

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCRA2019/0004

BETWEEN:

**[1] MARTIN JNO BAPTISTE
[2] DANNY HENRY**

Appellants

and

THE KING

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster
The Hon. Mr. John Carrington

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

Appearances:

Mr. Warren Cassell for the Appellants
Mr. Oris Sullivan, The Director of Public Prosecutions for the Respondent

2022: February 11;
October 21.

Criminal appeal – Appeal of guilty plea – Circumstances where appellant can appeal guilty plea – Jurisdiction – Court’s inherent jurisdiction – Whether the court had jurisdiction to try the appellants – Section 9 of the Criminal Procedure Code – Section 23 of the Magistrate’s Court Act – Extraterritoriality – Penal Code – Whether section 226 of the Penal Code has extraterritorial effect – Duplicity – Whether charge against the appellants was duplicitous

The appellants, Mr. Martin Jno Baptiste and Mr. Danny Henry smuggled several Haitian migrants from Dominica to St. Maarten by boat. On their return to Dominica, the appellants encountered difficulties at sea and the boat eventually drifted into Rendezvous Bay on the Island of Montserrat. There the appellants were apprehended by members of the Coast Guard and the Royal Montserrat Police Service. A small amount of cannabis was found in a bag belonging to Mr. Baptiste. The appellants were subsequently charged with smuggling migrants contrary to section 226(1) of the Penal Code and importation of a controlled drug cannabis contrary to section (3) of the Drug (Prevention of Misuse) Act the commencement of their trial, counsel for the appellants, made an application to the learned judge that the charge be dismissed on the bases that section 226(1) of the Penal Code did not have extraterritorial effect and therefore the court did not have jurisdiction to hear the matter. The

learned judge dismissed the application. Thereafter, Mr. Baptiste pleaded guilty to the offence of importing cannabis into Montserrat. Counsel for the appellants then sought a sentence indication hearing in relation to the offence of smuggling. The learned judge gave an indication of six (6) years imprisonment and that if there was a guilty plea on the same day, it would be considered to be a guilty plea made at the first opportunity and the appellants would receive a one-third discount thereby reducing the sentence to 4 years. The appellants pleaded guilty to the smuggling offence and were each sentenced to four (4) years imprisonment. No penalty was imposed on the appellant Mr. Baptiste for the offence of importation of cannabis.

The appellants being dissatisfied with the decision of the learned judge have appealed to this Court. The main issues that arise for this Court's determination are (i) whether the court had jurisdiction to try the appellants; and (ii) whether the charge against the appellants was duplicitous.

Held: allowing the appeal; quashing the convictions of the appellants; and setting aside the sentences of the appellants, that:

1. A guilty plea can be appealed successfully in limited circumstances including where (i) if the plea were to stand it would be inconsistent with the principles of fairness of the trial proceedings and safety of the conviction; (ii) there is a legal obstacle to the defendant being tried; and (iii) on the relevant facts the defendant did not commit the offence. The appellants' case falls within the second category of circumstances where a conviction based on a guilty plea may be quashed, since their trial amounted to an abuse of process, the court having no jurisdiction to try them. Section 226 of the Penal Code, the section under which the appellants were charged, does not have extraterritorial effect. While the presumption against extraterritoriality can be rebutted where there is express or implied wording within legislation which shows Parliament's intention to give such effect, section 226 of the Penal Code does not provide any such express or implied wording. Further, neither the court's inherent jurisdiction nor section 9 of the Criminal Procedure Code confers an extraterritorial jurisdiction on the court to try offences committed outside the territorial limits of Montserrat. Section 23 of the Magistrate's Court Act also does not apply in the circumstances as the offence of smuggling is not an offence punishable on summary conviction. Section 23 therefore cannot be deployed to ground jurisdiction of the court to try the appellants. The learned judge therefore had no jurisdiction to try the appellants for the offence of smuggling pursuant to section 226 of the Penal Code.

