

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

MONTSERRAT

MNIHCVAP2018/0003

BETWEEN:

DAVID BRANDT

Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Dame Janice Pereira, DBE
The Hon. Mr. Paul Webster
The Hon. Mr. Terrence Williams

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

Appearances:

Dr. David Dorsett for the Appellant
Ms. Anesta Weekes, QC for the Respondent

2018: November 27;
November 29.

Civil Appeal – Statutory Construction – Interpretation of section 141 of the Penal Code – Whether construction of section 141 of the Penal Code is suitable for resolution by a judge of the High Court during a sufficiency hearing – Whether learned judge should have found that the proper place for the appellant to seek redress for alleged defects of criminal charges is in the High Court by a constitutional motion

ORAL JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the judgment of the learned trial judge dated 10th January 2018 dismissing the Appellant's application for an interim order staying

the prosecution of criminal charges against him pending the final determination of his claim said to be for relief under the **Montserrat Constitution Order 2010** (“the Constitution”).¹

Background

- [2] The Appellant stands charged with five charges of sexual exploitation, with particulars given, four of them contrary to paragraph (a) of section 141(1) of the **Penal Code**,² and one contrary to paragraph (d) of section 141(1) of the **Penal Code**. The Appellant complained that the charges on their face are defective and bad in law, both in form and substance, and that the prosecution of the charges contravenes his constitutional right to protection of the law and a fair trial. When the matter first came before the Chief Magistrate, the Appellant applied to dismiss the charges on account of the alleged deficiencies. The Chief Magistrate dismissed the application and sent the matter to the High Court for a sufficiency hearing as provided for under the **Criminal Procedure Code**.³ The Appellant appealed against the Chief Magistrate’s decision. The Court of Appeal dismissed the appeal finding that the application to dismiss the charges, as well as the claim for constitutional relief, were premature.
- [3] The Appellant then applied to the High Court under section 20 of the **Constitution** for orders that his rights to protection of the law and a fair hearing are being contravened by the continued prosecution of the charges against him. The Director of Public Prosecutions opposed the application. The learned judge dismissed the application for interim relief, as well as the substantive claim which sought essentially the same relief on a permanent basis.
- [4] The appellant appealed against the judge’s decision. The notice of appeal lists the following five grounds of appeal:
- (i) The judge erred in law in giving summary judgment and summarily dismissing a proceeding for constitutional redress under the **Constitution** contrary to rule 15.3 of the **Civil Procedure Rules 2000** (“CPR”).

¹ 2010 S.I. No. 2474.

² Cap. 4.02, Revised Laws of Montserrat, 2013.

³ Cap 4.01, Revised Laws of Montserrat, 2013.

- (ii) The judge erred in law on a matter of statutory construction in finding that sexual exploitation is not limited to the acts enumerated in section 141 of the **Penal Code**.
- (iii) The judge erred in law on a matter of statutory construction by holding that having sexual intercourse with someone is not outside of section 141 of the **Penal Code**.
- (iv) The judge erred in law on a matter of statutory construction by failing to properly apply the rule that penal statutes are to be strictly construed by failing to properly apprehend the Appellant's argument on how the rule of strict construction was to be applied in the context of section 141 of the **Penal Code**.
- (v) The judge should have found that the proper place for the Appellant to seek redress for the alleged breaches of the **Constitution** is the High Court under section 20 of the **Constitution**.

I will deal with ground 5 first as it is in the nature of a threshold issue, and then grounds 2, 3 and 4 together as they relate to the interpretation of the section 141 of the **Penal Code**, and finally ground 1.

Ground 5 – Relief under the Constitution

- [5] Dr. David Dorsett appeared for the Appellant. He submitted that where a person is charged with criminal offences, the issue of the defectiveness of the charges, which I will deal with when I consider grounds 2, 3 and 4, should be dealt with as early as possible. He relied on the decision of the Court of Appeal of England and Wales in **R v Gleeson**⁴ to the effect that counsel for the defendant in a criminal trial should not delay in bringing issues of fact and law to the attention of the court. Further, the continued prosecution of the Appellant on defective charges is manifestly unfair and in breach of his constitutional right to protection of the law and a fair trial. The proper

⁴ [2003] EWCA 3357.

place for the Appellant to seek immediate redress is therefore by a constitutional motion in the High Court which is what the Appellant has done.

