

MONTSERRAT

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL No. 6 of 1994

BETWEEN:

DAVE KIRWAN

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Rt. Hon. Sir Vincent Floissac Chief Justice

The Hon. Dr. N.J.O. Liverpool Justice of Appeal

The Hon. Mr. Satrohan Singh Justice of Appeal

Appearances:

Mr. K. Allen O.C. & Mr. H. Sergeant for the Appellant

Mrs Vera Mendes for the Respondent

1994: October 18 & 31.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The appellant was charged with the offence of nuisance by noise contrary to subsection (c) of section 305 of the Penal Code of Montserrat No. 12 of 1983 which reads as follows:-

"Any person who -

- in or near any public place; or
- in connection with any shop, business premises or other place used for any commercial purpose; or
- in any other premises situated in or near any town or village, by operating or permitting the operation of any amplifier, musical instrument, radio or electrical or mechanical device for producing, reproducing or amplifying sound, causes or permits to be made any noise which is so loud, continuous or repetitive as to cause a nuisance to persons in any public place or to the occupants of any premises in the neighbourhood, shall be guilty of an offence and liable on summary conviction to a fine of five hundred dollars."

On 1st June 1994, Acting Magistrate David T. Hallchurch (sitting in the Magistrate's Court of the Colony of Montserrat) convicted the appellant of the offence charged and reprimanded and discharged him. The conviction was based on the testimony of the occupants of a house in the village of Weekes in the said Colony. The occupants were a father (Mr. Hilario Del Pinno), a mother (Mrs Agripina Del Pinno) and a 34 year old son (Mr. Anthony Del Pinno). The Del Pinnos testified that on 16th September 1993 at about 6.30

- m., they were awoken by loud and annoying music emanating from a house which is 10 yards away from their home and which was occupied by the appellant and his grandmother.

The appellant appealed against his conviction on the grounds that the learned magistrate's decision is erroneous in point of law and is unreasonable and cannot be supported having regard to the evidence. The appeal was argued by reference to the principles which govern public nuisances at common law.

The reality is that there are three types of nuisances - the common law private nuisance, the common law public nuisance and the statutory nuisance. A private nuisance is an unjustifiable interference with the use or enjoyment of a private proprietary right and is actionable as a tort. A public nuisance is an unjustifiable interference with the use or enjoyment of a public or common right relating to the reasonable physical comfort and convenience of human existence and is punishable as a crime. It is also actionable as a tort if a sizeable section of the public in fact suffered such interference and if the plaintiff suffered some particular and substantial damage over and above that sustained by other members of that section. A statutory nuisance is an act or omission designated or treated by statute as a

nuisance although it may not possess all the essential ingredients of a private or public nuisance at common law. It is usually punishable as a statutory crime.

Nuisances are classified in Halsbury's Laws of England (Fourth

- Edition) 34 paragraphs 301 & 304 as follows:

" 301. ... Nuisances may be broadly divided into (1) acts not warranted by law or omissions to discharge a legal duty, which obstruct or cause inconvenience or damage to the public in the exercise of rights common to all the Queen's subjects; (2) acts or omissions which have been designated or treated by statute as nuisances; and

(3) acts or omissions generally connected with the user or occupation of land which cause damage to another person in connection with that other's user of land or interference with the enjoyment of land or of some right connected with the land.

304. Nuisances are divisible into common law and statutory nuisances.

A common law nuisance is one which, apart from statute, violates the principles which the common law lays down for the protection of the public and of individuals in the exercise and enjoyment of their rights. A statutory nuisance is one which, whether or not it constitutes a nuisance at common law, is made a nuisance by statute either in express terms or by implication."

Here, we are concerned with the statutory nuisance created by section 305(c) of the Penal Code. For the purposes of this appeal, the relevant words of the subsection are: "Any person who - in any other premises causes or permits to be made any noise which is so loud as to cause a nuisance to the occupants of any premises in the neighbourhood". The question to be decided is whether those words should be interpreted so as to confine them to nuisances which are public or criminal nuisances at common law.