Section 226 of **The Penal Code of Montserrat** Cap. 4.02 of the Revised Laws of Montserrat 2019 applied; Section 9 of the **Criminal Procedure Code** Cap. 4.01 of the Revised Laws of Montserrat 2019 applied; Section 23 of the **Magistrate's Court Act** Cap. 2.02 of the Revised Laws of Montserrat 2019 applied; **R (on the application of KBR, INC) (Appellant) v Director of the Serious Fraud Office (Respondent)** [2021] UKSC 2 applied; **Al Sabah v Grupo Torres-SA** [2005] UKPC 1 applied; **Masri v Consolidated Contractors International Company SAL and Others (No. 4)** [2009] UKHL 43 considered; **Al-Skeini and others v Secretary of**

State for Defence [2007] UKHL 26 considered; **Connelly v DPP** [1964] AC 1254 applied; IH Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 24 applied.

2. A count is not to be held bad on its face for duplicity merely because its words are logically capable of being construed as alleging more than one criminal act. While the agreed facts of the case are logically capable of being construed as alleging more than one criminal act, it is clear that it was part of a single transaction of smuggling and therefore the prosecution was not required to draft a separate count in relation to each person. The charge against the appellants for smuggling migrants is not duplicitous.

Jemison v Priddle [1972] 1 QB 489 considered; **Blackstone’s Criminal Practice 2023** at D11.49 applied; **Carrington Carr Ltd v Leicestershire County Council** (1993) 158 JP 570 considered; **DPP v Merriman** [1973] AC 584 applied.

3. A breach of the rule against duplicity does not automatically result in an indictment or count being quashed, as the prosecution could seek an amendment. Where no application was made by the defence to quash the indictment or count in the court below, an appellate court would be cautious to quash the conviction unless the appellant has demonstrated that as a consequence, he has suffered prejudice at the trial which resulted in a substantial miscarriage of justice and the conviction was therefore unsafe.

R v Thompson 9 Cr App Rep 252 applied; Section 118 of the **Criminal Procedure Code** Cap. 4.01 of the Revised Laws of Montserrat 2019 applied; **R v Marchese** [2009] 1 WLR 992 applied

JUDGMENT

- [1] **THOM JA:** This is an appeal against conviction after a guilty plea as entered by the appellants for the offence of smuggling migrants contrary to section 226(1) (formerly 210(1)) of **The Penal Code of Montserrat (“the Penal Code”)**.¹

Background

- [2] The background to this appeal, which is not in dispute, is that the appellants, citizens of the Commonwealth of Dominica (“Dominica”) agreed to smuggle several Haitian migrants who were in Dominica to St. Maarten by boat. The appellants were the captain and the engineer of the boat. They did so successfully. On their way back

¹ Cap. 4.02 of the Revised Laws of Montserrat 2019.

to Dominica, the appellants encountered difficulties at sea and the boat eventually drifted into Rendezvous Bay on the Island of Montserrat. The appellants were apprehended by members of the Coast Guard and the Royal Montserrat Police Service. A small amount of cannabis was found in a bag belonging to the first appellant Mr. Baptiste.

[3] The appellants were charged with smuggling migrants contrary to section 226(1) of the **Penal Code** and importation of a controlled drug cannabis contrary to section 5(3) of the **Drugs (Prevention of Misuse) Act**.²

[4] At the commencement of their trial, Mr. Cassell who represented both appellants, made an application to the learned judge that the charge be dismissed on the bases that section 226 of the Penal Code did not have extraterritorial effect and therefore the court did not have jurisdiction to hear the matter. The learned judge having heard submissions from both sides, dismissed the application. Thereafter, the appellant Mr. Baptiste pleaded guilty to the offence of importing cannabis into Montserrat. Counsel for the appellants Mr. Cassell then sought a sentence indication hearing in relation to the offence of smuggling. The learned judge gave an indication of six (6) years imprisonment and if there was a guilty plea on the same day, it would be considered to be a guilty plea made at the first opportunity and the appellants would receive a one-third discount thereby reducing the sentence to 4 years. The maximum sentence for conviction of smuggling is twenty (20) years. The learned judge also indicated that if the appellants were convicted by the jury the sentence could be as high as eight (8) years.

