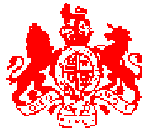

The Court of Appeal for Bermuda

CRIMINAL APPEAL No 17 of 2013

Between:

JOMAR CAINES

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, JA
Baker, JA

Appearances: Mr. Larry Mussenden, Mussenden Subair, for the Appellant
Ms. Cindy Clarke, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **12 November 2014**

Date of Judgment: **8 January 2015**

JUDGMENT OF THE COURT

Evans, JA

At the conclusion of the hearing of an application to enlarge time within which to appeal, on12 November 2014, the Court refused the application and further stated that, having been requested to do so, it would provide guidance as to the application of the sentencing provisions in section 70P of the Criminal Code Act 1907 (as amended in 2001) ("the Act"). What follows is the Judgment of the Court on that issue.

1. Section 70P(1) of the Act provides that a person sentenced to imprisonment for a fixed term must serve at least one-third of the term before the Parole Board can entertain any application for his release on licence.

2. As a general rule, the sentencing judge when imposing a sentence of imprisonment is not concerned with the fact that the period spent in custody by the prisoner will be significantly less than the period of the sentence, if the Parole Board orders his early release on licence. The Parole Board is an administrative rather than a judicial body, and its decision to order early release does not in any way second-guess the judge`s sentence. By a kind of modern legal fiction, the sentence of imprisonment is deemed to continue until the end of its term, notwithstanding that the offender is released from custody on licence before the term is complete.
3. Section 70P(3), when it applies, requires the sentencing judge to have regard to the fact that the Parole Board may order early release. It reads –

> "(3) Notwithstanding sub-section (1), where an offender receives a sentence of imprisonment of two years or more on conviction on indictment, the court may, if satisfied, having regard to –
> (a) the circumstances of the commission of the offence; and
> (b) the character and circumstances of the offender,
> that the expression of society`s denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on licence is one-half-of the sentence or 10 years, whichever is less."

4. Questions have arisen as to how this sub-section should operate in practice. Similar problems have arisen in Canada, where corresponding provisions of the Canadian Criminal Code (1985) gave rise to differences that were considered by the Supreme Court in *R .v. Zinck* [2003] 1 R.C.S.41. There are no reported decisions on the Bermudian legislation, and we shall consider its effect as a matter of statutory construction first.
5. Section 70P(3) expressly predicates that the sentencing judge has passed a sentence of imprisonment for a term of two years or more, following the offender`s conviction on indictment. He or she has decided, in other words, that that is the correct sentence for the offence in the circumstances of the case, taking account of all relevant factors before making that decision. Those factors include all of the matters listed in the sub-section: the circumstances of the commission of the offence (sub-section 3(a)), the character and circumstances of the offender (sub-section 3(b), as well as "society`s denunciation of the offence or "the objective of specific or general deterrence". But there may be other factors also, including the

nature of the offence and the risk of re-offending and whether it is necessary to protect the public from further offences by the offender (partly but not entirely covered by the phrase "special or general deterrence").

6. It may be observed that all the factors listed in the sub-section are matters that will be known to the sentencing judge when the sentence is imposed. Other matters that may be relevant when deciding the appropriate sentence but which lie in the future – for example, the risk of re-offending after release, or the chances of rehabilitative treatment being successful by the time of release – have to be excluded when considering whether to make an order under section 70P(3). A possible rationale is that such matters are reserved to the Parole Board whereas the sentencing judge is better placed to determine the circumstances of the offence and of the offender when it was committed.
7. When it applies, therefore, the sub-section requires the sentencing judge to decide, in addition to the length of the prison sentence, whether to make the order permitted by sub-section (3), helpfully described in the Canadian authorities as an order for delayed parole. Put another way, the sentencing judge has to take account of the fact that the prisoner will have the right to apply to the Parole Board for early release from custody, and he/she is given power to limit that right by delaying the time when it may be exercised.
8. The order can only be made if the sentencing judge is satisfied of the matters referred to in the sub-section. If it is made, it has significant consequences for the offender. The time spent in custody will be extended by one-sixth of the sentence period (from one-third to one-half of the total period) –a full year if the sentence is six years. The power directly affects the liberty of the subject and, as such, it must be strictly construed in favour of the offender: *Selassie v. The Queen* JCPC 2014.
9. Based on the above analysis, we would hold that –

