

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

MONTSERRAT

MNIMCRAP2023/0002

BETWEEN:

ANDRE WEST

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon Mde. Paula Gilford

Justice of Appeal [Ag.]

The Hon Mde. Nicola Byer

Justice of Appeal [Ag.]

The Hon Mde. Cadie St. Rose-Albertini

Justice of Appeal [Ag.]

Appearances:

Mr. Wendel Alexander for the Appellant

Ms. Allana Cumberbatch for the Respondent

2025: September 30;

2026: May 19

Magisterial criminal appeal – Sections 51, 52, 55, and 201 of the Criminal Procedure Code - Section 231 of the Penal Code – Sections 57, 61, 62 and 63 of the Customs and Excise (Control and Management) Act - Whether the learned chief magistrate acted contrary to the Court of Appeal’s Order for re-trial by allowing the amendments to the complaint and further whether she was lawfully entitled to hear and determine the matter contrary to section 201 of the Criminal Procedure Code having found that the matter was not statute barred – Whether the learned chief magistrate erred in admitting and relying upon inadmissible or insufficient evidence, including the statement of Hammish McCullin, and convicting the appellant on such evidence that was incapable of establishing the elements of the offence – Whether the learned chief magistrate erred in convicting the appellant in the absence of proof of the requisite criminal intent, notwithstanding her finding that there was no intention to commit a crime, contrary to the requirement that both actus reus and mens rea be proved beyond reasonable doubt

The appellant was employed by the Government of Montserrat as Chief Fire Officer. His duties included sourcing items required for the operation of the Fire Department, although responsibility for authorising and effecting payment rested with the Commissioner of Police as accounting officer, or a deputy acting on his behalf. During late February and early March 2016, replacement parts were identified as being required for several Government vehicles assigned to the Fire Department. A list of required items was compiled and submitted through the Police Department and an order was thereafter placed with GDM Lindex ("GDM"), a supplier in the United Kingdom with whom the appellant had prior dealings both personally and in his official capacity.

After the Government order had been submitted, the appellant placed a separate personal order for certain Nissan Navara parts, namely two front shock absorbers, two rear shock absorbers, four rear bushings and four rear leaf springs. The appellant sent an email to GDM instructing that those items were to be included in the same shipment as the Government order. The shipment arrived in Montserrat on 20th May 2016 and arrangements were made for the shipment to be processed through Customs by the Deputy Chief Fire Officer, Mr. Vachel Murraine. Mr. Murraine was not informed that the shipment contained personal items belonging to the appellant and was not provided with documentation relating to those items. Consequently, no separate declaration was made to Customs in respect of the Nissan Navara parts and no customs duty was paid thereon.

Following customs clearance, the shipment was delivered to the Fire Station and placed in the custody of the stores officer, Mr. Adrian Carty. On the following day, the appellant attended the Fire Station, opened the crate, removed the Nissan Navara parts without notifying the stores officer and departed with them. Thereafter, documents relating to those items were discovered under an ambulance by another fire officer and subsequently brought to the attention of the Commissioner of Police. An investigation ensued during which the appellant later communicated with GDM and ultimately paid for the items by credit card after the investigation had commenced.

The appellant was charged with three offences contrary to section 231 of the **Penal Code**. The first alleged that he procured the Nissan Navara parts by deception by representing that they were consigned to the Montserrat Fire and Rescue Services. The second alleged that he dishonestly secured remission of shipping costs in respect of the parts. The third alleged that he dishonestly obtained an exemption from Customs Duty in the sum of EC\$1,113.89 by representing that the items were consigned to the Montserrat Fire and Rescue Services. At the first trial, the appellant was convicted. On appeal, the matter was remitted for retrial by the Court of Appeal. During the retrial proceedings, the Crown applied to amend one of the complaints by substituting section 231 for section 232 of the Penal Code without altering the factual particulars. The learned Chief Magistrate permitted the amendment, finding that

it was technical in nature and did not alter the substance of the allegation. At the conclusion of the retrial, the appellant was acquitted on the procurement and shipping remission counts but convicted of dishonestly obtaining an exemption from Customs Duty contrary to section 231(1)(c)(i) of the **Penal Code** and sentenced to pay a fine of EC\$1,000.00, in default two months' imprisonment.

Being dissatisfied with the learned Chief Magistrate's decision, the appellant appealed on the grounds, inter alia, that the learned Chief Magistrate lacked jurisdiction to hear and determine the matter following the retrial order; that the proceedings were statute barred pursuant to section 201 of the Criminal Procedure Code; that inadmissible evidence was admitted at trial; and that the prosecution failed to establish the requisite dishonesty and criminal intent necessary to sustain the conviction.

Held: dismissing the appeal and affirming the conviction and sentence, that:

1. An order for retrial restores criminal proceedings to the stage prior to conviction, subject only to any express limitation contained in the order itself. Neither the original Certificate of Result of Appeal directing retrial "on the three offences which he was originally charged with", nor the Amended Certificate directing retrial "for the three offences", prescribed the precise form in which the complaints were required to remain framed or restricted the constitutional authority of the Director of Public Prosecutions to institute and conduct criminal proceedings. The substance of the retrial order was that the appellant was to be retried on the offences which formed the subject of the appeal. Provided that the complaints alleged those offences in substance, the retrial order was complied with. The appellant's complaint improperly conflated the identification of the offence with the manner in which it was expressed in the complaint. Criminal procedure recognises that defects in form do not necessarily alter the nature of the offence alleged, particularly where the factual particulars remain unchanged and the accused is fully aware of the case he is required to meet.

Montserrat Constitution Order Cap. 1.01 applied; sections 15(5), 193 and 198 of the **Criminal Procedure Code** Cap. 4.01 applied.

2. The amendment permitted by the learned Chief Magistrate was technical in nature, being confined to correcting the statutory provision cited in relation to the procurement charge from section 232 to section 231 of the **Penal Code**. The amendment did not alter the factual particulars or substance of the allegation and occasioned no prejudice to the appellant. Further, the complaint which was amended was not the complaint upon which the appellant was ultimately convicted.

The appellant was, at all material times, charged under section 231(1)(c) in respect of count MNIMCR2017/0031, upon which he was convicted, and that charge remained unamended throughout the proceedings. Accordingly, even if there had been force in the appellant's complaint regarding the amendment, it could not have affected the validity of the conviction.

Director of Public Prosecutions v Stewart (1982) 35 WIR 296 followed; **R v McVitie** [1960] 2 All ER 498 followed; **Cross v John** (1964) 7 WIR 359 applied.

3. Section 201(1) of the **Criminal Procedure Code** applies only to offences "triable only summarily". The offences charged against the appellant were offences triable either way. The fact that the prosecution proceeded summarily did not convert those offences into summary-only offences for the purposes of the statutory limitation period. The applicability of section 201 depended upon the legal character of the offences at the time proceedings were instituted and not the mode by which the matter ultimately proceeded. Accordingly, the proceedings were not statute barred and the learned Chief Magistrate correctly concluded that she possessed jurisdiction to hear and determine the retrial.

Section 201(1) of the **Criminal Procedure Code** Cap. 4.01 applied. **Benion, Bailey and Norbury on Statutory Interpretation** Ch. 6.10 (8th ed. 2020) considered.

4. The learned Chief Magistrate did not err in admitting the statement of Hammish McCullin into evidence. In any event, the conviction did not depend solely or substantially upon that evidence. The surrounding circumstances, documentary evidence and witness testimony provided ample evidential basis upon which the learned Chief Magistrate was entitled to conclude that the appellant knowingly arranged for his personal vehicle parts to be included in a Government consignment which was processed through Customs as exempt from duty.
5. The prosecution established beyond reasonable doubt the essential elements of the offence under section 231(1)(c)(i) of the **Penal Code**. The evidence demonstrated that the appellant intentionally instructed that his personal Nissan Navara parts be shipped together with Government property; failed to inform the officer responsible for clearing the shipment through Customs that the consignment contained personal items; permitted the shipment to be processed as Government property exempt from customs duty; and thereafter removed the parts from the Fire Station without notifying the stores officer. In those circumstances, the learned Chief Magistrate was entitled to infer dishonesty and deception from the appellant's conduct and from the surrounding circumstances and to conclude that the appellant dishonestly

obtained an exemption from Customs Duty by representing that the items formed part of the Fire Department consignment.

Section 231(1)(c)(i) of the **Penal Code** Cap. 4.02 of the Revised Laws of Montserrat considered.