[5] The appellants pleaded guilty to the smuggling offence and were each sentenced to four (4) years imprisonment. No penalty was imposed on the appellant Mr. Baptiste for the offence of importation of cannabis. The prosecution withdrew the count of importation of cannabis in relation to the second appellant Mr. Henry and the learned judge further ordered the boat to be confiscated.

² Cap. 4.07 of the Revised Laws of Montserrat 2019.

[6] The appellants being dissatisfied with the decision of the learned judge appealed on the following grounds:

(a) The learned judge erred when he failed to uphold the submission made on behalf of the appellants that the facts alleged against the appellants did not amount to a criminal offence under the **Penal Code**.

(b) The proceedings were a nullity by virtue of the fact:

(i) That there was no evidence which demonstrated that there was a connection to Montserrat of the *actus reus* and *mens rea* of the offence of smuggling unauthorized migrants to St. Maarten.

(ii) The indictment is duplicitous on its face.

(c) The learned trial judge erred in law when he permitted the appellants to plead to the offence of smuggling unauthorized migrants.

Grounds A, B (i) and C

[7] These grounds raise the same issue and would therefore be dealt with together.

Appeal of guilty plea

[8] While ordinarily a plea of guilty by an accused person who knows what he did or did not do amounts to an admission, a guilty plea is not a bar to a successful appeal. It has long been established, as is illustrated in the case of **R v Forde**,³ that a guilty plea can still be appealed successfully in limited circumstances. This was the approach taken by the English Court of Appeal in **R v Togher and others**⁴ where the Court found that a conviction based on a guilty plea was liable to be quashed on the grounds of abuse of process. The issue was more recently considered by the English Court of Appeal in **R v Tredget**.⁵ There the court identified three categories of circumstances where a guilty plea could be quashed.

³ [1923] 2 KB 400.

⁴ [2001] 3 All ER 463.

⁵ [2022] EWCA Crim 108.

Firstly, where if the plea were to stand it would be inconsistent with the principle of fairness of the trial proceedings and the safety of the conviction. This includes circumstances such as where the plea was equivocal, where the plea was made as a result of a wrong ruling by the judge which resulted in the defendant having no arguable defence. This is illustrated in **R v Fouad Kakaie**.⁶ Also where there was improper pressure from the judge for the defendant to plead guilty.⁷ The list of circumstances is not closed. Secondly, where there is a legal obstacle to the defendant being tried e.g. an abuse of process, or where the prosecution would be stayed. The court in **R v Togher and others**, in referring to this category examined Rose LJ's pronouncement in **R v Mullen**⁸ which stated '... for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe.'⁹ In such circumstances the guilty plea of the defendant is irrelevant since the defendant ought not to have been subjected to the trial process. Thirdly, where on the relevant facts the defendant did not commit the offence. In other words, his guilty plea is false. Included also in this category would be cases where fresh evidence emerges which shows that the defendant was not guilty of the offence charged.

[9] At the trial, having heard submissions from both sides on the issue of whether section 226 of the **Penal Code** had extraterritorial effect, the learned judge ruled as follows:

"I began with certain hesitations about the applicability of the law but as a result of discussing it with Mr. Cassell and Mr. Gordon I am of the view there is a sufficiency of evidence for this matter to go before a jury. There is a weakness in the evidence in terms of making the jury sure that firstly there is a gain by the defendants and secondly that the migrants were unauthorized but inferentially there is a case but there may be a weakness in identifying that the boat went through Montserrat waters but there is an inference circumstantially it could be said that it did and failing that in any event we know that the boat ends up in Montserrat and there is no argument that the boat on its way back to Dominica from St. Maarten is still engaged

⁶ [2021] EWCA Crim 503.

⁷ R v Nightingale [2013] EWCA Crim 405.

⁸ [2000] QB 520.

