

MONTSERRAT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 of 1991

BETWEEN:

YVONNE PIPER

Appellant

and

THE QUEEN

Respondent

Before: The Honourable Chief Justice Floissac - President
The Honourable Mr. Justice Byron J.A.
The Honourable Miss Justice Joseph J.A. (Ag.)

Appearances: Dr. F. Ramsahoye Q.C. and Mr. K. Markham for the
Appellant
Miss E. Henry for the Respondent

1991: November 14, 15;
1992: May 5.

JUDGMENT

FLOISSAC, C.J.

The appellant was indicted for forgery and uttering of documents purporting to be so-called job letters and for so doing with intent to defraud contrary to section 237(3), section 241(1) and section 243(1) of the Montserrat Penal Code No. 12 of 1983. The indictment contained five counts charging the appellant with:

(i) forgery contrary to section 241(1) of a job letter purporting to have been executed by Edric Allen between the 4th and 8th November 1990,

(ii) forgery contrary to section 241(1) of a job letter purporting to have been executed by Oeslyn Jemmotte between the 7th and 8th November 1990,

(iii) forgery contrary to section 237(3) (f) of a job letter purporting to have been executed between the 4th September 1990 and the 19th November 1990 by Samuel Anthony Maloney (Permanent Secretary in the Ministry of Agriculture, Trade, Lands and Housing and head of the department of that Ministry),

(iv) uttering contrary to section 243(1) of the forged job letter from Edric Allen and so doing on or about the 8th November

1990, and

(v) uttering contrary to section 243(1) of the forged job letter from Oeslyn Jemmotte and so doing on or about the 8th November 1990.

The so-called job letters were all addressed to the U.S. Ambassador, Embassy or Consulate in Antigua and were in effect applications for gratuitous non-immigrant visas to the United States. They purported to be applications by Allen (on behalf of Warren Thomas), by Jemmotte (on behalf of Michelle Martin-Thomas) and by Maloney (on behalf of Rukhmin Sukchand). They purported to certify that the applicants (W. Thomas, M. Martin-Thomas and Sukchand) were employed by the signatories (Allen, Jemmotte and Maloney respectively) and wished to spend their vacation in the United States.

At the appellant's trial by jury presided over by Redhead J., there was no dispute as to the falsity of the job letters. They purported to have been executed by Allen, Jemmotte and Maloney, all of whom testified uncontradictorily that they did not in fact execute or authorise the execution of the job letters attributed to them. Nor was there any dispute as to the uttering in Antigua of the two forged job letters which purported to have been executed by Allen and Jemmotte. These two job letters were uttered to Steve Wangsness (the Vice Consul at the American Embassy in Antigua) who testified uncontrovertibly that the job letters were delivered to him in Antigua but that he refused to grant visas to the applicants (W. Thomas and M. Martin-Thomas).

The issues at the trial were whether the appellant was the forger and utterer of the job letters, whether there was an intent to defraud within the meaning of the Penal Code and whether the utterings were local offences committed in Montserrat and were therefore justiciable locally.

In proof of the appellant's authorship of the job letters and of her intent to defraud, the prosecution relied principally on the expert opinion of a forensic document examiner (ASP Lionel Belle) and on certain items which the police found in the appellant's business premises. Belle testified that, in his opinion, the job letters were all typed on the appellant's typewriter and the forged signatures of Jemmotte, Maloney and Allen on the job letters were in the handwriting of the appellant. Police Officers testified and the appellant admitted that the police found in a drawer in the appellant's desk at least 5 blank letterheads of the Ministry of Agriculture, Trade, Lands and Housing and two typewritten job letters which were addressed to the U.S.Embassy, St.John's Antigua and one of which bore the forged signature of S.A.Maloney.

In the light of this and other evidence, on the 20th March 1991, the appellant was convicted on all counts and was sentenced to imprisonment with hard labour for a term of 2 years on counts 1, 2, 4 & 5 and for a term of 3 years on count 3 - the sentences being declared to be concurrent. The appellant has appealed against her convictions and sentences.

The appellant filed 15 grounds of appeal most of which overlap. The addresses of counsel however indicated that there are in fact only 5 issues in this appeal. The issues are (1) whether there was sufficient evidence of the appellant's intent to defraud (2) whether count 3 was an appropriate charge (3) whether the forgeries were local crimes justiciable locally (4) whether the utterings were local crimes justiciable locally and (5) whether the sentences were excessive.

(1) The intent to defraud

Section 235 of the Penal Code provides that:

"An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained,

capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such persons from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document."

Section 235 therefore creates a statutory presumption of intent to defraud based solely on the fact that at the time of the forgery, there existed a specific person who was capable of being defrauded by the forgery. The statutory presumption applies to this case because at the time of the forgeries of the job letters, there were at least two persons capable of being defrauded thereby. Those persons were the United States Government (which is a political and legal entity) and the United States Ambassador or Vice Consul in Antigua.