6. The learned Chief Magistrate's statement that she did not find that the appellant intended to commit a crime in relation to the other two offences did not amount to a finding that the prosecution had failed to prove the requisite mens rea for the offence charged. Read in its proper context and against the findings made throughout the judgment, the learned Chief Magistrate accepted that the appellant knowingly arranged for his personal vehicle parts to be included in the Government shipment; failed to disclose the existence of those items to the officer responsible for clearing the shipment through Customs; allowed the shipment to be processed as exempt Government property; and thereafter removed the items from the Fire Station without disclosure to the stores officer. On those findings, the learned Chief Magistrate concluded that, whatever may have been the appellant's original intention at the time of ordering the parts, his conduct ultimately amounted to dishonestly obtaining an exemption from Customs Duty by deception contrary to section 231(1)(c)(i) of the **Penal Code**.
7. The learned Chief Magistrate's decision to convict was supported by the evidence before the court and disclosed no error of law, misdirection, or conclusion which was plainly wrong so as to warrant appellate interference.

JUDGMENT

- [1] **BYER JA [AG.]:** Before the Court is an appeal arising from the conviction of the appellant in the Magistrate's Court. The appellant was convicted of dishonestly obtaining, by deception, an exemption from Customs Duty in the sum of EC\$1,113.89 in respect of certain items, namely two front shock absorbers, two rear shock absorbers, four rear bushings and four rear leaf springs for a Nissan Navara (the "Nissan Navara parts"). It was alleged that the appellant represented that the items were consigned to the Montserrat Fire and Rescue Services and were therefore not liable to duty, contrary to section 231(1)(c)(i) of the **Penal Code**¹

¹ Cap. 4.02, Revised Laws of Montserrat, 2013.

(“MNIMCR2017/0031”). Upon the conviction, the appellant was sentenced to pay a fine of EC\$1,000.00 within one month, in default of which he was to serve a term of two months’ imprisonment.

[2] The appellant was also charged on two additional counts in respect of which the learned Chief Magistrate acquitted him. The first count alleged that the appellant had, by deception dishonestly secured the remission of shipping costs in the sum of EC\$158.68 in respect of the Nissan Navara parts, by representing that those items were consigned to the Montserrat Fire and Rescue Services, contrary to section 231(1)(a)(i) of the **Penal Code** (“MNIMCR2017/0032”).

[3] The second count alleged that the appellant had, by deception, procured the Nissan Navara parts, valued at EC\$2,713.33, by representing that they were consigned to the Montserrat Fire and Rescue Services, contrary to section 231(1)(c) of the **Penal Code** (“MNIMCR2017/0030”).

[4] Before this Court was also an appeal by way of case stated by the respondent, challenging the acquittals in respect of charges MNIMCR2017/0030 and MNIMCR2017/0032. That appeal was subsequently withdrawn. I therefore proceed solely to determine the appellant’s appeal in relation to his conviction under charge number MNIMCR2017/0031.

Brief Facts

[5] The appellant was employed by the Government of Montserrat (the “Government”) as the Chief Fire Officer. As Chief Fire Officer, his duties included the sourcing of items required for the operation of the Fire Department. He was, however, not responsible for authorizing or effecting payment for items procured. Those responsibilities rested with the accounting officer, who, at the material time, was the Commissioner of Police, or, in his absence, a deputy officer on his behalf. The procurement process required that items be identified by the relevant department, submitted through the Police Department, and approved by the accounting officer

prior to payment. Invoices were forwarded to the Police Department's business manager, who attended to the administrative and financial arrangements necessary for payment.

- [6] During late February and early March 2016, replacement parts were identified as being required for several government vehicles assigned to the Fire Department. A list of required items was compiled and submitted through the Police Department. An order was thereafter placed with a supplier, GDM Lindex, ("GDM") a company in the United Kingdom with which the appellant had prior dealings, both personally and in the course of his official duties.
- [7] After the Government order had been submitted, the appellant then placed a personal order for the subject Nissan Navara parts and sent an email to GDM instructing that those items were to be included in the same shipment as the items ordered for the Government.² The shipment arrived in the Territory of Montserrat on 20th May 2016. Arrangements were made for the shipment to be processed through Customs by the appellant's deputy, Deputy Chief Fire Officer Mr. Vachel Murraine. Mr. Murraine was not provided with documentation relating to the additional Nissan Navara parts, nor was he informed that the shipment contained items which belonged to the appellant personally. As a result, when the customs declaration was made to His Majesty's Customs, no separate declaration was made to Customs in respect of those items. Following clearance, the shipment was delivered to the Fire Station.
- [8] Upon delivery, the shipment was received at the Fire Station and placed in the custody of the stores officer, Mr. Adrian Carty. As the delivery occurred near the close of business on a Friday, the shipment was secured with the intention that its contents would be checked and recorded at a later time.

² Exhibit C.A.R.9 located at page 82 of the All Exhibits Bundle (18th October 2024).

[9] On the following day, 21st May 2016, the appellant attended the Fire Station, opened the crate, removed the Nissan Navara parts without notifying the stores officer, and departed with the items. Thereafter, documents relating to the Nissan Navara parts were discovered under an ambulance by Mr. Sheldon White, a fire officer responsible for inspecting the condition of vehicles. Those documents were subsequently brought to the attention of the Commissioner of Police, giving rise to the allegation that the appellant had imported personal vehicle parts in a shipment consigned to the Fire Service without payment of the requisite duty, shipping charges, or purchase cost.

[10] On 14th June 2016, the appellant was summoned to the office of the Commissioner of Police, Mr. Steve Foster, where, in the presence of both Mr. Foster and the Deputy Commissioner of Police, Mr. Charles Thompson, the allegation was put to him. An investigation subsequently commenced. During the course of that investigation, correspondence ensued between the appellant and representatives of GDM, following which an invoice was issued for the parts and paid by the appellant by credit card.

[11] Following the investigation, the appellant was charged with three offences, namely those bearing charge numbers MNIMCR2017/0030, MNIMCR2017/0031 and MNIMCR2017/0032. The matter was heard in the Magistrate's Court, following which an appeal was brought to the Court of Appeal. By Certificate of Result of Appeal dated 15th June 2019, the Court of Appeal directed that the matter be remitted as follows:

‘For the retrial of the Appellant Andre West on the three offences which he was originally charged with.’

[12] Thereafter, by an Amended Certificate of Result of Appeal dated 12th August 2022, the terms of the retrial were reformulated as follows:

‘For the retrial of the Appellant Andre West for the three offences.’

- [13] Following the remittal of the matter, the retrial proceeded before the learned Chief Magistrate. In the course of those proceedings, the Crown applied to amend one of the complaints by substituting section 231 for section 232 of the Criminal Code, without altering the factual particulars of the allegation. The application was opposed by the defence on the basis that the order of the Court of Appeal confined the retrial to the original complaints as framed.
- [14] In a ruling dated 2nd May 2023, the learned Chief Magistrate rejected that contention and held that, in light of the amended order and the absence of limiting language, the charges could properly be amended, the amendment being characterized as technical in nature and not affecting the substance of the offence alleged.
- [15] The retrial thereafter proceeded, resulting in the appellant's acquittal on MNIMCR2017/0030 and MNIMCR2017/0032 and his conviction on MNIMCR2017/0031. It is against that conviction, and in particular the learned Chief Magistrate's decision to permit the amendment and proceed with the retrial, that the present appeal is brought.
- [16] The appeal filed on 8th August 2023 was advanced on nine (9) grounds:
- "[1] The learned Magistrate erred when she ruled that she had jurisdiction to adjudicate on the case.
 - [2] The learned Magistrate erred when she ruled that the case is not statute-barred by virtue of Section 201 of the Criminal Procedure Code Chapter 4.01 of the Laws of Montserrat.
 - [3] That by making certain amendment to (sic) charge upon which the appellant was convicted, the learned Magistrate acted contrary to the Re-Trial Order of the Eastern Caribbean Court of Appeal.
 - [4] The Magistrate's decision to convict is not supported by the evidence and is therefore erroneous.
 - [5] The learned Magistrate erred when she allowed evidence of the Statement of [Hammish] McCullin to be admitted into evidence and read into court.

