Hilary Term

[2015] UKPC 8

Privy Council Appeal No 0085 of 2013

JUDGMENT

Gomes (Appellant) v The State (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance

Lord Sumption

Lord Reed

Lord Hughes

Sir Brian Leveson

JUDGMENT GIVEN ON

25 February 2015

Heard on 19 January 2015

Appellant	Respondent
Paul Garlick QC	Aidan Casey
Frances Ibekwe	
(Instructed by Simons Muirhead and Burton Solicitors)	(Instructed by Charles Russell Speechlys)

SIR BRIAN LEVESON:

1.
On 14 August 2010, after a retrial before Lucky J and a jury at the Port of Spain Assizes, the appellant, Rick Gomes, was convicted upon two counts of possession of a dangerous drug (cocaine) for the purpose of trafficking, possession of a firearm and possession of ammunition. He was sentenced to 13 years' imprisonment with hard labour on the first count with concurrent terms of five years, five years and three years imprisonment with hard labour respectively. His appeal against conviction to the Court of Appeal of the Republic of Trinidad and Tobago (Weekes, Yorke-SooHon and Narine JJA) was dismissed. There was no appeal against sentence and by dismissing the appeal against conviction, the sentences were affirmed.

2.
On 18 March 2014, the Board (Lord Kerr, Lord Clarke and Lord Toulson) refused the appellant leave to appeal against conviction but, on the basis of arguments not previously advanced, granted leave to appeal against sentence. The written grounds were that the appellant's sentence should have been reduced so as to give credit for the time that he spent on remand in custody, pending extradition, both in the United Kingdom and in Trinidad and Tobago and that, both for that reason and in any event, the current sentence is manifestly excessive. In the circumstances, the facts and, more important, the chronology of the proceedings require analysis.

3.
As long ago as 15 May 1998, when executing a search warrant at the appellant's home, police officers observed the appellant and another seated at opposite sides of a table on which there were 17 packets each containing a white powder later found to be cocaine. Using two sets of different car keys found in the appellant's trouser pocket, the police searched both cars. Under the driver's seat in one car, there was a firearm and ammunition; in the boot of the other was a further packet also containing cocaine. Forensic analysis revealed that the 17 packets consisted of 18.7 kilograms of powder which represented 8.41 kilograms of cocaine at 100% purity; the single packet consisted of 999.6 grams of power which represented 377 grams of cocaine at 100% purity. The appellant was charged with the offences and remanded in custody.

4.
On 4 November 1999, Volney J severed the firearms charges and a trial proceeded on the drugs charges. On 14 December 1999, for reasons which do not require elaboration, the judge upheld a submission of no case to answer in respect of which the State intimated an intention to appeal. The appellant was then granted bail on the firearms charges and, two days later, in breach of his bail and knowing of the intended appeal, he left the country.

5.
On 11 February 2000, the Court of Appeal (de la Bastide CJ, Sharma and Ibrahim JJA) allowed the State's appeal and ordered a retrial: the appeal was heard in the absence of the appellant although there were newspaper notices of the hearing. A domestic arrest warrant was issued but, notwithstanding efforts both locally and abroad, the appellant could not be located. It was only on 5 May 2006 that the appellant was arrested at Heathrow Airport in London: this arrest was pursuant to the activation of an Interpol red notice. On 5 June 2006, Trinidad and Tobago requested his extradition.

6.
There then commenced a process of extradition in the UK. This was hotly contested and the initial basis for the request can best be summarised in the language of Lord Brown of Eaton-under-Heywood in the House of Lords which ultimately determined his appeal (see [2009] UKHL 21; [2009] 1 WLR 1038, para 16):

"Prior to his leaving Trinidad on 16 December 1999, Gomes had been held on remand for 19 months at Frederick Street prison, a prison which Lord Ramsbottom had unequivocally condemned in 2001 as not ECHR compliant. It was not, however, on this account that Gomes explained his decision to flee the country in breach of his bail conditions. Rather he claimed to have been threatened with death, the police being so upset at his acquittal …"

7.

District Judge Purdy (who had heard the extradition request) “roundly rejected” this explanation and sent the case to the Secretary of State who, on 9 March 2007, ordered his extradition. The appellant then appealed to the Divisional Court on the grounds of delay and (because of prison conditions in certain prisons in Trinidad and Tobago) a real risk of breach of article 3 of the European Convention on Human Rights. On 22 August 2007, the Divisional Court (Sedley LJ and Nelson J) remitted the case to the District Judge to consider section 82 of the Extradition Act 2003 (whether it would be unjust or oppressive by reason of the passage of time to return the appellant to Trinidad for trial) and, if not, whether the prison conditions in the maximum security facility in Trinidad would be such as to breach article 3’s prohibition against inhuman and degrading treatment. It is important to underline that shortly before the Divisional Court hearing, Trinidad had provided a diplomatic assurance that the appellant would not be held either on remand or, if convicted, as a prisoner, in Frederick Street prison (see [2007] EWHC 2012 (Admin), para 6).