The U.S. Government, the U.S. Ambassador and the U.S. Vice Consul are persons responsible for public duties. The intent to defraud such persons is specifically dealt with in **Welham V D.P.P. (1960) 1 AER 805**. There Lord Radcliffe said at p809:

"In my opinion, it is clear that, in connexion with this offence, the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit or not doing something that but for it he would have done."

There can be no doubt that the object of the forged job letters was to induce the U.S. Government, the U.S. Ambassador or the U.S. Vice Consul, in the discharge of a public duty, to grant non-immigrant visas which would not have been granted but for the forged job letters. That manifest object was sufficient evidence of the appellant's intent to defraud.

(2) Count 3

Count 3 was a charge under section 237(3)(f) of the Penal Code which provides that:-

"Any person who, with intent to defraud or deceive, forges any of the following documents shall be guilty of an offence and liable to imprisonment for seven years..... (f) any document made or issued by the head of any department of the Government....."

Counsel for the appellant submitted that count 3 was inappropriate because the permanent secretary in a Ministry of Government is not a head of a department of the Government. Although the status of a permanent secretary in Montserrat is not defined in the Constitution of Montserrat, there is no reason to believe that he enjoys a status different from that enjoyed by the permanent secretaries in the former Associated States. For example, sections 60, 61, 64, 68, 69 and 78 of the Constitutions of Saint Vincent, St. Kitts, Grenada, Dominica, Saint Lucia and Antigua respectively provide that:

"Where any Minister has been charged with responsibility for any department of government, he shall exercise general direction and control over that department; and, subject to such direction and control, every department of government shall be under the supervision of (a permanent secretary whose office shall be a public office)/(a public officer whose office is referred to in this Constitution as the office of a permanent secretary)..."

The effect of these sections is to appoint the permanent secretary as the supervisory head of the department or Ministry but to place the department or Ministry under the general direction and control of the Minister. I am content to assume that the Constitutions of the independent island states which previously comprised the Associated States express the status enjoyed by permanent secretaries in Montserrat. Accordingly, count 3 cannot

be said to have been misconceived.

(3) Were the forgeries local?

Counsel for the appellant submitted that the forgeries were not justiciable in Montserrat because the persons (if any) capable of being defrauded thereby were outside the territorial jurisdiction of Montserrat. The general question therefore arises as to whether a crime is classifiable as local and is accordingly justiciable locally if the actus reus of the crime was committed locally and the intent or other mens rea of the crime was formed locally but the victim or intended victim of the crime was outside the jurisdiction.

In **Reg V Treacy (1971) A.C. 537 at 561-562**, Lord Diplock said:

"There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.

In **R v El-Hakkaoui (1975) 2 AER 146**, Browne L.J. (delivering the judgment of the Court of Appeal) said (at p150):

"In our view there are only two elements which have to be proved to establish an offence under s 16: (a) that the defendant had a firearm in his possession in the United Kingdom, and (b) that at the time when he had it in his possession in the United Kingdom he intended by means thereof to endanger life. If these elements are proved the offence is complete. It is quite irrelevant whether or not the intention was carried out. If this view needs any confirmation it is

provided by the last 12 words of the section. In our view, the place where the intention would have been carried out, if it had been carried out, is equally irrelevant.

After citing passages from the judgment of the Court of Appeal in the case of **R v Hornett** (1975) RTR 256, Browne, L.J. concluded (at p154) as follows:-

"We have thought it right to refer to that judgment at some length because it seems to us to be relevant and conclusive in the present case. We can see no distinction between the intent to defraud or deceive in *R.v Hornett* and the intent to endanger life in the present case. In both cases the intent was present in England and the offence was complete here, and the fact that the persons who would or might suffer from the carrying out of that intent were abroad was and is irrelevant."

Reg v Treacy and **R v Hornett** are therefore authorities for the proposition that where the actus reus of a crime was committed locally and the intent or other mens rea of the crime was formed locally, the crime is classified as a local crime and is justiciable locally notwithstanding the fact that the victim or intended victim of the crime was outside the jurisdiction. Accordingly, since the acta rea of the forgeries of the job letters were committed in Montserrat and the intents to defraud thereby were formed in Montserrat, the forgeries must be classified as local crimes justiciable in Montserrat, notwithstanding the fact that the persons (the U.S.Government and the U.S.Vice Consul) defrauded or intended to be defrauded by the forgeries were in Antigua or outside the territorial jurisdiction of Montserrat.

(4) Were the utterings local?

Counsel for the appellant submitted in effect that the utterings of the job letters were not justiciable in Montserrat because the utterings were foreign crimes committed abroad (in

Antigua) and had no adverse consequences in Montserrat. The question therefore arises as to whether the utterings were committed in Montserrat or in Antigua.

Section 243(2) of the Penal Code provides that:

"A person utters a forged document, seal or die, who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the document, seal or die in question, uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders, in evidence, or puts off the said forged document, seal or die."