- [6] The learned Magistrate did not apply proper legal principles in coming to the decision to convict.
- [7] The Magistrate (sic) reasons for convicting the Applicant (the Defendant) cannot be supported on the evidence before the court.
- [8] There is no evidence or the evidence presented by the prosecution is insufficient to find the Appellant guilty on the charge MNIMCR2017/0031 i.e. that the Appellant by deception dishonestly obtained an exemption from Customs Duty in the sum of \$1,113.89 contrary to Section 231(1)(c)(i) of the Penal Code cap 4.02.
- [9] The learned Magistrate erred in her judgement by finding the Appellant guilty despite ruling there was no intention to commit a crime, thus contradicting the fundamental legal principle that both actus reus and mens rea are required to constitute a crime:
 - a) The Prosecution failed to sufficiently establish both an intention and an act to make out the commission of a crime.
 - b) The HM Customs Service was not given the opportunity to raise a tax payable by the Appellant, and was in fact, prevented from accepting a tax declaration from the Appellant due to intervention from police management.
 - c) The conclusion by the Appellant's managers that the passive act of shipping an item in a container owned by others, executed by other parties, amounted to a conspiracy or fraud on customs is both erroneous and flawed, thereby unjustly implicating the Appellant.
 - d) No evidence was led as to the Customs Duty amount that the Appellant was required to pay; that the appellant purported that the items were consigned to the Montserrat Fire & Rescue Service, and that the appellant acted by deception and or dishonestly within the meaning of the offence for which he was charged."

Issues for Determination

- [17] Having advanced nine grounds of appeal, these may however be conveniently reduced to the following issues:
 - a. Whether the learned Chief Magistrate acted contrary to the order for a retrial issued by the Court of Appeal by allowing the amendments to the complaint and further whether she was lawfully entitled to hear and determine the matter contrary to section 201 of the Criminal Procedure Code of Montserrat having found that the matter was not statute barred, (Grounds 1, 2 and 3).

- b. Whether the learned Chief Magistrate erred in admitting and relying upon inadmissible or insufficient evidence, including the statement of Hammish McCullin, and convicting the appellant on such evidence that was incapable of establishing the elements of the offence (Grounds 4, 5, 6, 7 and 8).
- c. Whether the learned Chief Magistrate erred in convicting the appellant in the absence of proof of the requisite criminal intent, notwithstanding her finding that there was no intention to commit a crime, contrary to the requirement that both actus reus and mens rea be proved beyond reasonable doubt (Ground 9).

Grounds 1, 2 and 3 – Whether the learned Chief Magistrate acted contrary to the order for a retrial issued by the court of appeal by allowing the amendments to the complaint and further whether she was lawfully entitled to hear and determine the matter contrary to section 201 of the Criminal Procedure Code of Montserrat having found that the matter was not statute barred

Appellant's Submissions

- [18] The appellant's main complaint was that the learned Chief Magistrate did not have jurisdiction to adjudicate on the complaints as laid before her and that she had erred in purporting to do so on amended complaints which were also statute barred.
- [19] In substance the appellant contended that, notwithstanding this Court's Order dated 15th June 2019 directing that the matter be retried for 'the three offences he was originally charged with', and its subsequent amendment by the Order of 12th August 2022 providing for a retrial 'for the three offences', the learned Chief Magistrate erred in granting the Crown's application to amend the original complaints. It was further contended that the effect of those amendments was that the appellant was, in substance, tried on new complaints.
- [20] The appellant submitted that these new complaints upon which the appellant was tried were made without the sanction of the Court of Appeal, and therefore the

learned Chief Magistrate lacked jurisdiction to proceed. The appellant maintained that the learned Chief Magistrate incorrectly asserted jurisdiction over the case, which is a fundamental error impacting the validity of her rulings, and argued that this warranted the appeal being allowed, relying by analogy on jurisdictional decisions of this Court such as in **Martin Jno Baptiste and Danny Henry v The King**.³

[21] Accordingly, the appellant submitted that the lack of proper jurisdiction not only undermined the learned chief magistrate's authority but also impacted the integrity of any decisions made during the proceedings and the ruling should be revisited.

[22] Arguing further on the lack of jurisdiction by the learned Chief Magistrate, the appellant also submitted that even if the learned Chief Magistrate had the power to make the amendments that she did and proceed to re-try the appellant, in any event the matter was statute barred by virtue of section 201 of the **Criminal Procedure Code**.⁴

[23] The appellant submitted that the Magistrate's Court being a creature of statute with limited jurisdiction was restricted to act within the confines of the **Magistrate's Court Act**⁵ and the Criminal Procedure Code. Thus, with the offences having been alleged to have occurred in March 2016 and the complaints were not laid until May 2017, it was clear that they were in excess of the six-month statutory bar.

Respondent's Submissions

[24] The respondent disagreed with the appellant's submission that the complaint MNIMCR2017/0031 was a nullity because the learned Chief Magistrate had no power to amend the charges and, in any event, that the matter was statute barred.

³ MNIHCRA2019/0004 (delivered 21st October 2022, unreported).

⁴ Cap. 4.01, Revised Laws of Montserrat 2019.

⁵ Cap. 2.02, Revised Laws of Montserrat 2013.

- [25] In the first instance the respondent contended that the appellant misconceived not only the wording of the order for retrial, and what powers were open to a magistrate on the retrial but also the applicability of section 201 of the **Criminal Procedure Code** to the offences as charged.
- [26] In relation to the learned Chief Magistrate's jurisdiction to permit an amendment, the respondent submitted that it was not open to the Court of Appeal to determine the specific offences for which the appellant should be tried. In support of that submission, reliance was placed on the **Montserrat Constitution Order**⁶ and the **Criminal Procedure Code**, it being contended that the authority to institute and conduct criminal proceedings is vested in the Director of Public Prosecutions. In particular, the respondent referred to section 46 of the **Montserrat Constitution Order**, which establishes the office of the Director of Public Prosecutions and confers upon that office the power to institute, take over, continue, or discontinue criminal proceedings. The respondent also noted that a similar provision is contained in section 15(5) of the **Criminal Procedure Code**.
- [27] On that basis, the respondent submitted that the determination of appropriate charges remained within the constitutional remit of the Director of Public Prosecutions, not the Court of Appeal.
- [28] Further, and in any event, the respondent submitted that on a proper reading of the Court of Appeal's Order, it directed a retrial on the facts, as evidenced by the express wording that the matter be remitted for trial 'on the three offences.'⁷ This, it was argued, reflected a general retrial of the original case rather than any prescription of specific charges. Any suggestion to the contrary was said to arise from a misunderstanding of the court's order by the Registrar of the High Court, as appellate courts do not dictate or recommend charges to be preferred, and it

⁶ Cap. 1.01, Revised Laws of Montserrat 2013.

⁷ Amended Certificate of Result of Appeal dated 12th August 2022.

remained open to the Director of Public Prosecutions to determine whether and how to proceed with retrial.

[29] Further, the respondent contended that the amendment was simply to the section stated in the statement of case from an offence under section 232 to section 231 of the **Penal Code**, which was described as nothing but a technical amendment which did not affect the particulars of the offence. The respondent argued that the fact that the wrong section and Act were initially quoted can be regarded as a mere technicality, since the particulars of the offence were clear to the appellant and at all material times, he knew he was facing an offence committed under section 231(1) (c)(i) of the Penal Code.

[30] The respondent substantiated that argument by relying on **Director of Public Prosecutions v Stewart**⁸ (which was incorrectly cited as **R v Stewart**) and **R v McVitie**,⁹ as authority for the proposition that where a defect in a charge is of a technical nature and the particulars accurately describe the offence, such a defect does not render proceedings a nullity and should not result in a quashed conviction where there has been no prejudice or miscarriage of justice.

[31] In this context, the respondent drew the Court's attention to section 193 of the **Criminal Procedure Code**, which requires a charge to contain a statement of the offence together with particulars sufficient to give reasonable information as to the nature of the offence alleged. The respondent also relied on section 198 of the **Criminal Procedure Code**, which permits a magistrate to alter, substitute or add to a charge at any stage before the close of the prosecution case where the charge appears defective in substance or form.

[32] It was further argued in oral submissions that in any event, the charge which was amended was not the subject of the present appeal, but rather the offence in respect

⁸ (1982) 35 WIR 296.

⁹ [1960] 2 All ER 498.

of which the appellant was acquitted, such that any challenge to the amendment was immaterial to the issues arising in this appeal.

