

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

MONTSERRAT

CASE 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. Anu Mohindru KC and Mrs. Rasheema Kanhai Britton for the Crown

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

2024: JUNE 14

2024: JUNE 26

RULING

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING:

- [1] What is the sentencing jurisdiction of the Montserrat High Court? One would think that to be a question long ago settled. Not so and now an issue that this Court has been called upon to determine.

- [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 filed (the “Indictment”) 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 and found guilty with respect to counts nine through thirteen. Mr. Ryan’s sentencing was scheduled for June 14, 2024. Counsel filed submissions in advance of the sentencing date. For reasons detailed below, the sentencing jurisdiction of the Montserrat High Court was presented as a threshold issue along with a challenge to the particular charge wording for these counts.

Background

- [5] Counts nine through thirteen charged Mr. Ryan with five times failing to render a tax return on behalf of a company incorporated in Montserrat, namely Paradise Development Corporation Ltd. The formal charge reads:

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.

- [6] The applicable sections of the *Income and Corporation Tax Act* (“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.

[7] Mr. Ryan through his counsel submits that:

- a) Counts nine through thirteen of the Indictment are duplicitous when comparing the requirement of willfulness at *ICTA* subsection 50(5) 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 lacks the jurisdiction to sentence for a summary conviction offence. In essence, 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.

[8] Based on the above, Mr. Ryan seeks a warning and discharge on sentencing.

- [9] Counsel for the Crown submits that the Indictment is clear on its face and the High Court has inherent summary conviction jurisdiction for these charges. The Crown seeks a fine of \$2,000 for each of the five counts Mr. Ryan was found guilty on by the jury.

Was the Indictment Duplicious?

- [10] The first thing to note is that at no time prior to sentencing did Mr. Ryan challenge the wording of the Indictment respecting counts nine through thirteen on the basis of duplicity or otherwise. This Court wonders whether any challenge to the Indictment is now more properly an issue for the Court of Appeal? However, with these caveats noted, this Court will endeavour to address the argument placed before it.
- [11] The thrust of Mr. Ryan's argument is that the jury was confused by the references to sections 50 and 85(b) for counts nine to thirteen such that the guilty verdicts should not be allowed to stand. I do not agree that the subject wording in the Indictment was duplicious or that the jury was thereby unable to find Mr. Ryan guilty.
- [12] There is a difference between asking whether the overall sections of the *ICTA* are duplicious and whether the Indictment is so.
- [13] Looking at the legislation on whole, this Court has little difficulty in stating that *ICTA* subsections 50(4) and 50(5) are poorly worded. It is not at all clear how they interact.
- [14] How is the "willfully fails to comply" requirement for an offence to be made out pursuant to subsection 50(5) "subject to" and interact with the "fails to deliver a true and correct return" language of subsection 50(4)? In addition, there is no penalty identified in subsection 50(5) whereas subsection 50(4) imposes a fine of \$10 per overdue month. How do these subsections interact on penalty?
- [15] Even more complicated, how do subsections 50(4) and (5) interact with the "without reasonable excuse refuses, fails or neglects to render any return" requirement of subsection 85(b)? Again, there is no penalty identified in subsection 50(5) whereas subsection 50(4) imposes a fine of \$10 per overdue month. Subsection 85(b) imposes a fine of \$2,000 per offence with the possibility of a four month jail sentence upon default of payment. How do these subsections interact on penalty?

- [16] Reading the above, one could find engagement with Mr. Ryan's argument that the legislation is too confusing such that the proceeding must be nullified. There is certainly a strong argument that the legislature should review these provisions towards achieving clarity. However, the issue here is more focused than simply reviewing the legislation on whole.
- [17] It is the wording of the Indictment that drives the proceeding and that is the proper focus of analysis. The seminal language from the Indictment is "**fail to render a return** for each of the 2017, 2018, 2019, 2020 and 2021 tax years **without reasonable excuse**" [all emphasis mine].
- [18] Again, Mr. Ryan did not challenge the wording of the Indictment during the trial and the issue of duplicity he now raises was not before the jury.
- [19] The jury received clear instructions at the commencement of the trial and again just prior to their deliberations that they were to apply the law as it was given to them by the Court.
- [20] The jurors were told by this Court that the applicable sections of the *ICTA* were 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.

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.