⁹ [2001] 3AER 463 at 471.

in the act of human trafficking, namely it's part and parcel of criminal activity that it involves going from services to St. Maarten dropping off the cargo and going back to Dominica. So, there's an argument, there is no question but that the defendants engaged in the offence were connected to and ... the offence because they were on their way back. I think there is a curiosity about whether the language of the statute must imply that the offence must be committed in connection with Montserrat "in connection with Montserrat" not necessarily on Montserrat but in connection with it but nevertheless that's the argument which may well entertain the trial judge and in any event there is evidence that if there isn't universal jurisdiction and there is in connection with Montserrat that the offence took place namely that the boat went through territorial waters on the way up and certainly was in territorial waters on the way back. So overall there is a sufficiency. I do take notice of the terrible plight of Haitians. I cannot pretend I don't know..."

[10] Mr. Cassell who appeared for the appellants submits that in so finding, the learned judge erred. He contends that based on the facts of the case, no offence was committed by the appellants in Montserrat since neither the *actus reus* nor the *mens rea* was committed in Montserrat and there was no evidence that the appellants had entered the territorial waters of Montserrat on their way to St. Maarten with the twenty-four persons. Further, there was no evidence that the appellants had entered Montserrat prior to drifting into Montserrat as a result of distress.

[11] Mr. Cassell also submits that section 226(1) (formerly 210(1)) does not have extraterritorial effect. It relates to offences that are committed in Montserrat. He relies on the cases of **Treacy v DPP**,¹⁰ **R v Hornett**¹¹ and **Yvonne Piper v The Queen**.¹²

[12] The learned DPP in response contends that the jurisdiction of the Court is derived from three bases. Firstly, section 9 of the **Criminal Procedure Code**,¹³ secondly, section 23 of the **Magistrate's Court Act**¹⁴ and thirdly the inherent jurisdiction of

¹⁰ [1971] AC 537.

¹¹ [1975] RTR 256.

¹² Criminal Appeal No. 1 of 1991 (delivered 5th May 1992, unreported).

¹³ Cap. 4.01 of the Revised Laws of Montserrat 2019.

¹⁴ Cap. 2.02 of the Revised Laws of Montserrat 2019.

the court.

- [13] The main issue is whether the court had jurisdiction to try the appellants. While the learned DPP in his oral submissions suggested, as was expressed by the learned judge, that the offence of smuggling was not completed until the appellants returned to Dominica, he did not do so with any sense of commitment. Based on the undisputed facts I agree that the offence of smuggling was committed when the migrants landed in St Maarten. The learned judge seems to have conflated the offence of smuggling with the offence of human trafficking which is a separate offence set out in section 227 of the **Penal Code** which reads:

“Trafficking in people by means of coercion or deception. (1) A person who

—

- (a) arranges the entry of a person into Montserrat or any other State by an act of coercion against the person, an act of deception of the person or both; or
- (b) arranges, organises or procures the reception, concealment or harbouring in Montserrat or any other State of a person, knowing that the person's entry into Montserrat or that State was arranged by an act of coercion against the person, an act of deception of the person or both, commits an offence and is liable on conviction to imprisonment for twenty years, a fine of \$500,000 or both.”

I will deal first with the second and third bases since these could be disposed of very shortly.

Section 23 Magistrate’s Court Act

- [14] The section reads:

“Offences committed on vessels within the waters of Montserrat

23. Where any person is alleged to have committed any offence punishable on summary conviction in or upon any ship, vessel, or boat –

- (a) within the territorial waters of Montserrat; or
- (b) without the territorial waters of Montserrat and such ship, vessel or boat subsequently anchors in or comes within the waters of Montserrat, proceedings in respect of such offence may be heard and determined by the Court, and any summons or warrant issued in respect of the commission, or supposed commission of such offence may be served and executed, as

the case may be on board such ship, vessel or boat while, or on any subsequent occasion when, such ship, vessel or boat is within the territorial waters of Montserrat.”

