

COLONY OF MONTSERRAT

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO. 1 OF 2003

BETWEEN:

CLARENCE LEE

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Brian Alleyne
The Hon. Mr. Michael Gordon, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Jean Kelsick for the Appellant
Mrs. Esco Henry-Greer, Attorney General for the Respondent

2003: September 23;
2004: March 29.

JUDGMENT

- [1] REDHEAD, J.A.: This appellant was arrested on 4th October, 2002 by Sergeant Cabey for the offence of possession of illegal drugs. On 7th October, 2002 he was brought before the Magistrate to answer the said charge.
- [2] The record reveals that the prosecution was not ready to proceed as the drug had to be sent to Antigua for testing. A request for an adjournment was granted to the prosecution.

- [3] The defendant appeared in person and elected for summary trial. The defendant was admitted to bail in the sum of \$800.00 with one surety. The case was adjourned to 14th October, 2002 at 9.00 a.m. for trial.
- [4] On 14th October, 2002 when the matter was called the defence was not ready and a request for an adjournment was made by the defendant which was granted.
- [5] It appears from the record that Mr. Kelsick was noted on the record as appearing for the appellant as the record reads “no appearance by Counsel Mr. Jean Kelsick. Matter is adjourned to 9.00 am on 22nd October, 2002. Bail to continue as before until trial”
- [6] On 22nd October when the case was called the record reveals that the prosecution was not ready to proceed as the drugs were not tested. The defendant and his lawyer Mr. Kelsick were present.
- [7] The prosecution requested an adjournment which was granted to 18th November, 2002 at 9.00 a.m. Bail was to continue until trial.
- [8] When on the 18th November, 2002 the matter was called the prosecution was ready to proceed. The defendant was present. The record reads:
- “Mr. Jean Kelsick is absent. Out of the island. Order matter is adjourned to 9.00 a.m. 2nd December, 2002 for trial to start. Bail to continue as before until trial.”
- [9] On 2nd December, 2002 the case was called as scheduled the defendant was present but Mr. Kelsick was absent. The learned Magistrate commenced and completed the hearing on that day. The appellant was found guilty and fined \$3,500.00 to be paid in one (1) month in default six (6) months in prison.
- [10] The appellant now appeals to this Court. Four grounds of appeal are filed on behalf of the appellant

1. My constitutional rights per section 57 of the Montserrat Constitution Order 1989, to be legally represented at the hearing, to be given adequate time to prepare my defence and to obtain the attendance of my own witness witnesses was violated.
2. That having explained to the Magistrate that I had not enough time to secure the attendance of the several witnesses I intended to call, he should have granted an adjournment.
3. That the Magistrate erred in stating and holding that because my Counsel Mr. Jean Kelsick habitually comes to Court late he was entitled to proceed with hearing the case in his absence, it being wrong for the Magistrate to punish me for any perceived neglect on my Counsel's part and to deprive me of an opportunity to engage other Counsel if necessary.
4. That the amount of fine imposed is excessive and higher than fines imposed in comparable cases and that the time given to pay is unreasonable"

[11] The Learned Magistrate in his reasons for decision said, among other things, that when the matter was called at 9.20 a.m. on 2nd December, 2002 the appellant was present but his lawyer was not. The appellant was allowed to use the Court office telephone to communicate with his lawyer.

[12] The lawyer then spoke to the Court Clerk informing her, that he (the lawyer) was not dressed to come to Court, he had not had a list of cases from the Court, and he needed to call witnesses.

[13] I refer to S 57 (2) of the Montserrat Constitution.

"Every person who is charged with a criminal offence –

- a. –
- b. –
- c. –
- d. Shall be permitted to defend himself before the Court in person or, at his own expense, by a legal representative of

his own choice, or where so provided by any law, by a legal representative at the public expense”

[14] Mr. Kelsick learned Counsel for the appellant argued in his skeleton arguments that the word “permitted” in the above quoted sub section should be given a wide and flexible interpretation in keeping with the principle that constitutional provisions protecting fundamental rights and freedoms should be interpreted generously and purposively.

[15] In support of this argument Mr. Kelsick relied on *Thornhill v Attorney General of Trinidad and Tobago*¹; *Attorney General of the Gambia v Momodou Jobe*², and *Robinson v The Queen*³.