8.
When the case came back before the District Judge, following Krzyzowski v The Circuit Court in Gliwice, Poland [2007] EWHC 2754 (Admin), he expressed himself sure that the appellant was “a classic fugitive”. Having been guilty of deliberate flight, he could not rely on the passage of time to defeat extradition and there were no exceptional circumstances to justify a different course. He also decided that detention in the maximum security facility involved no real risk of breach of article 3.

9.
By virtue of section 104(7) of the 2003 Act, further appeals were taken as having been dismissed by the Divisional Court whereupon the appellant appealed to the House of Lords: on 29 April 2009, that appeal was dismissed and, on 22 May 2009, an application to the European Court of Human Rights for a stay of extradition pending an application to the Court was refused. The appellant then submitted further representations to the Secretary of State as to why he should not be extradited and, when they were rejected, sought judicial review. On 2 February 2010, the court refused to set aside the order: [2010] EWHC 168 (Admin).

10.
So it was that on 3 or 4 February 2010, the appellant was returned to Trinidad where he was remanded in custody for trial. That trial (which encompassed both the drugs and firearms charges) commenced on 7 June 2010 and lasted over two months. At its conclusion, following guilty verdicts, Lucky J was called upon to consider three periods which the appellant had spent on remand in custody. These were (a) 19 months between the arrest of the appellant and the conclusion of the trial before Volney J when he was granted bail; (b) 45 months between his arrest at Heathrow and his return to Trinidad following the extradition process; and (c) six months while he was on remand in custody in Trinidad following his return and prior to conviction.

11.
Counsel for the appellant then argued that the judge should discount the appropriate sentence by deducting all three periods that the appellant had spent remanded in custody either in Trinidad or the UK. Counsel for the State recognised credit should be given for the first period of 19 months but contended that as the appellant had fled the jurisdiction, in breach of bail in relation to the firearms offences and when fully aware of the appeal against the dismissal of the drugs charges, no discount should be given in respect of the period spent opposing extradition. In that context, reference was made to the conduct of the appellant causing the State to deploy resources both to locate him and secure his return.

12.
Lucky J clearly directed her mind to these issues. She referred to Callachand v State of Mauritius [2008] UKPC 49 and the observations of the Board in these terms:

“9. … In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing …

10. Their Lordships recognise that there may be unusual cases where a defendant has deliberately delayed proceedings so as to ensure that a larger proportion of his sentence is spent as a prisoner on remand. In such a case it might be appropriate not to make what would otherwise be the usual order. Similarly a defendant who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once …”

13.
Reflecting on these observations, she agreed that it was appropriate to make allowance for the period of 19 months prior to bail being granted but did not discount either of the other periods, observing:

“The Court just says, very succinctly, that Mr Gomes was aware that there were two other matters, more specifically, matters reflected in Counts 3 and 4 of this indictment, that would be the Possession of the Firearm and Ammunition. And that Mr Gomes would have been well aware that he ought to, as part of his conditions for bail, in any event, be in Trinidad and Tobago or be available to face those two particular charges or offences or counts, while this other matter was being dealt with. The fact that resources had to be used to find Mr Gomes from 1999 to 2006 for matters which include two counts which Mr Gomes would have known he had to face trial, are matters, and is a time frame, rather, that cannot be used to his benefit.”

This decision was not challenged on appeal to the Court of Appeal.

14.
In the written case, Mr Paul Garlick QC for the appellant first advanced the argument that extradition was a reciprocal international law arrangement such that the statutory position in England and Wales (contained within section 240 Criminal Justice Act 2003 and the guidelines issued by the Sentencing Guidelines Council) should have been considered. He did not pursue that proposition in oral argument and he was right not to do so. Reciprocity is met by the existence of appropriate legislation providing for extradition between Trinidad and Tobago and the United Kingdom: UK statute law which deals with the approach to and assessment of sentence length simply does not bite on the law in Trinidad and Tobago.

15.
Turning to the common law, Mr Garlick accepts that there is a line of authority which makes it clear that, while time spent in custody overseas pending extradition should normally be taken into account when sentencing, where the defendants had deliberately resisted extradition to the fullest extent and prolonged the period in custody abroad while waiting extradition, it was not necessary for the sentence to be reduced to take that into account: see R v Scalise and Rachel (1985) 7 Cr App R (S) 395 per Lawton LJ.

