

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COLONY OF MONTSERRAT

(CRIMINAL)

A.D 2016

CLAIM NO. MNIHCR2016/0013

BETWEEN:

REGINA

AND

DWAYNE IRISH

APPEARANCES:

Mr. Kenroy Hyman for the Queen

Mr. David Brandt for the Defendant

2016 November 08

RULING

Whether the Defendant can make an unsworn statement from the Dock

- [1] **Morley, J.** Application is made by defence counsel Mr Brandt that the defendant be allowed to make an unsworn statement from the dock rather than be silent or required to give evidence on oath from the witness box where he is then liable to be cross-examined.

- [2] Orally, I have refused the application and promised written reasons, as I foresee this ruling may affect other criminal trials, where others ask to make an unsworn statement. This ruling will have like effect on all future criminal trials on Montserrat.
- [3] The prosecution has resisted the application, pointing out changes to the law on 1 March 2016.
- [4] It is right there has been previously the right to make an unsworn statement. Matters have been complicated in that my predecessor Justice Redhead during criminal assizes in July 2016 allowed a dock statement in the case of *Molyneaux*, despite a like argument being made by the prosecution. Clarification has been sought by Counsel.
- [5] Criminal procedure on Montserrat is governed by the 'Criminal Procedure Code' (CPC), articulated as Chapter 4.01 of the Laws of Montserrat. The CPC has been amended from time to time.
- [6] The current compendium CPC publication on the website for the Attorney General of Montserrat¹ has a front page as follows:

CHAPTER 4.01

CRIMINAL PROCEDURE CODE and Related Legislation Revised Edition showing the law as at 1 January 2013

This is a revised edition of the law, prepared by the Law Revision Commissioner under the authority of the Revised Edition of the Laws Act.

This edition contains a consolidation of the following laws—

CRIMINAL PROCEDURE (No. 2) CODE Act 9 of 2010 .. Sections 183 and 269 to 303 in force 29 April 2010 (S.R.O. 28/2010) Amended by Act 9 of 2011 .. in force 27 September 2011 (S.R.O. 40/2011) – page 3

¹ See <http://agc.gov.ms/wp-content/uploads/2011/10/4.01-Criminal-Procedure-Code.pdf>.

- [7] However, there appear a number of errors in how this publication is marked.
- a. Act 21 of 1982 does not appear on page 16 but on page 153.
 - b. The CPC compendium is said to show the law as at 1 January 2013, when to my mind it does not do so clearly. Consideration of the statutory rules and orders (SRO) is required, and which do not appear in the CPC compendium.
 - i. Prior to 2010, Act 21 of 1982 appears to have been in force as the CPC, (which for clarity I will refer to as CPC No 1).
 - ii. On 29.04.10, by SRO No 28 of 2010, it appears that Act 9 of 2010 (being CPC No 2) only came into force as to section 183 and parts 32-35.
 - iii. On 27.09.11, by SRO no. 40, the Montserrat Constitution Order of 2010 came into force.
 - iv. On 01.03.16, by SRO no.8, concerning Act 9 of 2010 (being CPC No 2), Parts 1-22, sections 182, 184-192, parts 24-31, and parts 36-37 came into force.
 - v. What has been uncertain on the face of the CPC compendium has been what part of CPC No 2 has been in force, and when to replace CPC No 1.
- [8] To my understanding, it follows that on 1 March 2016, part 19 of CPC No 2, and specifically s163, came into force, replacing therefore its retrospective equivalent sections in the CPC No 1, specifically s136.
- [9] In the CPC compendium at page 207, concerning CPC No 1, under part 7 entitled 'Procedure in trials before the High Court', and the section heading 'Close of case for the prosecution', s136 (2) reads as follows:

When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing Court has been given in evidence, the Court, if it considers that there is evidence that the accused person, or any one or more of several

accused persons, committed the offence, shall inform each such accused person of his right to address the Court, either personally or by his counsel (if any), to give evidence on his own behalf, **or to make an unsworn statement**, and to call witnesses in his defence, and in all cases shall require him or his counsel to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof, the Judge shall record the same.

[Bold added]

- [10] In the CPC compendium at page 71, concerning CPC No 2, under part 19 entitled 'Trial on Indictment: the prosecution case', and the section heading 'High Court to invite the defence to put its case', s163 reads as follows:

When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing judge has been given in evidence, the High Court, if it considers that there is evidence that the accused person, or any one or more of several accused persons, committed the offence, shall inform each such accused person of his right to address the High Court, either personally or by his counsel (if any), to give evidence on his own behalf, and to call witnesses in his defence, and in all cases shall require him or his counsel to state whether it is intended to call any witnesses as to fact other than the accused person himself.

- [11] It is to be noted that these sections are in identical terms, describing in the High Court the same stage of the proceedings, save for one feature: what is missing in s163 of CPC No 2 is the clause '*or to make an unsworn statement*'.
- [12] It follows in my judgment that the deliberate omission from CPC No 2 of the ability to make an unsworn statement means that an unsworn statement is no longer permissible.
- [13] Mr Brandt argued that there needs to be specific language in statute or in the CPC that an unsworn statement is no longer permitted, on the principle that it has long been allowed, should not be rendered impermissible lightly, and what is not expressly prohibited is permissible. I reject this

submission. The deliberate omission of the clause clearly renders an unsworn statement henceforth impermissible.

[14] This is in keeping with its abolition in most Common Law jurisdictions for the understandable reason it allows evidence which cannot be tested by cross-examination. Moreover, the unsworn statement emerged in Common Law prior to 1898 at a time when it was not permissible for a defendant to give evidence in his or her own defence, for fear swearing an oath, and then lying, would imperil his or her soul, leading to eternal damnation. Such times are long over, and so too the need for unsworn statements.

[15] For reasons of the above analysis of CPC No 2, unsworn statements will no longer be permitted in criminal trials on Montserrat.

The Hon. Justice Iain Morley QC

High Court Judge