[16] Mr. Kelsick also argued that, ‘it also imposes a negative obligation in (sic) the Court to ensure that such permission is not denied’.

[17] Mr. Kelsick contended that the learned Magistrate failed to appreciate this.

[18] In light of what transpired, it is not true to say that appellant was not permitted to defend himself by a legal representative of his own choice. To put it another way it cannot be said that the appellant was denied the opportunity to have a legal representative of his own choice to defend him.

[19] In my view the argument that the Magistrate failed to appreciate the appellant’s right to have Counsel of his choice to defend him is untenable.

[20] The learned Magistrate in his reasons said:

¹ (1981) A. C. 61

² (1984) A. C. 689

³ (1985) 32 WIR 330

“The matter was further adjourned to 22nd November when Mr. Kelsick appeared. Both sides were not ready so the trial was scheduled for the 18th November, on which date the Attorney was off island. The 2nd December 2002, was the new date for trial ...

[21] On 2nd December 2002, Mr. Kelsick did not turn up in Court and when contacted by his client, he offered his list of excuses which was (1) not being properly dressed for Court, (2) no list from the Court and (3) he needed to cite witnesses.”

[22] In light of the foregoing which I am compelled to accept as being accurate of what transpired, there being no challenge from Counsel for the appellant, I find that every opportunity was given to Counsel to attend Court to represent his client.

[23] At 9.20 a.m. he was not in court before the Magistrate began the hearing of the case. He was telephoned by the Clerk of Court. His excuse was that he was not properly dressed and he had to summons witnesses. He did not seek indulgence from the Court, through the Clerk of Court for time to dress properly and to get to the Court.

[24] Montserrat is a very small island and it takes very little time to travel from one point to any point.

[25] On appeal Mr. Kelsick urged before us that he was not notified by the Court of the date of the hearing of the case prior to the hearing. He also argued that he received no list of the cases set down for hearing on that date and it is customary for the Court office to send out such a list to lawyers.

[26] I cannot accept any of these baseless arguments. The counsel was not present at Court when the case was called on the scheduled date for hearing, 18th November, 2002. His client was in court.

[27] An adjournment was granted to the 2nd December 2002. Did his client fail to inform him? It was his client's duty to inform Mr. Kelsick of the date that the case was adjourned to.

- [28] Moreover Mr. Kelsick must have known that the case was set down for the 18th November, 2002 when he was off island. It was Mr. Kelsick's duty to enquire from his client what transpired in court on that date and whether the case was adjourned and what date it was adjourned to.
- [29] As I have said above it appears from the record that Mr. Kelsick was on record from 14th October as appearing for the appellant.
- [30] At any rate there can be no doubt that by 18th November, 2002 he was appearing for the appellant.
- [31] For Mr. Kelsick to say on the 2nd December, 2002 he needed time to call witnesses is, to my mind a very lame excuse.
- [32] I therefore hold that there is no merit in ground 1 in that no constitutional right of the appellant was infringed by the Magistrate. Ground 2 is also dismissed as being without merit.
- [33] I now deal with the allegation that the learned Magistrate erred by failing to advise the appellant of his right to appeal the appellant being unrepresented.
- [34] Learned Counsel relied on S. 164(1) of the Criminal Procedure Code of Montserrat in support of this allegation. The record does not contain any notation indicating that the learned Magistrate so advised the appellant. But his failure to do so, could not or did not compromise the fairness of the appellant's trial as the Magistrate would have had to advise the appellant of that right after he would have been convicted. Moreover the appellant having exercised his right of appeal and appealed the matter there could be no prejudice the appellant suffered by the Magistrate's failure.

[35] Learned Counsel submitted that the fine imposed on the appellant was excessive and higher than fines imposed in comparable cases.

[36] The learned Magistrate in his reasons for decision referred to the appellant's criminal record in which he said that since 1990 the appellant had 10 previous convictions, five of which are for possession of cannabis and two of which are for possession with intent to supply.

[37] In imposing a fine of \$3,500.00 in my judgment in light of the appellant's record it cannot be said that the learned Magistrate exercised his discretion improperly.

[38] I am of the opinion that the fine was not too severe.

[39] The appeal is therefore dismissed. The conviction and sentence imposed by the learned Magistrate are affirmed.

Albert Redhead
Justice of Appeal

I concur.

Brian Alleyne
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]