, considered whether there should be a public policy consideration in setting aside a consent order on the basis that there was a change of law. By reason of the possibility of the flood gates opening for all the orders made in the last quarter of a century or more, the court decided that the principle that there should be an end to litigation must prevail. In **R v Burrell** McClellan CJ acknowledged that there was a fundamental public interest in the finality of litigation.

[122] Inherent in the statements of the Privy Council in **Ruddock v The Queen** is the recognition of this principle. The public interest in maintaining the finality of litigation means this court must exercise its jurisdiction to reopen a concluded case, heard on the merits, where orders were made and perfected, with great caution and only in exceptional cases.

[123] An applicant applying to reopen his appeal which has been finally determined and in which the court's orders have been perfected must show that his case falls into one of the exceptions identified in the authorities. This, the applicant has failed to do.

Disposition

[124] For the reasons stated above, this court orders that:

i) The application to vary or discharge order of a single judge is refused.

ii) The application for extension of time to file appeal against sentence is refused.

iii) The application for permission to appeal against sentence is refused.