The interpretation of each word or phrase of section 305(c) or each word or phrase of any other statutory provision is derived from the legislative intention in regard to the meaning which that word or

phrase shall bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention. Those surrounding circumstances include the evident purpose or object of the statute or statutory provision in which the word or phrase under construction appears and the fact that the interpretation of the word or phrase in its primary sense would result in manifest absurdity.

Accordingly, the legislative purpose of the Penal Code is a good starting point in the process of interpretation of section 305(c) of the Code. It is a good starting point because the legislative

purpose of a statute is a most important component of the statutory context by reference to which the legislative intention may be ascertained and the words or phrases of the statute may be interpreted.

In **Pepper v Hart** (1993) 1 A.E.R. 42 at 50, *Lord Bridge* said:

"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."

The legislative purpose of the Penal Code of Montserrat is expressed in the long title to the Code which reads "AN ORDINANCE TO AMEND AND CODIFY THE PENAL LAWS OF THE COLONY AND FOR MATTERS CONNECTED THERE-WITH." Accordingly, the legislative purpose of the Code is not merely to codify but to amend the penal laws (including the law of criminal nuisance) of Montserrat. Some sections of the Code purport to be mere codifications of the common law but other sections are clearly intended to introduce new penal laws.

The common law relating to public or criminal nuisances purports to be codified in **section 288** of the Code which bears a marginal or side note entitled "common nuisance" and which reads as follows:

"Any person who does an act not authorized by law or who omits to discharge a legal duty and thereby causes a common injury or danger or annoyance, or who obstructs or causes inconvenience to the public in the exercise of common rights, commits the offence of being a common nuisance and shall be liable on summary conviction to imprisonment for six months or to a fine of five hundred dollars, or to both such imprisonment and fine".

Section 288 virtually expresses the essential ingredients of a public or common nuisance and treats such a nuisance as a serious offence punishable by a custodial sentence. By contrast, section 305(c) treats the so-called nuisance mentioned therein as a relatively venial offence punishable by a fine. If the word "nuisance" appearing in section 305(c) were interpreted to be synonymous with a public or common nuisance at common law or under section 288, an absurdity would result. It would mean that either section 305(c) is subsumed under section 288 and is therefore otiose or the legislature (acting contrary to the principle of separation of powers) has transferred to the prosecution the judicial power or discretion to decide the severity of the punishment to be inflicted on a person who has committed a public or common nuisance at common law or under section 288. I certainly would not ascribe any such legislative intention to the legislature of a guided British Colony.

The word "nuisance" appearing in section 305(c) of the Code must be interpreted in the light of its statutory context (particularly the legislative purpose of the Code, the provisions of section

288 of the Code and the rule against absurdity). So interpreted, the word "nuisance" signifies an unjustifiable interference with the use or enjoyment by the occupants of any premises of their private occupational rights or an unjustifiable interference with the use or enjoyment by persons in any public place of their public or common rights where the latter interference does not affect a sufficiently significant number of persons so as to constitute a public or common nuisance at common law or under section 288. The interference is restricted to interference by noise made by the operation of "any amplifier, musical instrument, radio or electrical or mechanical device for producing, reproducing or amplifying sound".

In the present case, the learned magistrate believed the testimony of the Del Pinnos that they were awoken at 6.30 a.m. by loud noise caused by musical instruments in the appellant's home. This was an unjustifiable interference with the use and enjoyment by the Del Pinnos of their private occupational rights and was therefore a so-called nuisance punishable under section 305. In my judgment, the conviction of the appellant was justified in law and the reprimand was appropriate to the veniality of the offence. I would accordingly dismiss this appeal.

SIR VINCENT FLOISSAC

Chief Justice

I concur.

NICHOLAS J.O. LIVERPOOL

Justice of Appeal

I concur.

SATROHAN SINGH

Justice of Appeal