    (1) section 70P(3) requires a separate order by the sentencing judge after the term of imprisonment has been imposed, though as part of the same sentencing process;

    (2) the power to make the order is discretionary: it must be justified in the circumstances of the case;

(3) the reality is that an order under the sub-section extends the period of custody and therefore the burden of the sentence for the offender; and

(4) in deciding whether or not to make the order, the judge must have regard to its consequences for the offender and must take account only of the matters listed in the sub-section.

10. The Canadian statute is in different terms but, as interpreted by the Supreme Court of Canada, it is directly comparable with the Bermudian provision. It reads –

> "Criminal Code
>
> Power of court to delay parole
>
> 743.6 (1) …where an offender receives …… a sentence of imprisonment of two years or more ……… the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society`s denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less………..
>
> Principles that are to guide the court
>
> (2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles."

11. Several judgments of the Canadian Courts were concerned with the application of section 743.6, and two schools of jurisprudence developed from it. There was "a clash between narrow and broad interpretations of the power to order delayed parole. One thread …emphasizes the exceptional nature of the provision and seems to call for a restricted application of this new judicial power……….By contrast, a number of judgments advocate a broader approach….requiring no evidence of exceptional circumstances." (R. *v. Zinck* [2003] 1 R.C.S. 41 at page 55).

12. In that case, the Supreme Court of Canada held that the "extent of this jurisprudential conflict has been over played……..both views address the same difficulty and adopt ultimately consistent solutions to the integration of delayed

parole into the process of sentencing. Under both approaches, the same method must be used. That method accepts that delayed parole is a decision that remains out of the ordinary and must be used in a manner that is fair to the offender……the sentencing judge [must] use a two-step intellectual process when deciding to delay parole" (page 57). The Court added "…the sentencing decision must remain alive to the nature and position of delayed parole in criminal law as a special, additional form of punishment. Hence it should not be ordered without necessity, in a routine way"(page 58). What was meant by "necessity" was explained on the following page – "required in order to impose a form of punishment which is completely appropriate in the circumstances of the case" (para.33).

13. The Supreme Court then addressed the practical issues of procedure and fairness –

> "It should be enough that the issue is raised in a fair and timely manner so as to allow the offender to respond effectively…..When possible, the Crown may give notice in writing or verbally before the hearing. The application may be made at the sentencing hearing itself. The issue may also be raised by the judge in the course of the hearing…….Fairness must be preserved, but in a flexible manner……….At the end of the process, the offender is entitled to reasons. The judgment must state with sufficient clarity the reasons why the delayed parole order is made" (paras.34-37).

14. In our judgment, this guidance is equally applicable under the Bermudian statute as it is in Canada. The question may asked, why should the judge have to make the same assessment twice, first for the purpose of deciding what term of imprisonment is appropriate, and a second time in order to decide whether there should be an order for delayed parole? We would answer that the statute expressly requires a two stage process, and that the two questions are not the same. What is the appropriate sentence depends upon well-known principles that need not be rehearsed here; whether a section 70P(3) order should be made depends on the factors listed in the sub-section, which requires the judge to recognise the reality that the period spent in custody will be less, absent special factors, than the term of imprisonment imposed, and to consider whether in the particular case the period in custody should be longer.

15. We add only this, that section 743.6(2) makes express what is implied in the Bermudian legislation, namely, that what it describes as "rehabilitation of the

offender" is excluded from the factors that are taken into account when deciding whether or not to delay parole in the circumstances of the case. This confirms that the question asked at the second stage of the sentencing process is not the same as at the first, and that the answer does not depend on the same factors. It also underlines the fact that the two questions are asked for different purposes. First, what is the appropriate term of imprisonment? Secondly, for how long, within statutory limits, shall the offender be held in custody?

Signed

Evans, JA

Signed

Zacca, P

Signed

Baker, JA