[33] Further, and in the alternative, the respondent submitted that even if the offence was properly to be characterized as a summary-only offence, an amendment of a technical nature would nevertheless be permissible, provided that the original complaint was laid within the applicable limitation period. In support of this proposition, reliance was placed on **Cross v John**¹⁰, in which the Court of Appeal of Trinidad and Tobago recognized that a technical amendment to a complaint does not render proceedings a nullity where the original complaint was brought within the limitation period and no prejudice is occasioned to the accused.

[34] In the present case, the amendment was confined to correcting the statutory provision cited, namely from section 232 to section 231, and did not alter the substance or particulars of the allegation. Applying the principle in **Cross v John** to the present case, the respondent submitted that the amendment effected was purely technical, did not alter the substance of the allegation, and caused no prejudice to the appellant. Accordingly, the validity of the proceedings was not undermined by the amendment.

[35] As it related to the contention that the proceedings were statute barred, the respondent invited this Court to reject the appellant's submission that the learned Chief Magistrate erred when she ruled that the matter was not statute barred by virtue of section 201 of the **Criminal Procedure Code**.

[36] The respondent contended that the offences were triable either way, and therefore fell outside the scope of section 201(1), which applies to summary-only offences. It was submitted that the appellant had conflated the "mode of trial" with the

¹⁰ (1964) 7 WIR 359.

“classification of the offence”, and that the fact that the matter proceeded summarily did not convert it into a summary-only offence.

Discussion

- [37] Grounds 1, 2 and 3 are connected and may conveniently be considered together. In essence, they raise the single question whether the learned Chief Magistrate had the lawful authority to entertain and determine the proceedings following the order of this Court directing a re-trial and whether she erred in concluding that the matter was not statute barred and in permitting amendments to the complaints.
- [38] The appellant places considerable reliance on the Order of this Court remitting the matter ‘for the retrial of the Appellant Andre West on the three offences which he was originally charged with.’ It was submitted that this language confined the prosecution to the precise form of the original complaints and that any departure required further direction from the Court of Appeal. I am unable to accept that construction, especially in light of the Amended Certificate of Appeal that emanated from the Court of Appeal in August 2022.
- [39] By any consideration, an order for retrial restores the proceedings to the stage prior to conviction, subject to any express limitations contained in the order itself. Nothing in the order before this Court purported to prescribe the form of the charges to be laid, nor to curtail the constitutional authority of the Director of Public Prosecutions to institute and conduct criminal proceedings.
- [40] The substance of the order was that the appellant was to be retried on the offences that were the subject of the appeal. Provided that the complaints laid at the time of the retrial alleged those offences in substance, it must be accepted that there was compliance with the order of the court. The appellant’s argument appears to conflate the identification of the offence with the manner in which it is expressed in the complaint. Criminal procedure has long recognized that defects in form do not necessarily alter the nature of the offence alleged, particularly where the factual

particulars remain unchanged and the accused is fully aware of the case he must meet. In any event, I must accept that the Amended Certificate of Result of Appeal, which directed that the matter be remitted 'for the retrial of the Appellant Andre West for the three offences,' removed the earlier limitation referring to 'the three offences which he was originally charged with.' In those circumstances, the amended order permitted the learned Chief Magistrate to consider the exercise of her power to amend the complaints on which the appellant stood trial before her.

[41] Counsel for the respondent during the oral hearing of the appeal helpfully informed the Court when the point was made by counsel for the appellant that the amendment sought by the Crown on the retrial was technical in nature, being confined to correcting the statutory provision cited in respect of the procurement charge (MNIMCR2017/0030) from section 232 to section 231, and that in any event, the amendment did not concern the count upon which the appellant was ultimately convicted, but a different count, namely the charge under section 231(1)(b) relating to the procurement of the items. By contrast, the appellant was, at all material times, charged under section 231(1)(c) in respect of count MNIMCR2017/0031, on which he was ultimately convicted, and that charge remained unamended.

[42] In any event, even if there was force in the appellant's complaint regarding the amendment of the charge, it is of no moment in the circumstances of this case, since the charge which was amended was not the charge upon which the appellant was ultimately convicted. No prejudice could therefore have arisen from that amendment, nor could it have affected the validity of the conviction.

[43] Likewise, the appellant's reliance on section 201(1) of the **Criminal Procedure Code** is of no assistance to him. Section 201(1) states as follows:

"Except where a longer time is specifically allowed by law, a magistrate's court shall not try an accused for an offence **triable only summarily** unless the charge (in proceedings commenced by arrest and charge) or the complaint (in proceedings commenced by complaint) relating to it was laid within six months from the time when the matter of such complaint or charge

arose or the date on which evidence sufficient to justify proceedings first came to the actual or constructive knowledge of a competent complainant".
(My emphasis added)

[44] In my mind the crux of the applicability of this provision must rest on the legal character of the offence at the time when proceedings were instituted.

[45] It is common ground that in the present case, the charges that were laid against the appellant, were offences that were triable either way.¹¹ The fact that the trial proceeded summarily cannot convert such offences into offences that are captured by the specific parameters of the section 201(1) as being offences that are 'triable only summarily'. The statutory language is clear and can admit no broader construction.

[46] This interpretation is reinforced by the very structure of the **Criminal Procedure Code**. Section 201 thereof establishes a specific limitation regime directed exclusively to summary-only offences which in my mind must be those offences that are specifically established under section 51 of the **Criminal Procedure Code**. Under section 51 '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.' This is in direct contradistinction to section 52 under which the appellant was charged. Section 52 defines offences 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 or her to the High Court for committal and trial on indictment; or
- c) the offence is punishable, on summary conviction only, by imprisonment for a term exceeding six months."

¹¹ Section 231 of the Penal Code, Cap. 4.02 Revised Laws of Montserrat 2019.

- [47] Thus, there having been a clear distinction made between triable only offences and offences which are triable either way, which may result in an offence being tried summarily, then the engagement of section 55 of the Criminal Procedure Code must be read in that context. Subsection 3 notes that if the mode of trial determined is to be summary trial that Parts 10,11, 24-30 apply which by general application includes the limitation provision under section 201.
- [48] In my mind the reference to the mode of trial as determined by Parts 10,11, 24-30 cannot change the nature of the offence. That is, the offence was not one which is triable summarily only; those provisions which govern the mode of trial are general provisions which immediately raise the principle of interpretation that *generalia specialibus non derogant*, that is, specific laws or provisions take precedence over general ones when they cover the same subject.¹² Thus, those general provisions cannot be construed as impliedly applying to that specific limitation regime enacted by section 201.
- [49] Indeed, if the interpretation advanced by the appellant is accepted, in my mind an unbridled mischief would be unleashed. In other words, a litigant can wait until it is time to elect, not object to the matter proceeding in a summary manner and then raise the point at that time that the offence is statute-barred, when it would not have been if it had proceeded on indictment. In my mind the legislative intention behind section 201(1) of the **Criminal Procedure Code** could not have meant that it would operate in this manner. Indeed, if so, the entire scheme of hybrid offences would be undermined and lose its potency. It must therefore follow that it must only be those offences that are from their inception summary offences as defined in the **Criminal Procedure Code** at section 51 that are captured by the language of section 201(1). Such a provision must signal that there is expediency in police and prosecutors not allowing trivial matters to clog a system by delaying the laying of charges and the trial of those matters. In my mind the case at bar cannot fall within that process and

¹² Benion, Bailey and Norbury on Statutory Interpretation Ch. 6.10 (8th ed. 2020).

it has to be accepted that at the time the complaint was laid, the offence remained one capable of trial on indictment and was not an offence 'triable only summarily' within the meaning of section 201(1) and as such the six-month limitation period was therefore never engaged.

[50] Viewed cumulatively, the matters relied upon by the appellant do not disclose any absence of jurisdiction. Rather, they amount to an attempt to impose limitations on the re-trial which are not supported either by the terms of the Order of this Court or by the governing statutory framework. The learned Chief Magistrate plainly had authority to try offences of this nature, to determine whether the proceedings were in fact time barred, and to amend defective complaints in accordance with the **Criminal Procedure Code**.

[51] In my judgment, the appellant has not demonstrated that the proceedings were a nullity or that the learned Chief Magistrate misdirected herself in law. There is no basis upon which this Court could properly interfere with the exercise of her jurisdiction.

[52] Accordingly, I am satisfied that the learned Chief Magistrate did not err in assuming jurisdiction to hear and determine the matter, in permitting the amendments to the complaints, or in concluding that the proceedings were not statute barred. Grounds 1, 2 and 3 therefore fail.

