

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCR 2023/0003

BETWEEN:

[1] The King

Crown

and

[1] John Ryan

[2] Alford S. Dyett

[3] Dion Weekes

[4] Fitzroy Buffonge

[5] Kato Kimbugwe

[6] Lei Meng

[7] Paradise Development Company Ltd.

Defendants

Appearances:

Mr. Oris Sullivan and Ms. Kadian McNeil for the Crown

Mr. Dane Hamilton KC and Ms. Chivone Gerald for the Defendants

2024: JULY 5

RULING

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING:

- [1] Should the Montserrat High Court accept the request of the Director of Public Prosecutions to state a case for consideration by the Court of Appeal arising from the discharge of Mr. John Ryan?

Background

- [2] John Ryan, Alford S. Dyett, Dion Weekes and Fitzroy Buffonge (the “Accused”) were alleged to have committed various financial and related offences detailed in the thirteen count indictment (the “Indictment”) filed on this trial. The Accused each entered not guilty pleas on May 7, 2024 and were thereafter tried before a jury on all charges.
- [3] On May 22, 2024, the jury found each of the Accused not guilty of the offences itemized at counts one through eight of the Indictment.
- [4] John Ryan alone was charged with and found guilty by the jury of failing to file corporate tax returns on behalf of a company incorporated in Montserrat, Paradise Development Company Ltd., for each of the 2017-2021 taxation years as set out in counts nine through thirteen of the Indictment.
- [5] On sentencing, Mr. Ryan through his counsel submitted that:
- a) Counts nine through thirteen of the Indictment were duplicitous when comparing the requirement of willfulness at subsection 50(5) of the *Income and Corporation Tax Act* (“*ICTA*”) and the lack of reasonable excuse language at subsection 85(b) with the result that the proceeding in the High Court was a nullity; and, alternatively,
 - b) That this Court lacked the jurisdiction to sentence for a summary conviction offence. In essence, Mr. Ryan argued that the subject offences ought to have proceeded before the Magistrate’s Court with the result that the trial in the High Court was a nullity.
- [6] Counsel for the Crown submitted that the Indictment was clear on its face and that the High Court had inherent summary conviction jurisdiction for those charges.
- [7] Both counsel agreed that counts nine to thirteen were summary conviction offences given that the only instructive reference was in *ICTA* section 85(b) stating that an offender “*shall be liable on summary conviction to a penalty of \$2,000*”.

- [8] Mr. Ryan sought a warning and discharge on sentencing.
- [9] The Crown sought a fine of \$2,000 for each of the five counts Mr. Ryan was found guilty on by the jury pursuant to *ICTA* section 85(b).
- [10] The sentencing decision of this Court was released on June 26, 2024.
- [11] This Court found that the constituent elements for counts nine to thirteen were unambiguous with consideration to the entire wording of the Indictment, particularly the words “without lawful excuse”. Mr. Ryan’s argument challenging his guilty verdicts on the basis of the Indictment wording was rejected.
- [12] However, this Court ruled that it had no authority to try the summary conviction offences set out in counts nine through thirteen of the Indictment. This Court noted that this class of offences could only be tried before the Magistrate’s Court pursuant to sections 49-52 and 61 of the Montserrat *Criminal Procedure Code* (“*CPC*”). As a result, this Court ruled that the trial on counts nine to thirteen before this Court was a nullity. In other words, the trial on those counts was legally void and of no effect whatsoever.
- [13] Given the trial was a nullity, this Court was bound to and did discharge John Ryan on counts nine through thirteen of the Indictment pursuant to *CPC* section 117 (the “Sentencing Ruling”).
- [14] The Prosecution initially indicated that an appeal of the Sentencing Ruling would be pursued. Subsequently, the Prosecution, instead, requested that this Court state a case for consideration by the Court of Appeal respecting the correctness of the Sentencing Ruling on the jurisdiction issue further to section 56 of the *Supreme Court Act* (“*SCA*”) and with specific consideration to *ICTA* subsection 90(1).
- [15] The request by the Crown for a stated case was heard on July 5, 2024 and opposed by Mr. Ryan. This Court rejected the request for full reasons given orally that day. At the Crown’s request, the Court’s oral reasons are hereby memorialized.