- [15] The learned DPP submits that the High Court being a court of unlimited jurisdiction, section 23 must be given a broad interpretation. Since Magistrates are given the power to try offences committed outside the territorial waters of Montserrat, the section must be construed to mean that both the Magistrate’s Court and the High Court have jurisdiction to try offences committed outside the territorial waters of Montserrat. This is particularly so in relation to human trafficking, having regard to the nature of the offence. The learned DPP referred to several authorities including **R v Baxter**,¹⁵ **DPP v Stonehouse**,¹⁶ **A-G v Yeung Sun-Shun**,¹⁷ **Treacy v DPP**, **Mharapara v The State**¹⁸ and **DPP v Doot**.¹⁹
- [16] In my opinion none of the authorities are of assistance to the respondent. The **Magistrate’s Court Act** deals exclusively with proceedings in the Magistrate’s Court. It addresses offences which are punishable on summary conviction. Section 23 specifically empowers magistrates to try offences which are subject to summary conviction where the offence was committed on a vessel or boat outside of the territorial waters of Montserrat and the ship, vessel or boat subsequently enters the territorial waters of Montserrat. The short answer is that section 23 only applies to offences punishable on summary conviction. The appellants were charged under section 226(1) which reads:
- “A person who arranges for an unauthorised migrant to enter Montserrat or any other state, if he or she –
- (a) does so for a material benefit; and
- (b) either knows that the person is, or is reckless as to whether the person is, an unauthorised migrant; commits an offence.”

¹⁵ [1972] 1 Q.B. 1.

¹⁶ [1978] A.C. 55.

¹⁷ [1989] LRC (Crim) 1.

¹⁸ [1988] LRC (Crim) 18.

¹⁹ [1973] 2 WLR 532.

- [17] The offence of smuggling migrants with which the appellants were charged, is an indictable offence. It is not an offence punishable on summary conviction. Section 23 therefore cannot be deployed to ground jurisdiction of the court to try the appellants.

Section 9 of the Criminal Procedure Code

- [18] Section 9 reads as follows:

“9(1) The Court has authority to cause to be brought before it a person who is within Montserrat and who is charged with an offence –

(a) committed within Montserrat; or

(b) which according to law may be tried as if it had been committed within Montserrat, and to deal with the accused person according to law and subject to the jurisdiction of the Court concerned.

(2) The Court has jurisdiction over a person accused of committing an offence immediately when, in accordance with Part 5, a summons is served on the person or immediately when the person is arrested either with or without warrant.”

- [19] The learned DPP relies specifically on section 9(1)(b). He contends that the provision gives the court jurisdiction to try an offence under section 226 of the **Penal Code** in circumstances where the offence was committed outside the territorial waters of Montserrat.

- [20] A careful reading of section 9(1)(b) shows that it does grant the court extraterritorial jurisdiction. However, the section specifically circumscribes the jurisdiction to circumstances where the laws of Montserrat make provision for the offence, although committed outside of Montserrat, to be tried in Montserrat. The respondent was therefore required to identify the law which made provision for the offence of smuggling of migrants when committed outside of Montserrat to be tried in Montserrat. This the learned DPP was unable to do, simply because there is no such provision in the Laws of Montserrat.

Inherent Jurisdiction of the Court

[21] The learned DPP submits that the High Court being a court of unlimited jurisdiction, has an inherent jurisdiction to try offences which were committed outside the territorial waters of Montserrat. The learned DPP referred the Court to several cases including **R v Baxter**, **DPP v Stonehouse**, **A-G v Yeung Sun-Shun**, **Treacy v DPP**, **Mharapara v The State** and **DPP v Doot**. None of these cases are of assistance. In **Treacy v DPP**, the appellant posted a letter from England to Germany seeking to obtain money by deception. She argued that since the demand did not become effective until the letter arrived in Germany, she could not be tried in England. The court rejected this submission and held that the demand was made in England as soon as the letter posted. The court has jurisdiction where the act was committed in the UK even where the consequences take effect outside of the UK. This was also the opinion of this court in **Yvonne Piper v R** where the act of forging the documents took place in Montserrat but the US Embassy in Antigua was to be deceived. In **DPP v Stonehouse** the appellant faked his death abroad to obtain the benefit of his insurance policy. On a charge of obtaining property by deception, the House of Lords held that the court had jurisdiction because the property he sought to obtain by deception was in the United Kingdom. In **DPP v Doot** the House of Lords upheld convictions for conspiracy to import dangerous drugs into the UK. Submissions on their behalf that they could not be tried in the UK for a conspiracy abroad was dismissed. The court opined that conspiracy being a continuing offence, the appellant being in the UK while it was continuing, the court had jurisdiction. It must be noted that smuggling of migrants is not a continuing offence. The offence was committed when the migrants landed in St. Maarten unlawfully.