[6] Ms. Annesta Weeks, QC who appeared for the Respondent submitted that it is wrong for the Appellant to seek redress for the alleged defects of the charges by a constitutional motion. The proper avenue for the Appellant to seek redress is at the sufficiency hearing where a judge of the High Court will rule on the sufficiency of the charges. She reminded this Court that in its previous judgment in November 2017 it had ordered that the case be sent to the High Court "... for a sufficiency hearing as soon as possible."⁵

[7] The issue of the proper procedure to be followed was debated in the lower court and the learned judge dealt with it in the oral judgment that he delivered, the transcript of which is in the record of appeal. At page 16 of the transcript he found that –

"So in this particular case I think that it is well argued that this application could have been dealt with at the summary hearing. You could have raised the same points with regard to any alleged abuse of process and it would have been heard in the similar fashion by the Court. All the references to the construction of legislation etc could all have been raised at a sufficiency hearing."

The judge then referred to the passing of the **Penal Code** and the **Criminal Procedure Code** in Montserrat and continued –

"...one has to take cognizance of the reason for this kind of effort and clearly part of it is to give every opportunity to the parties to thrash out matters like this without having to take the matters to a separate court to be argued as a Constitutional issue. So I think the Sharma and Brown-Antoine matter clearly deals with that."

[8] The judge's reference to "Sharma and Brown-Antoine" is of course to the decision of the Privy Council in **Sharma v Brown-Antoine and Others**⁶ where the Board had to deal with a challenge by way of judicial review by the former Chief Justice of Trinidad and Tobago to a decision of the Deputy Director of Public Prosecutions to bring criminal

⁵ David Brandt v Director of Public Prosecutions MNIMCRAP2017/0001 (delivered 6th November 2017, unreported), para. 21.

⁶ (2006) 69 WIR 379.

proceedings against the Chief Justice. The Board found that the decision to prosecute should properly be raised in the course of the criminal proceedings and that it was not a case where judicial review proceedings should be allowed. The decision of the Board on this issue is summed up in the joint opinion of Baroness Hale, Lord Carswell and Lord Mance at paragraph 31 -

“The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court”.

[9] The issue in the **Sharma** case involved a factual investigation into the decision of the Deputy Director of Public Prosecutions to bring criminal proceedings against the former Chief Justice and yet their Lordships had no difficulty in finding that it could be resolved in the criminal proceedings. The appeal before this Court is a matter of interpretation of legislation to wit, provisions of the **Penal Code**, and is a fortiori more suited to resolution in the sufficiency proceedings.

[10] This Court must guard against the use of constitutional motions to derail or delay proceedings in the Civil and Criminal Divisions of the High Court. I find that this appeal, and the application before Belle J, involved in essence, the singular issue of the construction to be given to section 141 of the **Penal Code**, which is a matter eminently suitable for resolution by a judge of the High Court in the sufficiency hearing. It is wholly inappropriate for this Court, or the High Court in its constitutional jurisdiction, to be made to tread upon the criminal jurisdiction of the High Court in the manner undertaken by the Appellant. The procedure used by the Appellant to bring this matter to the High Court as a constitutional claim is entirely wrong and improper. I would dismiss the appeal on this basis only, but out of deference to the full submissions that

were made orally and in writing by both counsel on the interpretation issue, I will now deal with that issue.

Grounds 2, 3 and 4 – Interpretation of section 141 of the Penal Code

[11] Dr. Dorsett supported his submission that the charges against the appellant were defective by reference to the particulars contained in the charges and comparing them with the wording of the section of the **Penal Code** under which the appellant is charged. The charges against the appellant allege that he committed various acts for the purpose of sexual exploitation contrary to section 141(a) and (d) of the **Penal Code**. Section 141 falls under the general heading “Dealing in people under eighteen for sexual exploitation” and the relevant parts of the section read:

“**141. (1)** A person who, within or outside Montserrat—

- (a) sells, buys, transfers, barter, rents, hires, or in any other way enters into a deal involving a person under the age of eighteen years for the purpose of the sexual exploitation of the person;
 - (b) ...
 - (c) ...
 - (d) induces a person under the age of eighteen years to sell, rent, or give himself for the purpose of sexual exploitation of the person;
- commits an offence and is liable on conviction to imprisonment for life.

(2) ...