16.
There have been cases in which some allowance has been made (R v Stone (1988) 10 Cr App R (S) 322, R v De Simone [2000] 2 Cr App R (S) 332), R v Peffer (1991) 13 Cr App R (S) 150) although in the last case it was emphasised that Stone required the court to look at the period spent in custody and "decide what, if any, should be the period of reduction". In R v Noye [2013] EWCA Crim 510, having reviewed the authorities and notwithstanding the UK statutory requirement to give credit in these circumstances save when it is just in all the circumstances not to do so, Lord Judge CJ put the matter this way (at para 19):

"As it seems to us, if this discretion may be exercised in such a way as to refuse to make any allowance for the time spent in custody abroad pending extradition … and plainly the statutory language underlines that it can … it would fall to be exercised where a defendant deliberately fled this country in a well-organised, sophisticated plan to evade justice here; successfully evaded justice for some time by staying abroad; when eventually brought before the courts abroad with a view to extradition, contested the extradition proceedings every inch of the way, and, what is more, put up a totally false story in order to evade extradition followed by as we have indicated, an unsuccessful appeal against the order."

17.
Mr Garlick recognises the force of these observations and equally recognises the features in that case which are replicated in the present appeal but he argues that, at the very least, there should be deducted from the sentence the period of time that the appellant spent on remand that was attributable to the State's delay in accepting that the conditions at the remand prisons in Frederick Street, Port of Spain and Golden Grove Road, Arouca, were such as amounted to a violation of article 3 of the Convention. This was not least because, in the absence of diplomatic assurance, the appellant would have been able to resist extradition entirely. In short, it is said that the appellant had good reason to challenge his extradition over that period (from arrest in May 2006 until the assurance in August 2007) even though he did not provide it as a reason for fleeing the country.

18.
The answer to this submission can be given shortly. As Lucky J clearly understood, there was, indeed, a discretion vested in her which she exercised. She was aware of the circumstances in which extradition had been sought (which was clear from the decision of the House of Lords to which she was referred in argument: see para 16 of the speech of Lord Brown of Eaton-under-Heywood cited above). In any event, she must also have been aware of the condemnation of prison conditions in Frederick Street (where the appellant had been held). Although individual members of the Board might have exercised the available discretion differently and afforded some discount in relation to some or all of the period when prison conditions were a live issue, Lucky J was entitled to reach the conclusion that she did. Given her far better knowledge of the impact locally of flight from the jurisdiction (including the consequences of the porosity of borders) and the effort needed to secure extradition, it would not be appropriate for the Board to substitute its view for hers. This aspect of Mr Garlick's challenge, therefore, fails.

19.
Mr Garlick also argued that the judge was wrong to refuse to take account of the period which the appellant had spent in custody following his return to Trinidad, that is to say, between February and August 2010. The time served in detention after extradition was not linked to his extradition but rather, as is the case for many of those remanded into custody, a consequence of his flight risk.

20.
Mr Aidan Casey for the State submitted that the judge correctly applied Callachand (supra) and was entitled to conclude that the appellant's breach of bail and flight from the jurisdiction had resulted in him spending longer on remand than otherwise he would have done such that Lucky J was also entitled to ignore this period in custody. There is however no indication that this formed part of the judge's reasoning. Further, even if apart from his flight, the appellant would have been granted bail not only pending his drugs trial, but also pending his retrial for the drugs charges once the Court of Appeal had ordered such a retrial, the fact remains that he spent six months in custody awaiting trial at a time when he was no longer a fugitive from justice and when the considerations which the Board has identified in para 16 above no longer applied. Bail is not infrequently withdrawn pending trial for one reason or another. To refuse to take it into account on the ground suggested by Mr Casey would smack of punishment, rather than deterrence.

21.
The Board sees no reason in these circumstances to differentiate between the period of 19 months spent on remand in custody before the decision of Volney J and the period spent in custody prior to conviction following his return to Trinidad. Given the very substantial period which had not been allowed while the appellant was in custody in the UK, the Board has concluded that this period should have been deducted from the overall term that the appellant serves.

22.
In the case, Mr Garlick also suggested that, quite apart from any allowance for time spent on remand, the sentence was excessive by local (and UK) sentencing standards. He did not pursue the argument and was right not to do so. It is the general practice of the Board not to interfere with the level of sentences imposed for different criminal offences, fashioned as they will be to address and reflect local circumstances, and there is nothing to take this case outside that practice.

23.
The upshot of this appeal is that it is allowed but only to the extent that the sentence of 13 years' imprisonment with hard labour imposed in relation to Count 1, possession of a dangerous drug namely cocaine for the purpose of trafficking is reduced to 12 and a half years imprisonment with hard labour.