[22] The inherent jurisdiction of the court was explained by Lord Morris in the following manner in **Connelly v DPP**:²⁰

“There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction... A court must enjoy such powers in order to enforce

²⁰ [1964] AC 1254.

its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”

- [23] Sir Jack Jacob in his article “The Inherent Jurisdiction of the Court” explained the court’s inherent jurisdiction as follows:

“The term inherent jurisdiction of the court does not mean the same thing as the jurisdiction of the court used without qualification or description: the two terms are not interchangeable, for the inherent jurisdiction of the court is only a part or an aspect of its general jurisdiction. The general jurisdiction of the High Court as a Superior Court is, broadly speaking, unrestricted and unlimited in all matters of substantive law both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment. The High Court is not subject to supervisory control by any other court except by due process of appeal. And it exercises the full plenitude of judicial power in all matters concerning the general administration of justice **within its area**. Its general jurisdiction thus includes the exercise of an inherent jurisdiction.”²¹ (emphasis added)

- [24] The above learning shows that the court’s inherent jurisdiction does not confer an extraterritorial jurisdiction on the Court to try offences committed outside the territorial limits of Montserrat.

Extraterritoriality

- [25] The issue of extraterritoriality was recently discussed in the United Kingdom Supreme Court in **R (on the application of KBR, INC) (Appellant) v Director of the Serious Fraud Office (Respondent)**.²² The issue was whether a notice issued by the Serious Fraud Office (SFO) under section 2(3) of the Criminal Justice Act 1987 to the appellant, a US Company, to collate material held abroad and produce it to the SFO could result in criminal penalty if the recipient failed to comply. The appellant did not have a place of business in the UK nor did it ever carry on business in the UK. The appellant contended that section 2(3) of the Act did not have extraterritorial effect and the SFO therefore had no jurisdiction to issue the notice in relation to material outside of the UK. In finding that section 2(3) had no extraterritorial effect and the notice was therefore invalid, the court reiterated that

²¹ IH Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 24.

²² [2021] UKSC 2.

the general principle is that legislation is not intended to have extraterritorial effect. There is a presumption against extraterritoriality. Lord Walker observed at paragraph 13 in **Al Sabah v Grupo Torres-SA**²³ that over the years the presumption has become stronger. This presumption is grounded on the principle of “Comity of Nations”. The court however recognised the legitimate interest of States in legislating in respect of the conduct of their nationals abroad see – **Masri v Consolidated Contractors International Company SAL and Others (No. 4)**.²⁴ In illustrating the principle, the court affirmed the following statement of Lord Bingham in **Al-Skeini and others v Secretary of State for Defence**²⁵ where the scope of the Human Rights Act was considered:

“In resisting the interpretation, upheld by the courts below, that the HRA has extra-territorial application, the Secretary of State places heavy reliance on what he describes as “a general and well-established principle of statutory construction”. This is (see Bennion, *Statutory Interpretation*, 4th ed (2002), p 282 section 106) that: “[u]nless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom.”

[26] Lord Rodgers also made the following observation which underpins the rationale for the principle:

“It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within “the legislative grasp, or intendment,” of Parliament’s legislation, to use Lord Wilberforce’s expression in **Clark v Oceanic Contractors Inc** [1983] 2 AC 130”.

[27] It is also to be noted that the UK Parliament has on several occasions made express provisions for legislation to have extraterritorial effect. The following examples were referred to in **KBR Inc** – section 134 of the Criminal Justice Act 1988 which dealt with acts of torture committed abroad, section 72 of the Sexual Offences Act 2003

²³ [2005] UKPC 1.

²⁴ [2009] UKHL 43.