Grounds 4, 5, 6, 7 and 8 – Whether the learned Chief Magistrate erred in admitting and relying upon inadmissible or insufficient evidence, including the statement of Hammish McCullin, and in convicting the appellant on evidence that was incapable of establishing the elements of the offence

Appellant's Submissions

- [53] The appellant submitted, as a preliminary matter, that in any criminal case the burden of proof rests on the prosecution to prove guilt beyond reasonable doubt and that a conviction unsupported by sufficient evidence amounts to a miscarriage of justice. The appellant argued that the learned Chief Magistrate's decision to convict was erroneous because the evidence fell short of this standard.
- [54] In that regard, the appellant relied on the principle that a conviction can only be sustained if a reasonable trier of fact, properly directed, could be satisfied that the elements of the offence are proved beyond reasonable doubt. It was submitted that the evidence adduced at trial did not meet this threshold and that the conviction therefore ought to be overturned.
- [55] The appellant's challenge was directed in particular to the prosecution's case that he had dishonestly obtained a customs duty exemption by deception. It was submitted that the Commissioner of Police, Mr. Foster's evidence that he did not know whether the government had paid for the items was mistaken, and that all the evidence, as a whole, demonstrated that the appellant was in fact the one who paid. On this basis, the appellant argued that there could have been no deception or dishonesty regarding payment and further submitted that there was no evidence that the items were imported on the basis that they belonged to or were the property of the Government.
- [56] The appellant relied on evidence from the storekeeper at the Fire Services, Mr. Adrian Carty and the Deputy Commissioner of Police, Mr. Charles Thompson, both of whom, it was submitted, confirmed that all items ordered and paid for by the Fire and Rescue Service and approved of by the police high command were properly accounted for. While the appellant accepted that Senior Customs Officer, Mr. Jamaul Wade, gave evidence regarding the operational pressures faced by customs officers in processing goods, it was contended that such pressures could not excuse deficiencies in the customs process. The appellant also referred to the evidence of

Mr. Sheldon White, a fire officer responsible for inspecting the condition of vehicles, who stated that he discovered documents relating to Nissan Navara parts beneath an ambulance during his inspection. The appellant submitted that there was no evidence that those documents had been placed there by him or that they were used by him as part of any deceptive scheme.

[57] Central to the prosecution's case were two email threads and documentary material said to emanate from the supplier, GDM. In this regard, the appellant challenged the admission and reliance upon evidence associated with Mr. Hammish McCullin, a representative of GDM, through whom certain emails and invoices were introduced. The appellant contended that nothing in the two email threads before the court demonstrated that the defendant acted dishonestly or with intent to deceive, and that such intent would require more than what appeared in those communications.

[58] The appellant further submitted that the invoices in question were generated by the supplier, GDM, not by the defendant, as they bore the supplier's name and letterhead. It was contended that any discrepancies or irregularities were more properly attributable to errors or miscommunication during international shipping, as supported by the evidence of the Senior Customs Officer, Mr. Jamaul Wade, regarding the operational pressures faced by customs officers in processing goods.

[59] In those circumstances, the appellant argued that the learned Chief Magistrate erred in admitting and placing reliance upon evidence which was either inadmissible or insufficient to establish the elements of the offence. It was submitted that the prosecution failed to discharge its burden of proof and the conviction should therefore be reversed and an acquittal entered, emphasizing that convictions must rest on solid evidence rather than speculation.

[60] The appellant further submitted that there was either no evidence, or alternatively insufficient evidence, to support a conviction under charge MNIMCR2017/0031 for

dishonestly obtaining a customs duty exemption of \$1113.89 by deception under section 231(1)(c)(i) of the **Penal Code**.

- [61] In particular, the appellant contended that the prosecution failed to prove that he acted dishonestly or by deception, notwithstanding that the prosecution's case was premised on the allegation that the exemption was secured by deceptive conduct.
- [62] It was submitted that a review of the record of appeal disclosed not even a modicum of evidence of deception.
- [63] Finally, the appellant relied on the authority of **R v Preddy; R v Slade**,¹³ as followed in **Joseph Brice v Regina**,¹⁴ to contend that, as a matter of law, a chose in action cannot be obtained by deception and that, as a matter of law, such an offence was not capable of being made out on the facts alleged.

Respondent's Submissions

- [64] The respondent relied on the objective test for dishonesty as stated in **Ivey v Genting Casinos (UK) Ltd**.¹⁵ The respondent cited Lord Hughes's formulation that the tribunal must first ascertain the defendant's actual state of knowledge or belief as to the facts and then determine whether the conduct was dishonest by the standards of ordinary decent people, without requiring proof that the defendant appreciated that ordinary people would regard the conduct as dishonest.
- [65] The respondent submitted that the learned Chief Magistrate correctly directed herself on the law of dishonesty and applied it to the facts as she found them.
- [66] The respondent contended that the email correspondence exhibited in the case, when read as a whole, demonstrated that the appellant intended to obtain the items

¹³ [1996] AC 815.

¹⁴ AXAHCRA2016/0001 (delivered 8th April 2020, unreported).

¹⁵ [2017] UKSC 67.

dishonestly. In particular, the respondent relied on the sequence of emails between the appellant and GDM. The correspondence showed that on 14th March 2016 the appellant, using his official government email address, responded to a quotation by stating: 'Place the order but NOT the 2 rear leaf springs – Ship these items (sic) with Land Rover parts please'.¹⁶ That instruction was given in the context of an ongoing procurement process initiated through the Fire Department, with the supplier having requested confirmation of which items were required.

[67] The respondent further noted that the supplier thereafter proceeded to process and confirm the order on that basis, sending an order confirmation on 15th March 2016, and later indicating on 21st March 2016 that the parts had already been delivered to their packers and could not be cancelled.¹⁷ The chain of correspondence culminated in the appellant forwarding the order details internally on 28th September 2016 under the subject 'FW: GDM Lindex Ltd – Suspension parts for Nissan Navara (ENQ30649)' with the supplier's sales order attached.¹⁸

[68] The respondent submitted that, when these emails are read together, they reveal a continuous transaction conducted through official channels, with no indication that the appellant identified the items as personal, requested separate billing, or indicated any intention to pay privately. Of particular significance, the instruction to ship the items 'with Land Rover parts' would have reinforced the impression that all items formed part of a single official consignment for the Fire Department.

[69] On that basis, the respondent contended that the natural and ordinary effect of the appellant's communications was to lead GDM to believe that the items were being ordered on behalf of the Fire Department. It was submitted that this was not a mere omission, but a positive misrepresentation arising from the context and wording of

¹⁶ All Exhibits C.A.R. 9.

¹⁷ Ibid.

¹⁸ All Exhibits C.A.R. 9.

the emails, and that such conduct evidenced both an intention to deceive and deception in fact.

[70] The respondent further relied on the evidence of Mr. Foster, Commissioner of Police, and Mr. Thompson, Deputy Commissioner of Police, as to the scope of appellant's authority. The respondent submitted that both witnesses, who were senior officers with direct oversight of procurement within the Fire Department, made clear that the appellant's role was limited to sourcing items and making recommendations. He was not authorized to procure items independently.

[71] The respondent further submitted that their evidence established that there was a recognized mandatory procurement process within the department, which required prior approval from either the Commissioner of Police or the Deputy Commissioner of Police. Once such approval was obtained, orders were to be placed through the business manager, with payment subject to approval by the relevant accounting officer. It was therefore contended that the appellant's actions fell outside of the scope of his authorized functions and were inconsistent with the prescribed procurement procedures.

[72] The respondent therefore contended that the appellant deliberately circumvented this entire procurement process. The respondent submitted that the appellant's order was made after the Deputy Police Commissioner, Mr. Thompson, had signed off on an earlier order and that it was not approved by either the Police Commissioner or the Deputy Police Commissioner. The respondent contended that GDM acted on the appellant's instructions in large measure due to the established relationship the appellant had personally with them. The respondent further submitted that the items reached Montserrat without the knowledge of the Commissioner of Police or acting Commissioner, and that in the final analysis the Royal Montserrat Police Service was billed for the items when the appellant was well aware that his items were in the same shipment as the items for the Government.