The Applicable Legislation

[16] SCA section 37 provides that “appeal means an appeal by a person **convicted** upon indictment” [emphasis mine].

[17] The SCA details the right of a party to appeal at section 38 where it states:

A person **convicted** on indictment may appeal under this Act to the Court of Appeal –

- a) Against his **conviction** on any ground of appeal which involves a question of law alone;
- b) With leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his **conviction** on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and
- c) With leave of the Court of Appeal against the sentence passed on his **conviction**, unless the sentence is one fixed by law. [all emphasis mine]

[18] Section 56(1) of the SCA provides when the High Court may state a case to the Court of Appeal as follows:

Where a person is **convicted** on indictment the trial Judge may state a case or reserve a question of law for the consideration of the Court of Appeal and the Court of Appeal shall consider such case stated or question of law reserved and may either [emphasis mine] –

- a) Confirm the judgment given upon the indictment;
- b) Order that such judgment be set aside, and quash the conviction and direct a judgment and verdict of acquittal to be entered;
- c) Order that such judgment be set aside, and give instead thereof the judgment that ought to have been given at trial;

- d) Require the Judge by whom such case has been stated or question has been reserved to amend such statement or question when specially entered on the record; or
- e) Make such other order as justice requires.

[19] Counts nine through thirteen charged Mr. Ryan with five times failing to render a tax return on behalf of Paradise Development Corporation Ltd. The formal charge read as follows:

Between January 1, 2018 and February 28, 2022, John Ryan did, as manager or other principal officer of Paradise Development Company Ltd., fail to render a return for each of the 2017, 2018, 2019, 2020 and 2021 tax years without reasonable excuse contrary to section 50, 56 and 85(b) of the Income and Corporation Tax Act 2013.

[20] The applicable sections of *ICTA* are as follows:

Section 50(1) - It shall be the duty of every person who receives an income to deliver to the Comptroller on or before 31 March in each year or such other date as may be prescribed, a true and correct return in the form and manner prescribed, of the whole of his income from every source whatever for the basic year and if absent from Montserrat to give the name and address of an agent residing in Montserrat.

Section 50(4) – A person who fails to deliver a true and correct return under subsection (1) shall pay a fine of \$10 in respect of each month he fails to submit a return.

Section 50(5) – Subject to subsection (4), any person who wilfully fails to comply with the provisions of this section shall be guilty of an offence against this Act.

Section 56 - The manager or other principal officer of every corporate body of persons or society shall be answerable for doing all such acts, matters and things as are required

to be done by virtue of this Act for the assessment of such body or persons or society and for the payment of tax.

Section 85(b) - Any person who without reasonable excuse (whether or not liability for tax is involved) refuses, fails or neglects to render any return or statement is guilty of an offence and shall be liable on summary conviction to a penalty of \$2,000 and in default of payment to imprisonment for a term of four months, and after judgment has been given for that penalty to a further penalty of \$100 for every day during which the refusal, failure or neglect to render any document or to pay over any tax continues.

- [21] On the request for a stated case, the Prosecution asked this Court to also consider ICTA section 90 which provides:

Section 90(1) – Notwithstanding anything contained in section 85, 86, 87, 88 or 89 the Director of Public Prosecutions may institute, take over or discontinue any proceedings brought under this Act and may cause any such proceedings to be brought in or transferred to any court as he shall deem fit.

Section 90(2) – Where proceedings are contemplated or pending, the Director of Public Prosecutions may demand from any person whether a taxpayer or not, any returns, books of accounts, statements or particulars in relation to any person's tax liability.

*Section 90(3) – Any person who refuses, fails or neglects to deliver to the Director of Public Prosecutions any document or thing demanded under subsection (1) shall be guilty of an offence and **shall be liable on summary conviction** to a fine of \$2,000 or imprisonment for up to two years [emphasis mine].*

- [22] Lastly, reference must also be made to the CPC.