In **Smith & Hogan Criminal Law (6th Edn, 1988)**, the learned authors said at p665:

"The offence under s.3 in substance replaces the former offence, under s.6 of the Forgery Act 1913, of uttering. Under s.6 a person who "uses, offers, publishes, delivers, disposes of, tenders in payment or exchange, exchanges, tenders in evidence or puts off" was guilty of uttering. This extravagance of language is now replaced by the single verb "uses" but this does not import any restriction on the ambit of the offence. The Law Commission was aware that "uses" is the paramount verb, was so regarded by the courts, and would do duty for the remaining expressions in the earlier legislation."

Accordingly, the question to be answered in this case is whether the forged job letters were used in Montserrat or in Antigua. The evidence is that the appellant entrusted her emissary or agent (Gwendolyn White) with the forged job letters with instructions to deliver them in Antigua to the U.S.Ambassador or Vice Consul there. According to Miss White, she took the job letters to Antigua and there gave them to a man called Lawrence with instructions to deliver them to the U.S.Embassy in Antigua.

The evidence is that the job letters were in fact delivered in Antigua to the U.S. Embassy there. Under cross-examination, Miss White said "I had nothing else to do with the package save to take it from Montserrat and deliver them to Antigua".

In those circumstances, I agree with counsel for the appellant that the job letters remained in the possession of the appellant while they were in the custody of the appellant's emissaries or agents (Miss White and Mr. Lawrence) and were used or uttered when they were delivered in Antigua to the U.S. Embassy there. I do not accept the proposition that a sender's delivery of a forged document to the sender's emissary or agent for delivery to the person intended to be defrauded by the forged document by itself constitutes an uttering of the forged document within the meaning and intent of section 243 (2) of the Penal Code. The legislature could not conceivably have intended that there should be a multiplicity of utterings and prosecutions resulting from every intermediate step leading to the delivery or communication of a forged document to the person intended to be defrauded thereby. The legislature evidently contemplated one offence of uttering committed when the forged document is used on or is delivered or communicated to the person intended to be defrauded thereby. I therefore conclude that the forged job letters were uttered in Antigua and not in Montserrat.

Since the utterings of the forged job letters were committed in Antigua and had no adverse consequences in Montserrat, the crucial question is whether the utterings are justiciable in Montserrat. In **Cox v Army Council (1963) A.C 48** at 67, Viscount Simonds said:

"...apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England."

In **Air-India v Wiggins** (1980) 2 AER 593 at 596, Lord Diplock said:

"My Lords, in construing Acts of Parliament there is a well-established presumption that, in the absence of clear and specific words to the contrary, an 'offence-creating section' of an Act of Parliament (to borrow an expression used by this House in *Cox v Army Council* [1962] 1 All ER 880, [1963] AC 48) was not intended to make conduct taking place outside the territorial jurisdiction of the Crown an offence triable in an English criminal court."

Again, in **Liangsiriprasert v U.S. Government** (1990) 2 AER 866, Lord Griffiths (delivering the opinion of the Privy Council) said at p879:

"When approaching the construction of a statute, particularly a criminal statute there is a strong presumption that it is not intended to have extra-territorial effect and clear and specific words are required to show the contrary: see *Air India v Wiggins* [1980] 2 All ER 593, [1980] 1 WLR 815 and *Holmes v Bangladesh Biman Corp* [1989] 1 All ER 852, [1989] AC 1112. This presumption arises from the assumption that the legislature does not intend to intrude on the affairs of other countries, which should be left to order affairs within their own boundaries by their own laws."

Since there are no specific and unequivocal words or phrases in the Penal Code expressing a legislative intention to extend the Code to extra-territorial utterings, the presumption referred to by Lords Diplock and Griffiths applies. The result is that the utterings of the forged job letters in Antigua - being foreign crimes or crimes committed outside the territorial jurisdiction of Montserrat - were not justiciable in Montserrat. I would therefore quash the convictions on counts 4 & 5 and set aside the sentences in relation thereto.

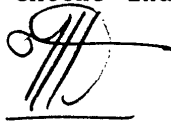
(5) The sentences

The custodial sentences under appeal were all imposed with hard labour which had already been abolished by section 331(2) of the Penal Code. The element of hard labour must therefore be excised from the sentences.

We should not interfere with the sentences imposed in respect of the forgeries charged under counts 1 & 2 merely because these sentences are maximum sentences. I would therefore affirm these sentences.

In imposing a sentence of 3 years' imprisonment in respect of the forgery charged under count 3, the learned judge must have taken into account the fact that the maximum sentence for that type of forgery is imprisonment for 7 years. However, since there was no allegation or proof that the forged job letter was ever uttered or used, a sentence of imprisonment for 2 years for the forgery of that job letter should adequately serve the ends of deterrence, retribution and reformation. Therefore, for the sentence of 3 years' imprisonment, I would substitute a sentence of imprisonment for 2 years to run concurrently with the other sentences affirmed herein.

I would allow the appeal to the extent indicated in this judgment.



V.F. FLOISSAC
Chief Justice



C.M.D. BYRON
Justice of Appeal

M. JOSEPH
Justice of Appeal (Ag.)