(3) For the purposes of subsection (1), sexual exploitation, in relation to a person under the age of eighteen, includes the following acts:

- (a) taking by any means or transmission by any means of still or moving images of the person engaged in explicit sexual activities, whether real or simulated;
- (b) taking by any means or transmission by any means, for a material benefit, of still or moving images of the person's genitalia, anus or breasts (whether real or simulated) for purposes other than those described in subsection (4) or (5);
- (c) participation by the person in a performance or display, for reasons other than that described in subsection (4) that—
 - (i) is undertaken for a material benefit; and
 - (ii) involves the exposure of the person's genitalia, anus or breasts;or
- (d) engaging the person in an activity such as employment in a bar or restaurant, that—
 - (i) is undertaken for a material benefit; and
 - (ii) involves the exposure of the person's genitalia, anus or breasts.”

- [12] The structure of the section is that a person commits an offence and is liable on conviction to imprisonment for life if he or she does any of the acts set out in paragraphs (a) to (g) of section 141(1) for the purpose of sexual exploitation. It is not enough for the defendant to enter into a deal involving a person under the age of eighteen years. The deal must be for the purpose of the sexual exploitation of a person under 18 years. Similarly, inducing a person under the age of 18 years to sell, rent, or give herself is not an offence under the section unless it is done for the purpose of sexual exploitation. The acts of entering into the deal involving a girl under 18 years or inducing such a person to give him or herself must be for the purpose of sexual exploitation to complete the elements of a charge under section 141(1).
- [13] I have reviewed the five charges against the appellant and I am satisfied that they contain sufficient allegations to bring them within the parameters of either paragraphs (a) or (d) of section 141(1), provided that it can be shown that the Appellant committed offences under the section for the purpose of sexual exploitation. For example, complaint MNIMCI2016/0056 alleges that the appellant sent sums of money to a female person to get her to bring a 13-year-old girl to Montserrat to have sex with him, contrary to section 141(1)(a) of the **Penal Code**; and complaint MNIMCI2016/0057 alleges that the appellant induced a female aged 15 years by providing financial support to her in return for her agreement to have sexual relationship with him, contrary to section 141(1)(d) of the **Penal Code**.
- [14] Dr. Dorsett submitted that the **Penal Code** is a criminal statute and section 141 created statutory offences. The section must be interpreted narrowly and the charges against the appellant must allege in clear terms the acts committed for the purpose of sexual exploitation in one of the ways that sexual exploitation is defined in subsection (3). Further, that there is nothing in any of the allegations against the Appellant to suggest that they were committed for the purpose of sexual exploitation as that term is defined in subsection (3) of section 141. For example, the complaint in MNIMCI2016/0055 which alleges that the appellant induced a girl under the age of 18 years to give herself for the purpose of sexual exploitation by "Telling (her) that he will

consider her request for money when she sends a picture of a vagina. (She) sent the picture.” Dr. Dorsett submitted that this allegation cannot amount to sexual exploitation because sub-section (3), which defines sexual exploitation, requires the person charged to have taken or transmitted by any means, still or moving, images of the exploited person’s genitalia etc. It is not alleged that the appellant performed any of these activities. In fact, they allege the opposite – the appellant was the intended recipient of the picture and there is no allegation that he took or transmitted the picture. Therefore, he could not have committed an act for the purpose of sexual exploitation within the meaning of section 141 of the **Penal Code**. All the charges have similar defects and should be dismissed.

[15] Ms. Weeks, QC countered, mainly in her written submissions, by submitting that subsection (3) should not be given a narrow interpretation and the use of the expression “... includes the following acts...” in subsection (3) before listing the four categories of sexual exploitation does not mean that sexual exploitation for the purposes of section 141 is limited to these four listed acts.

[16] Both counsel referred to **Dilworth v Commissioner of Stamps**,⁷ a decision of the Privy Council on appeal from the Court of Appeal of New Zealand, to assist the Court in interpreting the crucial word in section 141(3) - “includes”. Lord Watson delivered the advice of the Board and at pages 105-106 he said -

“The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word “include” is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to “mean and include,” and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.”

⁷ (1899) AC 99.

The passage by Lord Watson is helpful. It confirms that the use of the word “includes” generally has an expansive meaning so that it enlarges the categories of items covered by the preceding words beyond the things specifically mentioned. Thus, sexual exploitation as defined in section 141(3) can include acts other than those specifically mentioned in sub-section (3). Lord Watson also confirmed that the word can have a restrictive meaning and does not include things not mentioned. This depends on the context of the legislation.