- [23] Section 49 of the CPC identifies the classes of offences “as regards modes of trial” available in Montserrat as follows:

- a) Those triable **only** on indictment [emphasis mine];
- b) Those triable **only** summarily [emphasis mine]; and,

- c) Those triable either way.

[24] Section 50 of the *CPC* defines an “indictable only offence” as follows:

- a) An offence that any law states is to be tried by the High Court; or,
- b) An offence that does not so state and does not fall under section 51 or 52.

[25] Section 51 of the *CPC* states that an “offence is triable only summarily” if any law states that the offence is to be:

- a) Tried by the Magistrate’s Court; or,
- b) Tried summarily.

[26] Section 52 of the *CPC* defines an offence as “triable either way” if:

- a) Any law states that the offence is punishable on summary conviction or conviction on indictment;
- b) Any law **expressly** gives the **Magistrate’s Court a discretion as to whether to try the offender summarily or to send him/her to the High Court for committal and trial on indictment** [emphasis mine]; or,
- c) The offence is punishable, on summary conviction only, by imprisonment for a term not exceeding six months.

[27] *CPC* section 61 details the process for each of the two modes of proceeding.

[28] Section 61(2) of the *CPC* provides that a summary conviction offence must have an Initial Hearing to be held before a Magistrate and a trial before a Magistrate sitting alone.

[29] Section 61(1) of the *CPC* provides that an offence triable by indictment must have an Initial Hearing to be held before a Magistrate followed by a Sufficiency Hearing where the High Court judge must determine that there is sufficient evidence to commit the accused person to trial. If yes then the accused has an Arraignment and the case moves forward to a trial held before a High Court judge sitting with a jury of nine (see: section 7(g) of the *Montserrat Constitution* and section 26 of the *Jury Act*).

Analysis

- [30] The Prosecution requested this Court to state a case arguing that *ICTA* section 90 suggested, at the very least, that the Sentencing Ruling was in error.
- [31] The Prosecution submits that section 90 is not a charging section and permits that office to elect, at its absolute discretion, whether any *ICTA* offence will be tried before the High Court or the Magistrate's Court regardless of any other language presented in that Act, particularly the wording in sections 85, 86, 87, 88 or 89. There are several difficulties with that submission.
- [32] The first thing to note is that section 90 is most certainly a charging section, although a poorly drafted one as discussed below. The charge wording is presented in subsection 90(3) where it provides that "any person who refuses, fails or neglects to deliver to the Director of Public Prosecutions any document or thing demanded under subsection (1) shall be guilty of an offence".
- [33] There is an obvious error in the language for subsection 90(3) where it creates the offence of refusing, failing or neglecting to deliver to the Prosecution "any document demanded under **subsection (1)**" [emphasis mine]. The right of the Prosecution to make a demand for documentation is provided in subsection (2) not subsection (1).
- [34] A fundamental obstacle to the Prosecution's argument is the fact that none of the Accused in this trial, including Mr. Ryan, were charged with any offence under section 90. In other words, the purported authority found in section 90 was not relied upon by the Prosecution at any point in the trial and was never a live issue to be addressed by the Accused or this Court.
- [35] How could something that was not in issue or even mentioned at any point during this trial be the foundation supporting a stated case for the Court of Appeal? The simple answer is that it cannot.
- [36] Another fundamental concern with the Prosecution's request is that the language used in subsection 90(1) is ambiguous, which is simply insufficient where the Crown seeks to imbue itself with powers otherwise resting with the Magistrate or an accused person by clear, legislative enactment in the *CPC*. If the legislature intended to provide the

Prosecution with this purported authority then it would have and needs to do so specifically. Reviewing the language used in the CPC where the legislature has provided such authority illustrates this point.

- [37] The CPC expressly provides the Magistrate and the accused the right to elect the mode of trial where an either way offence is being prosecuted as follows:

Section 59(a) – If an accused is charged with an offence referred to in subsection 52(a) or 52(b) then, at the Initial Hearing, whether or not on application made by the prosecution or the accused person, if it appears to the magistrate that the case is one that ought to be tried by – the High Court, the magistrate shall proceed with the Initial Hearing in accordance with section 66 and afterwards the case shall be continued as if the person had been charged with an indictable only offence.