²⁵ [2007] UKHL 26.

which dealt with certain specified sexual offences committed abroad, and section 12 of the Bribery Act 2010 which criminalizes conduct outside the United Kingdom if it would form part of a relevant offence if done in the United Kingdom and if the actor meets one of certain defined criteria establishing a close connection with the United Kingdom. The legislative Council of Montserrat has also enacted legislation where it has clearly given extraterritorial effect to the provision as can be seen from section 23 of the **Magistrate's Court Act** referred to by the learned DPP.

[28] The intention of Parliament to give extraterritorial effect to a statutory provision may also be implied from the scheme, context and subject matter of the legislation.²⁶ This would very likely be the case where the purpose of the legislation could not effectively be achieved without such effect.²⁷

[29] While there is a presumption against extraterritoriality, the courts have long recognised that this presumption can be rebutted depending on the wording of the legislation, its purpose and the context of the legislation. Lloyd Jones LJ also cautioned in **KBR Inc** at paragraph 28 that: '[t]he more exorbitant the jurisdiction, the more is likely to be required of the statutory provisions in order to rebut the presumption against extra-territorial effect.'

[30] The question is whether the Legislative Council of Montserrat intended section 226 to have extraterritorial effect.

[31] There are no express words in section 226 to give the provision extraterritorial effect. For the provision to have extraterritorial effect it would have to be implied. In my view neither the language of the provision, the object, subject matter, nor the history of the enactment shows that it should be implied. Section 229 which also forms part of Part 17 reads as follows:

"(1) Proceedings for offences against section 226 or 227 shall not be commenced in any court in Montserrat without the consent of the Director

²⁶ **Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)** [2015] UKSC 23.

²⁷ *Cox v Ergo Versicherung AG* [2014] UKSC 22 per Lord Sumption at para 29.

of Public Prosecutions.

(2) If it is alleged that a person has committed an offence under section 226 or 227, the person may be arrested, a warrant may be issued and executed for the person's arrest or the person may be remanded in custody or released on bail even though the Director of Public Prosecutions consent under subsection (1) has not been obtained."

[32] It is inconceivable that the Legislative Council intended that a warrant should be issued if there is an allegation that a citizen of the neighboring State of Antigua and Barbuda smuggled unauthorized migrants into Antigua and Barbuda. While the purpose of the provision is to criminalise smuggling of migrants into Montserrat or another State, it does not establish a statutory regime which criminalises the conduct abroad of foreign nationals. The purpose of the legislation could be fully achieved without the legislation having extraterritorial effect. This is not a case concerning the conduct of a Montserrat national abroad. Rather it concerns the conduct of foreign nationals abroad. In my view, although the legislation criminalises smuggling into Montserrat or any other State it does not have extraterritorial effect. It must be noted that there are mechanisms such as extradition to deal with persons who have committed offences abroad and enter Montserrat or another State.

[33] The section not having extraterritorial effect, it therefore follows that the court did not have jurisdiction to try the appellants. The appellants' case therefore falls within the second category of circumstances where a conviction based on a guilty plea may be quashed, since their trial amounted to an abuse of process, the court having no jurisdiction to try them. This finding disposes of the appeal. However, Mr. Cassell also submitted that the appeal should also be allowed on the basis that the charge was duplicitous to which the Learned DPP made detailed submissions. I will therefore deal with this issue briefly.

Duplicity

[34] Mr. Cassell submitted that the charge against the appellants was duplicitous because the appellants were charged with smuggling several migrants into St.

Maarten in one count. This amounted to several offences in a single count and was therefore contrary to the rule against duplicity.

[35] The learned DPP relied on **Carrington Carr Ltd v Leicestershire County Council**²⁸ which succinctly outlines circumstances where charges may be duplicitous as follows:

- (a) Where two or more discrete offences are charged conjunctively in one information e.g. where a single information alleges both dangerous driving and careless driving (as illustrated in **Edwards v Jones**²⁹);
- (b) Where two offences are charged disjunctively or in the alternative in one information (e.g., where a single information alleges dangerous driving or careless driving) as illustrated in **Mallon v Allon**³⁰;
- (c) Where an offence was capable of being committed in more ways than one (e.g. driving under the influence of drink or drugs) and both ways are referred to in one information (as illustrated in (**Ware v Fox**)³¹;
- (d) Where a single offence was charged in respect of an activity, but the activity involved more often one act (as illustrated in **Jemmison v Priddle**³²);
- (e) Where a single activity was charged but a number of particulars are relied on by the prosecution to prove the offence (e.g, a single act of obtaining by deception where the deception involved several misrepresentation R v Greenfield 1973 3All ER 1050.

[36] The learned DPP submitted that none of these circumstances exist in the case at bar. He also relied on the following statement of Lord Widgery CJ in **Jemmison v Priddle**

²⁸ (1993) 158 JP 570.

²⁹ [1947] KB 659.

³⁰ [1964] 1 QB 385.

³¹ [1967] 1 WLR 381.

³² [1972] 1 QB 489 .

at page 234 which states:

“It is legitimate to charge in a single charge one activity even though that activity may involve more than one act. One looks at this case and asks oneself what was the activity with which this man was being charged. It was the activity of shooting red deer without a game licence, and although as a nice debating point it might well be contended that each shot was a separate act, indeed each killing was a separate offence...”

[37] In my opinion the rule against duplicity is very well established. It is clearly outlined in similar terms by Lord Diplock in **DPP v Merriman**.³³ The rule against duplicity, that only one offence should be charged in any count in an indictment, has always been applied in a practical, rather than in a strictly analytical way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century to charge them in a single count of an indictment. Where such a count was laid against more than one defendant, the jury could find each of them guilty of one offence only but a failure by the prosecution to prove the allegation, formerly expressly stated in the indictment but now only implicit in their joinder in the same count, that the unlawful acts of each were done jointly in aid of one another did not render the indictment *ex post facto* bad or invalidate the jury's verdict against those found guilty.

[38] The Learned Authors of **Blackstone's Criminal Practice**³⁴ put it this way: 'a count is not to be held bad on its face for duplicity merely because its words are logically capable of being construed as alleging more than one criminal act.' The Learned DPP submits that when one looks at the case and asks oneself what was the activity with which the appellants were charged, it is clear that it was a single activity with a single act. Therefore, the charge was not duplicitous. I agree. When the agreed facts are carefully examined, while the agreed facts of the case are logically capable of being

³³ [1973] AC 584.

³⁴ Blackstone's Criminal Practice 2023 at D11.49.

construed as alleging more than one criminal act, it was part of a single transaction of smuggling and therefore the prosecution was not required to draft a separate count in relation to each person. The charge is not duplicitous.

[39] I would also wish to add that breach of the rule against duplicity does not automatically result in an indictment or count being quashed. This principle was stated over a century ago in **R v Thompson**.³⁵ It has often been said that duplicity is a matter of form not substance. The objection should be taken on arraignment. The prosecution could seek an amendment. The Court by virtue of section 118 of the Criminal Procedure Code is empowered to make an amendment to an indictment as it considers necessary to meet the circumstances. Moreover, where no application was made by the defence to quash the indictment or count in the court below, an appellate court would be cautious to quash the conviction unless the appellant has demonstrated that as a consequence he has suffered prejudice at the trial which resulted in a substantial miscarriage of justice and the conviction was therefore unsafe.³⁶

[40] For the reasons stated above, the appeal is allowed.

Disposal

[41] I would make the following orders:

- (i) The appeal is allowed.
- (ii) Mr. Martin Jno Baptiste's conviction for the offence of smuggling migrants contrary to section 226(1) of the Penal Code of Montserrat is quashed and sentence set aside.

³⁵ 9 Cr App Rep 252.

³⁶ R v Marchese [2009] 1WLR 992.

- (iii) Mr. Danny Henry's conviction for the offence of smuggling migrants contrary to section 226(1) of the Penal Code of Montserrat is quashed and sentence set aside.

I concur.

Paul Webster

Justice of Appeal [Ag.]

I concur.

John Carrington

Justice of Appeal [Ag.]

By the Court

Chief Registrar