- [73] The respondent therefore contended that there were two separate acts of deception on the appellant's part which provided the basis for the charges as laid against him and for which he was found guilty. In relation to the first alleged deception, the respondent submitted that, once notified that the items had arrived, the appellant took receipt of the documentation that accompanied the shipment and instructed his deputy Mr. Murraine, to make the arrangements to have the items cleared through Customs without informing him that the shipment also included his personal items.
- [74] As a result of this act of the appellant, the respondent contended that the shipment was therefore sent to Montserrat to the cost of the Government without the appellant having taken financial responsibility for his personal items.
- [75] In relation to what the respondents contended was the second aspect of the appellant's deception, the respondent submitted that when the appellant's deputy was dispatched to His Majesty's customs without having been given the documents that indicated the presence of his personal items in the shipment, the appellant perpetuated the deception on the Government for which he must be liable.
- [76] The respondent submitted that the appellant therefore having made no declaration for his items, no duties were charged or paid for them.
- [77] In fact, the respondent contended that the appellant's conduct after the delivery of the items was also very telling of the level of deception perpetuated by him. It was not disputed that after the crate had been cleared by Customs and delivered to the storekeeper, the appellant attended at the Fire House and, without the storekeeper's knowledge or consent, opened the crate, removed his personal items and the associated documents, and took them away. The respondent submitted that the appellant having made no note of the removal and not having informed anyone that he had taken items from the shipment, were all part of the undisputed actions of a man with the requisite intention to deceive.

- [78] Indeed, as the respondent contended, the appellant's initial and continued denials of any wrongdoing and his failure to rectify the issue but rather to proceed on vacation, were all supportive in the round, that the appellant had been rightly convicted of the offence for which he appealed and that the appeal should be dismissed.
- [79] As to the admission of the statement of Mr. Hammish McCullin, the respondent submitted that the learned Chief Magistrate had not erred in admitting the statement contending that she was authorised to do so pursuant to section 12 of the **Evidence Act**.¹⁹
- [80] The respondent submitted by way of background that Mr. Hammish McCullin of GDM having provided a statement to the investigating officer, Inspector Courtney Rodney, the prosecution was entitled to apply at trial to have it adduced. Having done so, the respondent contended that the learned Chief Magistrate was satisfied that the statutory requirements were met and admitted the statement pursuant to section 12 of the **Evidence Act**.²⁰
- [81] Section 12 of the **Evidence Act**, the respondent submitted, provides that documents which are admissible in evidence in courts in England are admissible in evidence in the like manner in any Court in Montserrat. The respondent further submitted that reliance could also be placed on section 116 of the **Criminal Justice Act 2003** as the relevant English statutory framework concerning statements where a witness is unavailable and sets out the statutory conditions under which such a statement may be admitted and upon which the learned Chief Magistrate was entitled to rely. The respondent relied on the authorities of **R v Horncastle**; **R v**

¹⁹ Cap. 2.08, Revised Laws of Montserrat 2019.

²⁰ Cap. 2.08, Revised Laws of Montserrat 2019.

Marquis and another²¹ and **R v Carter**,²² submitting that they addressed the operation of section 116 and the compatibility of hearsay admission with the fairness of trial. The respondent contended that the right to confront witnesses is not absolute and may be restricted where there is a legitimate justification for the witness's absence and appropriate counterbalancing measures ensure overall fairness.

[82] The respondent invited the Court to find that this ground lacked merit on the basis that the learned Chief Magistrate complied with the legislative requirements and contended that her process of inquiry could not be impugned.

[83] As to the appellant's contention that the conviction of the appellant was unsupported by the evidence, the respondent submitted that this ground amounted to a bare assertion unsupported by any exposition in law or fact and contended that the learned Chief Magistrate's finding was grounded in the evidence that was before the court at trial.

Discussion

[84] The substance of these grounds is that the conviction under charge MNIMCR2017/0031 was said to rest upon inadmissible or insufficient evidence and that the evidence adduced at trial was incapable, as a matter of law and fact, of establishing the elements of the offence. The starting point is the well-established principle that in every criminal case the burden rests upon the prosecution to prove the guilt of the accused. It is equally well established that an appellate court does not approach the evidence as if conducting a retrial. The question is not whether this Court itself might have taken a different view of the facts, but whether there was evidence upon which a reasonable tribunal, properly directed, could conclude that the offence charged had been proved.

²¹ [2010] 2 All ER 359.

²² [2010] 2 AC 373.

- [85] In that regard, the principles governing appellate restraint in relation to findings of primary fact are settled. In **Kwok Kin Kwok v Yao Juan**,²³ the Privy Council made clear that an appellate court should not interfere with findings of fact unless they are plainly wrong, in the sense that there was no evidence to support them, they were based upon a misunderstanding of the evidence, or they were such that no reasonable tribunal could have reached them. Those principles have been applied in this Court, including in **Starcy Huggins v The Commissioner of Police**,²⁴ where it was emphasized that particular caution is required where findings depend upon the assessment of witnesses and upon the drawing of inferences from primary facts.
- [86] Against that background, it is necessary to identify with some precision what the prosecution was required to prove under charge MNIMCR2017/0031. The charge alleged that the appellant, between 15th March and 20th May 2016, ‘by deception dishonestly obtained an exemption from Customs Duty in the sum of EC\$1,113.89’ on certain Nissan Navara parts, ‘purporting that these items were consigned to the Montserrat Fire and Rescue Service and on which duties were payable.’
- [87] The elements therefore required proof that the goods were dutiable, that they were in fact cleared without duty being charged or paid, and that this result was achieved by deception and dishonesty on the part of the appellant. The issue for this Court is whether the evidence accepted by the learned Chief Magistrate was capable of establishing those matters.
- [88] I consider that the evidence as a whole was in fact capable of doing so. The documentary and oral evidence disclosed a coherent sequence. The appellant arranged for items intended for his personal vehicle to be shipped together with items for the Fire Department. The goods then arrived in a single crate. The documentation provided for clearance did not disclose the appellant’s personal items as dutiable goods requiring separate declaration. The goods were then

²³ [2022] UKPC 52.

²⁴ BVIMCRAP2021/0004 (delivered 25th April 2023, unreported).

cleared through Customs as part of what was treated as a government consignment. Thereafter, the appellant removed his personal items from the crate without accounting for them.

[89] That sequence was not merely capable of founding suspicion. It was in fact capable of supporting the conclusion that the appellant knew throughout that his personal items were not entitled to the treatment accorded to government goods and that, by allowing them to travel within that official shipment and by failing to disclose them at the point of clearance, he secured their release without payment of duty.

[90] The learned Chief Magistrate's treatment of the evidence shows that she addressed precisely that point. She distinguished between the shipping count and the customs duty count.²⁵ In relation to the shipping count, she concluded that the prosecution had not proved the requisite dishonesty. In relation to the customs duty count, however, she found that the appellant knew that duty was payable on the 12 items removed from the crate, made no attempt at the appropriate time to pay that duty, and acted in a manner which an ordinary person would not have acted.²⁶

[91] That distinction made by the learned Chief Magistrate is significant. It demonstrates that she did not reason in a broad or impressionistic manner. On the contrary, she rejected one part of the prosecution's case where she found the evidence insufficient, but accepted the customs duty count because, in her assessment of the evidence, the appellant's knowledge and conduct in relation to the undisclosed dutiable items justified that conclusion. That tends to support, rather than undermine, the safety of the conviction.

[92] The appellant's submissions placed considerable emphasis on the proposition that there was no proof of deception. I am unable to accept that contention. Deception in a case of this kind need not necessarily take the form of an express verbal lie. It

²⁵ Appeal Record at pp. 707 to 710 (18th October 2024).

²⁶ Ibid.

may arise from conduct, context and presentation. Where dutiable personal goods are knowingly allowed to pass through Customs as though they were part of a duty exempt government consignment, and the person responsible for those goods does not disclose their existence to those effecting clearance, the tribunal is entitled to conclude that the exemption was obtained by deception as set out in the parameters of the offence Section 231(1)(c)(i) of the **Penal Code**.

[93] The respondent's case was that the appellant's conduct operated on two levels. Firstly, the appellant caused his personal items to travel in the same shipment as official departmental items. Secondly, once the shipment arrived, he permitted the goods to be cleared on documentation which did not identify his own items for duty purposes. Whether those matters are analyzed as two separate acts of deception or as one continuing course of deceptive conduct, the essential point remains the same. The learned Chief Magistrate was entitled to find that the appellant withheld material information from those responsible for Customs clearance and thereby procured the release of his goods without payment of duty.