Section 60(1) – Subject to subsections (2) and (3), if an accused is charged with an offence referred to in subsection 52(c) then, at the Initial Hearing, he may elect, if he so desires, to be tried before the High Court, and the magistrate shall inform him of this right at the commencement of the Initial Hearing and before any issue in relation to trial is dealt with, explaining to him the difference in the procedure between summary trial and trial on indictment and the probable time at which he might be brought for trial before the High Court. If the accused then elects for trial before the High Court, the magistrate's court shall proceed with the Initial Hearing in accordance with section 66 and afterwards the case shall proceed as if the person had been charged with an indictable only offence.

Section 60(2) – This section does not apply in a case where the accused person is, or appears to the magistrate to be, under the age of fourteen years, unless the parent or guardian of the accused is present, in which case the right of election shall be exercised by the parent or guardian.

Section 60(3) – This section does not apply to curtail the summary jurisdiction of the magistrate's court in any case brought under any law which expressly provides that the offence charged shall be tried only summarily or which expressly gives the magistrate's court the discretion as to whether to try the accused summarily or to commit him to trial on indictment.

- [38] As demonstrated above, the language used by the legislature to grant the discretion to elect how a charge shall be tried is specific and comprehensive. Said differently, the discretion to elect was not left by the legislature to the caprice of interpretation.
- [39] The interpretation suggested by the Crown presents a contradiction within the wording of section 90 itself and other *ICTA* sections, including that of subsection 85(b) upon which Mr. Ryan was found guilty.
- [40] As noted above, both counsel on sentencing agreed that the offence provided for in *ICTA* section 85(b) was a summary conviction offence given that the wording therein stating that an offender “***shall be liable on summary conviction to a penalty of \$2,000***”. Section 90(3) contains identical language where it states that an offender ***shall be liable on summary conviction to a fine of \$2,000 or imprisonment for up to two years***” [all emphasis mine]. This is very precise and determinative language.
- [41] The charging language in *ICTA* sections 90(3) and 85(b) both clearly classify the offences as being summary conviction.
- [42] As noted in the Sentencing Ruling, the Montserrat legislature enacted the *CPC* which directs that a summary conviction offence shall only be tried before the Magistrate’s Court. *CPC* sections 49-52 and 61 when read together are coherent, compatible and consistent in this regard.
- [43] The Prosecution, therefore, argues that the legislature specifically classified *ICTA* section 85(b) and 90(3) offences as summary conviction and specifically mandated that those offences proceed only before the Magistrate’s Court pursuant to *CPC* sections 49-52 and 61 but, contrary to this, permitted the Prosecution via the imprecise language of section 90(1) to choose whether such offences would proceed before the Magistrate’s Court or the High Court.
- [44] Referring only to section 90, the Prosecution’s interpretation that subsection 90(1) authorizes the Prosecution to elect whether offences would proceed before the Magistrate’s Court or the High Court is also clearly contrary to wording of subsection 90(3) that expressly classifies an offence under section 90 as being summary conviction.