[21] The jurors were told that the Prosecution must prove each of these essential elements for these charges to the criminal standard that they were sure:

- i. that Paradise Development Corporation was required by law to deliver a tax return in the prescribed form to the Comptroller of Inland Revenue for each of the 2017, 2018, 2019, 2020 and/or 2021 taxation years;
- ii. that Paradise Development Corporation failed to deliver a required return for each of those taxation years;
- iii. that Paradise Development Corporation failed to have a reasonable excuse for not delivering a return(s); and,
- iv. that John Ryan was the manager or principal officer of Paradise Development Corporation required to file the return(s) on behalf of Paradise Development Corporation.

[22] The evidence presented by both the Prosecution and Mr. Ryan relevant to these charges was reviewed by the Court as follows:

Review of Evidence

John Ryan testified that he was in the public service for 27 years retiring as Financial Secretary in 1998. He subsequently went into private enterprise owning two companies in addition to PDC (Paradise Development Corporation Ltd.). John Ryan testified that it is the practice in Montserrat for Inland Revenue to send out tax return forms every December and he receives forms for his two other companies. John Ryan testified that he submits returns each year for his two other companies and pays his taxes. Mr. Ryan stated that he has never received tax return forms for PDC from Inland Revenue and, as a result, has never submitted tax returns for PDC.

Violette Silcott, the retired Comptroller of Inland Revenue, testified that the legislation requires a corporation director or chair to submit a tax return annually on prescribed Form C even if the corporation has no income (a “nil” return).

Violette Silcott testified that the legislation requires a taxpayer to submit a return even if no form is sent by Inland Revenue. She also noted that the tax return forms are available at the Inland Revenue office and online.

Violette Silcott and Roland Irish, the current Deputy Comptroller of Inland Revenue, testified that each searched the Inland Revenue records for tax returns submitted by PDC. Neither found any returns submitted by PDC.

[23] The wording of the Indictment is clear where it directs the parties and the trier to what the Prosecution had to prove them sure of, namely whether John Ryan was the corporate representative legally obligated to but who failed to render a return on behalf of the company for any of the subject years and whether this occurred without reasonable excuse.

[24] It was to this specific equation that the Prosecution and Mr. Ryan directed their respective evidence. It was to this specific equation that this Court instructed the jury just prior to the commencement of their deliberations. There was no confusion in the minds of Mr. Ryan, counsel, the Court and/or the jury about what elements constituted the offences charged and upon which the jury made their determination of guilt against Mr. Ryan.

[25] In summary, the Indictment, ideally, should have specifically referenced *ICTA* subsection 50(1) rather than subsection 50 more generally. That said, 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 was found guilty of failing to render returns on behalf of the company without lawful excuse pursuant to *ICTA* subsection 85(b). Mr. Ryan’s argument challenging his guilty verdicts on the basis of the Indictment wording is rejected. The more complicated issue is whether this Court has the jurisdiction to sentence Mr. Ryan for these counts.

Does the Montserrat High Court Have Jurisdiction for Summary Conviction Offences?

[26] Although he did not specify, it would appear that Mr. Ryan is intending to bring a motion in arrest of judgment pursuant to section 117 of the Montserrat *Criminal Procedure Code* (“CPC”) on the ground that counts nine through thirteen of the Indictment do not set out any offence which the High Court has the authority to try.

[27] As noted above, the Prosecution takes the position that this Court has inherent jurisdiction over summary conviction matters. The Crown relies on the House of Lords decision in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 (“*Bremer*”) and the decision of the Supreme Court of South Africa in *Ex Parte Millsite Investments Co (Pty) Ltd* [1965] 2 SA 582 (“*Millsite*”) in support of this.

[28] Lord Diplock offered the following in *Bremer* respecting the inherent power of the court in the context of determining whether the High Court had the authority to dismiss a private arbitration for want of prosecution:

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is within the "inherent jurisdiction" of the High Court. It would, I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.

[29] Justice Veyra in *Millsite* offered the following regarding the inherent power of the court:

The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control it's own procedure but also to hold the scales of justice where no specific law provides directly for a given situation.

[30] The limits to the court's ability to avail itself of inherent jurisdiction was succinctly expressed by Justice Dickson (as he then was) of the Supreme Court of Canada in *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.*, [1975] 2 S.C.R. 475 at page 481 where he stated:

Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

[31] The CPC touches, variously, upon the jurisdiction issue.

[32] 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.

[33] 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.

[34] 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.

[35] 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.

[36] Again, this Court has little difficulty stating that the language of the CPC is unnecessarily clumsy. That said, the various sections of the CPC referenced above must be interpreted in a logical, common sense manner that allows for the harmonious interaction of its provisions wherever possible and not otherwise indicated.

- [37] CPC sections 49-51 when read together create two distinct modes of trial, namely one for summary conviction offences and one for indictable offences. Clearly, either way offences would be tried either summarily or by indictment depending upon the election made. These two modes of proceeding and types of trial are logistically and jurisdictionally different. This is obvious when comparing the process.
- [38] A summary conviction offence must have an Initial Hearing to be held before a Magistrate and a trial before a Magistrate sitting alone (see: section 61(2) CPC).
- [39] 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 (see: section 61(1) CPC). 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*).
- [40] Here, both counsel agree that counts nine to thirteen are summary conviction offences. This is a reasonable conclusion given that the only relevant reference in section 85(b) is that an offender “*shall be liable on summary conviction to a penalty of \$2,000*”. This acknowledgement along with reference to CPC sections 49 and 51 direct that these counts are a class of offence “**triable only summarily**” [emphasis mine].
- [41] Any inherent jurisdiction of the Court may only, potentially, be engaged where there is a void, namely where the subject matter is not addressed by legislative enactment and/or Rules of the Court. That is not the situation here. 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.
- [42] The Prosecution also references CPC section 101 in support of its argument that the High Court has jurisdiction over counts nine through thirteen of the Indictment.
- [43] CPC section 101(1) addresses joinder of multiple counts in one indictment as follows:

Any offences may be charged together in the same indictment if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.

[44] The Prosecution argues that CPC section 101 provides the Court with the authority it needs given the Indictment in this case charges both indictable and summary conviction offences “founded on the same facts or form or are a part of a series of offences of the same or a similar character”. This Court takes no issue with the submission that the indictable and summary conviction offences named in the Indictment arise out of a shared narrative.

[45] Again, section 101 cannot be read in isolation. This section must be interpreted with consideration to and in a manner consistent with the CPC as a whole.

[46] CPC section 101 uses the undifferentiated and generic term “offences”. On its face, section 101 permits an indictment to be drafted with both indictable and summary conviction charges where those offences arise out of a common or related narrative. However, CPC sections 49-52 and 61 dictate the separate process that must be followed for each class of offence.

[47] Section 101 does not authorize this Court to try indictable and summary conviction offences. It simply permits one indictment to be presented by the prosecution covering all class of offences flowing out of a given narrative. Where an accused person seeks to have a trial upon a mixed indictment comprised of both class of offences then the indictable charges will need to be tried by jury before the High Court and the summary conviction charges before the Magistrate's Court.

Conclusion

[48] John Ryan was charged with and found guilty of failing to file corporate tax returns for each of the 2017-2021 taxation years as set out in counts nine through thirteen of the Indictment filed in this matter.

[49] On sentencing, Mr. Ryan through his counsel submits that:

- a) Counts nine through thirteen of the Indictment are duplicitous when comparing the requirement of willfulness at subsection 50(5) of the *Income and Corporation Tax Act* 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 lacks the jurisdiction to sentence for a summary conviction offence. In essence, Mr. Ryan argues 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.

[50] Based on the above, Mr. Ryan seeks a warning and discharge on sentencing.

[51] Counsel for the Crown submits that the Indictment is clear on its face and the High Court has inherent summary conviction jurisdiction for these charges. The Crown seeks a fine of \$2,000 for each of the five counts Mr. Ryan was found guilty on by the jury.

[52] This Court finds 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 was found guilty of failing to render returns on behalf of his company without lawful excuse pursuant to subsection 85(b) of the *Income and Corporation Tax Act*. Mr. Ryan's argument challenging his guilty verdicts on the basis of the Indictment wording is rejected.

[53] However, this Court had no authority to try the summary conviction offences set out in counts nine through thirteen of the Indictment. This class of offences can only be tried before the Magistrate's Court pursuant to sections 49-52 and 61 of the *Montserrat Criminal Procedure Code*. The trial on counts nine to thirteen before this Court, therefore, was a nullity. As such, this Court cannot sentence John Ryan further to the guilty verdicts entered against him by the jury on those counts.

[54] In conclusion, this Court is bound to and does discharge John Ryan on counts nine through thirteen of the Indictment pursuant to section 117 of the *Montserrat Criminal Procedure Code*.

IT IS HEREBY ORDERED THAT:

1. John Ryan is discharged on counts nine through thirteen of the Indictment filed in this matter pursuant to section 117 of the Montserrat *Criminal Procedure Code*.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

REGISTRAR