[94] The appellant also sought to rely upon alleged deficiencies in the Customs process. However, the existence of such deficiencies does not provide an answer to the charge. A failure on the part of Customs to detect irregularity does not preclude criminal liability where the accused knowingly creates or exploits the very circumstances in which that irregularity can pass undetected. The issue was not whether Customs might have discovered the goods had they inspected more thoroughly. The issue was whether the appellant knowingly failed to disclose dutiable personal goods and thereby obtained the benefit of an exemption to which he was not entitled.

[95] In that regard, the evidence of Customs Officer Jamaul Wade was indeed supportive of the conclusion that duty was in fact payable on the appellant's personal items and that, in the ordinary course, the importer bore responsibility for payment. In re-examination, Mr. Wade was specifically asked to clarify a suggestion that an

importer had seven years in which to pay duty. He explained that the issue was not that a person had seven years in which to pay, but rather that the question related to a limitation period.²⁷ The significance of that evidence is that it undermined any suggestion that the appellant could properly treat payment of duty as a matter to be postponed indefinitely after the goods had already been cleared.

[96] The Court has, however, considered with care the precise amount of duty stated in the charge, namely EC\$1,113.89. On the material before the Court, that specific figure was pleaded in the charge.²⁸ At the same time, the learned Chief Magistrate herself expressly observed that the prosecution had not shown how the figure of approximately EC\$1,113.89 had been calculated.²⁹

[97] I therefore accept that there was no detailed evidential breakdown in the record showing the method by which the customs duty figure was computed. There was, so far as the record discloses, no tariff calculation, no arithmetical explanation, and no precise evidence showing how the stated sum of EC\$1,113.89 was reached. To that extent, the learned Chief Magistrate's concern was a proper one.

[98] The question then becomes whether that evidential omission is fatal to the conviction. In my view, it is not. There are three reasons for that conclusion.

[99] Firstly, the charge was not one which required the prosecution to prove, as an essential ingredient of liability, the exact mathematical correctness of the stated figure to the cent. The essence of the offence was that the appellant, by deception and dishonesty, obtained an exemption from customs duty on goods which were in fact dutiable. Once the tribunal was satisfied that duty was payable, that no duty was charged or paid, and that this result was procured dishonestly, the core of the

²⁷ Appeal Record at pp. 503 and 504 (18th October 2024).

²⁸ Appeal Record at p. 86 (18th October 2024).

²⁹ Appeal Record at pp. 707 to 708.

offence was made out. The amount avoided was descriptive of the charge but did not constitute dishonesty.

[100] Secondly, the record does not suggest that the quantum of duty was squarely in issue at trial. The appellant's challenge was directed primarily to dishonesty, deception, payment arrangements, ownership of the goods, and the customs procedure. There is no indication in the portions of the record provided to the Court that the specific sum of EC\$1,113.89 was the subject of focused challenge in cross-examination, such as would have invited the prosecution to lead further evidence as to the calculation. In those circumstances, the absence of a developed calculation cannot readily be elevated on appeal into a basis for treating the conviction as unsafe.

[101] Thirdly, although the charge specified EC\$1,113.89 as the customs duty allegedly avoided, it is important to differentiate between including a figure and the core elements of the offence. Under section 231(1)(c)(i) the offence is complete if the accused through deception and dishonesty gained relief from duty on goods that were dutiable. Calculating the exact amount avoided is not by itself an element of culpability. Provided that the tribunal is convinced that duty was payable, remained unpaid and that the accused dishonestly caused this outcome the offence is proved.

[102] The appellant further challenged the admission and reliance upon the statement of Mr. Hammish McCullin. The Court does not consider that ground to advance the appellant's case in any material way on this count. Even leaving that statement to one side, there remained ample evidence upon which the learned Chief Magistrate could conclude that the appellant's personal items travelled within the official shipment, were not disclosed for duty purposes, were cleared without payment of duty, and were subsequently removed by the appellant. The conviction on MNIMCR2017/0031 did not depend exclusively, or even centrally, upon the impugned statement.

- [103] The Court is also unable to accept the submission that **R v Preddy** and **Joseph Brice v Regina** undermined the conviction in the present case. Those authorities concern the characterization of property or choses in action in a different legal context. The present charge was not concerned with the obtaining of a chose in action in that sense. It concerned obtaining by deception and dishonesty an exemption from customs duty on goods which were otherwise dutiable. The legal substance of the charge was therefore different.
- [104] Having considered the matter as a whole, the Court is satisfied that the learned Chief Magistrate correctly identified the real issue on MNIMCR2017/0031, namely whether the appellant knowingly caused or allowed his personal dutiable goods to be cleared as part of a duty exempt government consignment without disclosure and without payment. The evidence was capable of supporting an affirmative answer to that question.
- [105] I further consider that the learned Chief Magistrate was entitled to infer dishonesty from the surrounding circumstances, including the arrangement for shipment, the failure to provide the relevant invoice for the appellant's personal items at the point of clearance, the clearance of the goods without duty, and the appellant's subsequent removal of those items from the crate without accounting for them. Those facts were also clearly capable of forming a coherent evidential chain.
- [106] In the final analysis, this is not a case in which there was no evidence to support the conviction. Nor is it a case in which the learned Chief Magistrate can be said to have misunderstood the evidence or reached a conclusion outside the range reasonably open to her. On the contrary, the conviction on MNIMCR2017/0031 rested upon findings which were available on the evidence and which this Court is not entitled to disturb merely because other aspects of the prosecution's case were not accepted.
- [107] The Court therefore concludes that, although the precise amount of customs duty stated in the charge was not explained by detailed calculation in the evidence, that

omission does not render the conviction unsafe in circumstances where the learned Chief Magistrate was entitled to find that duty was payable, that no duty was paid, and that the exemption was obtained by deception and dishonesty.

[108] Accordingly, Grounds 4, 5, 6, 7 and 8 fail.

Ground 9 – Whether the learned Chief Magistrate erred in convicting the appellant notwithstanding her own ruling that there was no intention (*mens rea*) to commit a crime

Appellant's Submissions

[109] The appellant submitted that the learned Chief Magistrate erred in law by finding him guilty notwithstanding her own finding that there was no intention of committing a crime. The appellant contended that this conclusion is inconsistent with the fundamental criminal law principle that both *actus reus* and *mens rea* must be established before a conviction can properly follow.

[110] The appellant further submitted that the prosecution failed to prove both the requisite conduct and mental element necessary to make out the offence charged and for which he was convicted. The appellant contended that HM Customs Service was not afforded a proper opportunity to assess or raise any tax payable by him, and that officers were in fact prevented from accepting a tax declaration due to the intervention of police management.

[111] The appellant submitted that his managers were therefore wrong to characterize his involvement in the passive shipment of goods in a container owned and controlled by others, and executed by third parties, as amounting to a conspiracy or fraud on customs. He contended that this conclusion was legally and factually flawed and unjustly implicated him in wrongdoing.

[112] The appellant further relied on the absence of evidence as to the amount of customs duty allegedly owed. In that regard, it is to be observed that the record does not disclose that this issue was squarely raised or developed before the learned Chief Magistrate, and this Court has in any event at paragraphs [97] to [99] above found that the absence of a detailed evidential breakdown of the precise sum does not undermine the safety of the conviction, which turned on the appellant's knowledge that duty was payable, the non-disclosure of his personal items, and the obtaining of their clearance without payment of that duty.

[113] The appellant further contended that, as a matter of principle, criminal liability requires proof of both *actus reus* and *mens rea*, and that the Magistrate accepted there was no *mens rea* on his part.

[114] Relying on **Sweet v Parsley**,³⁰ the appellant submitted that *mens rea* is an essential element of criminal liability unless expressly displaced by statute, and that in the absence of such mental fault the offence could not be made out.

[115] The appellant submitted that in this regard the learned Chief Magistrate misapplied the law by convicting him despite acknowledging the absence of intent, thereby departing from established principles of criminal liability.

[116] Accordingly, the appellant contended that the conviction was unsafe in law and should be overturned on the basis that the Magistrate fundamentally misconstrued the requirements of criminal culpability.

Respondent's Submissions

[117] The respondent submitted that this ground of appeal is misconceived. The learned Chief Magistrate did not err in law and that the appellant's argument about the

³⁰ [1970] AC 132.

absence of *mens rea* misunderstood both the evidence and the statutory scheme governing the removal of warehoused goods.