- [17] The trial judge’s finding on the interpretation issue is also helpful. He said at page 16-17 of the transcript -

“When I look at both arguments and both sides I find in favour of the argument of the Crown and I therefore feel that the argument of the Appellant is incorrect. They are not construing the legislation correctly and even though I understand the submission that in criminal matters it is better to be strict and clear and so on I do not see in this particular legislation there is any need to be that strict in the sense that one totally omits all that is said in section 14 (1) (a), (b), (c), (d), (e), (f) and (g) and takes section 141(3) as the only definition that is important in the section. I think that that would reduce the legislation to absurdity and defeat the mischief that the legislation is attempting to deal with.”

- [18] It is clear that the judge followed the guidance of Lord Watson and considered the meaning of the word “includes” in the context of the Code, and that he also took into consideration Dr. Dorsett’s warning to have regard to the fact that we are dealing with a criminal statute. Having done so, he came to the conclusion that the word was used in section 141(3) in its general or expansive sense. He therefore preferred and accepted the submissions of Ms. Weeks.

- [19] I cannot find any fault in the judge’s reasoning and conclusion. But just to add my own thoughts on the matter, sexual exploitation is not a term of art. The words must be given their ordinary meaning. The meaning can cover a wide range of activities and the range can evolve with the passage of time. The draftsman could not have been expected to list in the section every act that could amount to sexual exploitation. If he wanted to restrict the definition of sexual exploitation as suggested by Dr. Dorsett, it would have been simple to use the word “means” or the words “means and includes”, instead of “includes”, thereby restricting the definition of sexual exploitation to the matters mentioned in the sub-section.

It must be left up to the courts on a case by case basis to decide whether the facts alleged by the Crown amount to sexual exploitation within the meaning of the **Penal Code**. As Ms. Weekes, QC submitted, and I accept, the **Penal Code** does not contain a definition of sexual exploitation which fortifies my view that the words are to be given their ordinary meaning and be construed on a case by case basis.

[20] I also agree with the learned judge that in the context of this criminal legislation the use of the word “includes” should not be given a restricted meaning. It would be quite difficult a task for a draftsman to capture all the various acts and circumstances that can give rise to sexual exploitation. Section 141(3) simply provides other types of instances in which sexual exploitation may occur.

[21] Dr. Dorsett did not pursue ground 3 of the notice of appeal in his submissions but the ground was not withdrawn. It is not clear why this ground was included in the notice of appeal because the Appellant is not charged with having unlawful sexual intercourse. The appeal relates to four charges under section 141 of the **Penal Code**. The Court did not receive assistance on this ground and as there is no charge of unlawful sexual intercourse before the Court, I will not express a view on this ground.

[22] I would dismiss grounds 2, 3 and 4 of the notice of appeal.

Ground 1 – Summary judgment

[23] The Appellant complains in ground 1 that the learned judge erred in law in granting summary judgment and summarily dismissing a proceeding for constitutional redress under the **Constitution** contrary to CPR 15.3. This ground is misconceived. The judge had before him an application for interim relief that turned on the interpretation of the provisions of the **Penal Code** which formed the same basis as his constitutional claim. He disagreed with the interpretation sought by the Appellant and dismissed the interim application. In doing so he noted that “...the interim relief claimed may very well bring the proceedings to an end.”⁸ The learned judge was correct in dismissing the substantive

⁸ Page 6 of the transcript

claim as well since the basis for the relief claimed, though more expansive, was the same as in the interim application, only that it is sought on a permanent basis. However, the effect, whether on an interim basis or a permanent basis, was the same, namely, to stay the criminal proceedings. It would be a waste of judicial time to have left the substantive application in abeyance in the circumstances. This decision is justified having regard to the order that this Court proposes to make.

[24] This ground of appeal is also dismissed.

Conclusion

[25] In summary, I find that the Appellant chose the wrong procedure for applying to dismiss the charges. His allegation that the charges are defective in form and substance have been resolved by the learned judge, and now by this Court, as a matter of statutory interpretation. This is the matter that was being dealt by the High Court in the sufficiency hearing. A considerable amount of time and resources have been expended by approaching the Court on a constitutional motion.

[26] The learned judge was correct in the conclusions that he reached and I would dismiss the appeal and order that the matter be remitted to the High Court for the continuation of the sufficiency hearing.

Order

- (1) The appeal is dismissed and the case is remitted to the High Court to continue the sufficiency hearing.

- (2) The parties shall submit written submissions on the issue of the costs of the appeal within 21 days of the date of this order.

I concur.
Janice M. Pereira, DBE
Chief Justice

I concur.
Terrence Williams
Justice of Appeal [Ag.]

By the Court

Chief Registrar