- [45] There are two principles of statutory interpretation that assist in assessing the Prosecution's position.
- [46] One, to the extent possible, statutes should be harmonized and not read as creating a conflict. This is especially so where the scrutinized wording is found within the same section of a statute as here with subsections 90(1) and 90(3).
- [47] Two, the specific controls over the general. If there is a conflict between two statutory provisions where one of them is a general statement and the other a specific statement then the court should apply the more specific statement.
- [48] Both of these tools of interpretation direct against the Prosecution's position.
- [49] The interpretation of *ICTA* section 90(1) suggested by the Prosecution is in direct conflict with subsection 90(3) and the express language directing the available modes of trial and powers of election presented in *CPC* sections 49-52, 59, 60 and 61. It cannot be correct that the legislature intended to enact such an obvious conflict.
- [50] The wording of *ICTA* section 90(1) is anything but express. It does not specifically empower the Prosecution to elect whether a charge under *ICTA* proceeds before the Magistrate's Court or the High Court. Again, compare this with the express language where the power of election is granted in *CPC* sections 59 and 60 along with the modes of trial in sections 49-52 and 61. The specific language does and must control over any contrary provision suggested on the basis of vague wording.
- [51] The power to elect the mode of trial for a charge(s) has an obvious impact on an accused and his/her right to a fair trial guaranteed by the Montserrat *Constitution*. Nothing short of an express legislative enactment granting that fundamental power to the Prosecution will suffice, especially where such an interpretation is in direct conflict with the specific statutory wording of *ICTA* subsections 85(b) and 90(3) and *CPC* sections 49-52, 59, 60 and 61.
- [52] Lastly, this Court cannot state a case to the Court of Appeal even if accepting the Prosecution argument that *ICTA* section 90 suggests the Sentencing Ruling on jurisdiction was erroneous. The simple reason is that section 56(1) of the *SCA* only permits a court to state a case where there has been a conviction registered. Here, the

Sentencing Ruling nullified the entire trial, including the finding of guilt by the jury against Mr. Ryan on counts nine to thirteen. There remains no finding of guilt and no conviction. As such, this Court has no jurisdiction to state a case here.

Conclusion

[53] By Sentencing Ruling released June 26, 2024, this Court ruled that it had no authority to try the summary conviction offences set out in counts nine through thirteen of the Indictment filed in this case. Further, the Court noted that this class of offences could only be tried before the Magistrate's Court pursuant to *CPC* sections 49-52 and 61. As a result, this Court ruled that the trial on counts nine to thirteen before this Court was a nullity. In other words, the trial on those counts was legally void and of no effect whatsoever.

[54] In response, the Prosecution requested that this Court state a case for consideration by the Court of Appeal respecting the correctness of the Sentencing Ruling on the jurisdiction issue further to section 56 of the *SCA* and with specific consideration to *ICTA* subsection 90(1). The Prosecution argued that a stated case was warranted on the basis that *ICTA* section 90 suggested, at the very least, that the Sentencing Ruling was in error.

[55] The request to state a case was denied for three reasons.

[56] Firstly, none of the Accused in this trial, including Mr. Ryan, were charged with any offence under *ICTA* section 90. In other words, the purported authority found in section 90 was not relied upon by the Prosecution at any point in the trial and was never a live issue to be addressed by the Accused or this Court. It cannot now be the foundation upon which a request for a stated case can find support.

[57] Secondly, the wording of *ICTA* section 90(1) is anything but express. It does not specifically empower the Prosecution to elect whether a charge under *ICTA* proceeds before the Magistrate's Court or the High Court. In addition, the interpretation argued by the Prosecution is in direct conflict with the specific statutory wording of *ICTA* subsection 90(3) and *CPC* sections 49-52, 59, 60 and 61.

[58] The power to elect the mode of trial for a charge(s) has an obvious impact on an accused and his/her right to a fair trial guaranteed by the Montserrat *Constitution*. Nothing short of an express legislative enactment granting that fundamental power to the Prosecution will suffice. There is an absence of any such enactment, including in *ICTA* section 90(1).

[59] Thirdly, this Court cannot state a case to the Court of Appeal given that SCA section 56(1) only permits a stated case where there has been a conviction registered. Here, the Sentencing Ruling nullified the entire trial, including the finding of guilt by the jury against Mr. Ryan on counts nine to thirteen. There remains no finding of guilt and no conviction. As such, this Court has no jurisdiction to state a case.

[60] This Court appreciates the frustration of the Prosecution flowing from this decision. However, any change permitting the Prosecution the power of election must be enacted by the legislature expressly.

IT IS HEREBY ORDERED THAT:

1. The request of the Director of Public Prosecutions for this Court to state a case for consideration by the Court of Appeal respecting the correctness of the Sentencing Ruling on the jurisdiction issue further to section 56 of the *Supreme Court Act* is denied and dismissed.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

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