- [118] The respondent relied on sections 61(1) and 62(1) of the **Customs (Control and Management) Act**,³¹ (the “**Customs Act**”), submitting that before goods are removed from a warehouse the proprietor must deliver a proper customs entry in the form directed by the Comptroller, and that save as permitted by law, no goods may be removed until all duty chargeable has been paid. Those provisions state as follows:

“Removal of warehoused goods

61. (1) Before any goods are removed from a warehouse the proprietor of the goods shall deliver to the Customs and Excise Unit an entry thereof in such form and manner and containing such particulars as the Comptroller may direct. (*Amended by Act 20 of 2010 and 7 of 2017*)

...

Duty chargeable on warehoused goods

62. (1) Save as permitted by or under this Act, no goods shall be removed from a warehouse until all duty chargeable on those goods has been paid.”

- [119] The respondent accepted that the Comptroller under the **Customs Act** has up to six years to recover unpaid customs duties, but submitted that this was separate from, and did not displace, the obligation on an importer to make a proper entry in relation to goods and pay duty at or before removal of goods from a warehouse.
- [120] The respondent contended that, in relation to the appellant's personal items, it is not disputed that no customs entry was made and no duty was paid. The respondent submitted that the evidence showed that Montserrat Shipping prepared entries based on the invoices provided to them, and that they were never provided with the invoice that included the appellant's personal items.

³¹ Cap. 17.04, Revised Laws of Montserrat 2019.

- [121] The respondent submitted that the court was therefore well placed to conclude that the appellant knew his personal items were inside the crate with the Fire Service items, because he had received prior email notification of this, yet failed to inform either Customs or Montserrat Shipping.
- [122] The respondent submitted that the appellant was the only person who knew his personal items were in the crate, and that he was able to attend the Fire Station the following day and remove them.
- [123] The respondent accepted that Customs has a duty to check items presented by importers but submitted that the primary obligation rested on the importer to provide an accurate and complete entry. The respondent contended that the appellant having deliberately failed to notify anyone that his personal items were in the container, did so with the purpose of deceiving Customs into believing that all items were for official Fire Service use.
- [124] The respondent submitted that by this argument on this ground of appeal, the appellant was improperly attempting to shift responsibility onto Customs officers as opposed to accepting his own wrongdoing, and that this should be rejected.
- [125] The respondent made it clear that the evidence clearly revealed that the appellant had previously cleared items both for himself and for the Fire Service, and that he was aware that customs checks on government-related consignments were less rigorous, typically involving only a 60 percent inspection rate, all of which supported the requisite *mens rea* of the offence with which he was charged.

Discussion

- [126] Ground 9 raises a discrete but narrow issue, namely whether the learned Chief Magistrate erred in convicting the appellant, notwithstanding what is said to have been her finding that there was no intention on his part to commit a crime and more particularly that that finding was in relation to the offence for which he was convicted.

[127] It is axiomatic that, unless displaced by statute, criminal liability ordinarily requires proof of both the prohibited act and the requisite mental element. The principle articulated in **Sweet v Parsley** is not in dispute. The question for this Court is whether the learned Chief Magistrate in fact found an absence of *mens rea* in relation to the offence for which the appellant was convicted.

[128] In addressing that issue, the judgment of the learned Chief Magistrate must be read as a whole. It is impermissible to isolate individual passages and treat them as determinative without regard to the overall reasoning. What may appear, when viewed in isolation, to be an inconsistency may be resolved when the findings are considered in their proper context.

[129] That being said, the appellant's argument appears to proceed on the basis that the learned Chief Magistrate, having rejected the prosecution's case on the other counts that were before her, finding that deception had not been established in relation to those matters, necessarily meant that the learned Chief Magistrate had found the absence of *mens rea* across the board for all offences. That approach is, however, fundamentally flawed. The learned Chief Magistrate in her reasoned judgement dealt separately with the issue of customs duty under the specific heading 'Customs Duty,' and her findings in that section are directly material to the offence for which the conviction was entered.

[130] In that regard, the learned Chief Magistrate stated as follows:

"[65] In June, the Commissioner of Police, by his evidence, having received a report from Mr. White ordered an investigation into the matter, and stated to Mr. West that it was his understanding that he had brought in personal items for which he had paid no duty. This the defendant West denied. The Commissioner further stated, 'if this is so sort it out'.

[66] Mr. West did not sort it out. He proceeded on leave. By the time the contact was made with Customs, through his attorney, investigations were advanced. The matter being in the hands of the police, he was

told he could not be assisted. Mr. West at all times knew customs duty was due on the 12 items.”³²

[131] The final sentence of paragraph 66 constitutes an express finding of knowledge. The learned Chief Magistrate found that the appellant knew that customs duty was payable on the items in question. Knowledge of that obligation, coupled with the failure to disclose the items and ensure payment of duty prior to their removal, was plainly capable of establishing the mental element of the offence.

[132] This finding must also be read together with the learned Chief Magistrate’s other conclusions that the appellant knew his personal items were included in a shipment presented as governmental, did not inform those responsible for Customs clearance of their presence, and subsequently removed those items without notifying the relevant authorities. In particular, the learned Chief Magistrate found that the appellant returned to the Fire Station and removed the 12 personal items from the crate without any Customs process having been undertaken,³³ and further accepted in his own caution statement that, instead of contacting Customs to regularize the position, he removed and retained those items.³⁴ The court additionally found that the appellant was aware that it was his responsibility to pay customs duty on those items and failed to do so.³⁵ Those findings, taken cumulatively, were therefore capable of supporting the inference that the non-disclosure was deliberate rather than inadvertent.

[133] The fact that the learned Chief Magistrate did not find deception established in relation to other offences does not and could not negate the presence of *mens rea* in relation to the customs duty offence. Different counts may turn on different factual matrices and evidential considerations. The rejection of one aspect of the

³² Page 17 of the Judgment delivered on 26th July 2023.

³³ Paragraph 62 of the Judgment delivered on 26th July 2023.

³⁴ At paragraph 63 of the Judgment.

³⁵ At paragraph 64 of the Judgment.

prosecution's case does not preclude acceptance of another where the evidence supports it.

- [134] The statutory framework reinforces this conclusion. The **Customs Act** imposes a clear obligation on an importer to make a proper entry and to ensure that duty chargeable is paid before goods are removed from a warehouse. Knowledge that duty is payable, coupled with failure to ensure its payment, is directly relevant to culpability and to the *mens rea* necessary to support the elements of the charge.
- [135] In the round, the learned Chief Magistrate was entitled to consider the appellant's conduct after delivery, including the removal of the items without the knowledge of the stores officer and the failure to notify Customs. Such conduct could support an inference as to the appellant's state of mind at the material time, and she so found.
- [136] When the judgment is read fairly and as a whole, the learned Chief Magistrate clearly made no finding of an absence of *mens rea* in relation to the offence concerning customs duty. On the contrary, she made an explicit finding that the appellant knew duty was payable on the items. There is therefore no inconsistency between her findings and the conviction entered nor any deviation from the fundamental prerequisite that both *actus reus* and *mens rea* be proven beyond reasonable doubt.
- [137] In those circumstances, the appellant has not demonstrated that the learned Chief Magistrate misdirected herself as to the requirement of *mens rea* or that the conviction was unsupported on the evidence or the law. Further, while the appellant repeatedly asserted that the elements of the offence were not made out, he failed when pressed by the panel during oral submissions to identify with any precision which elements were allegedly absent or how, on the evidence, they were not satisfied. That omission further undermines the substance of this ground of appeal.
- [138] Ground 9 therefore fails.

Conclusion and Disposition

- [139] This appeal has required the Court to examine with care both the procedural history of the matter and the evidential basis upon which the conviction was entered. Having done so, I am not satisfied that the appellant has demonstrated any error of law, misdirection, or material irregularity capable of vitiating the proceedings or rendering the conviction unsafe.
- [140] The learned Chief Magistrate had the lawful authority to entertain and determine the matter, properly directed herself as to the applicable legal principles, and reached findings of fact that were open to her on the evidence. This Court has not been persuaded that those findings were plainly wrong or that any miscarriage of justice has occurred.
- [141] In the circumstances, there is no proper basis upon which this Court could interfere with the conviction or the sentence imposed.
- [142] The appeal is accordingly dismissed. The conviction and sentence are affirmed.
- [143] There shall be no order as to costs.

I concur.
Paula Gilford
Justice of Appeal [Ag.]

I concur.
Cadie St. Rose-Albertini
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar