

COURT OF APPEAL SITTING

MONTSERRAT
23rd – 25th June 2014

APPLICATIONS AND APPEALS

Case Name: Charlesworth Piper
V
Montserrat Land Development Authority
[MNIMCVAP2013/0001]

Date: Monday, 23rd June 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal [Ag.]

Appearances:

Appellant:	In person
Respondent:	Mr. Khari Markham

Issues: Whether the learned magistrate erred by granting the attorney for the respondent any further hour and in half to carry out further investigations when both of the appellant's cases were in June 2012 and July 2012 – Whether the learned magistrate erred by saying that the appellant's witness, Mr. Cecil Lake, works for the Government of Montserrat so he has to be permitted to sit in court and hear what the appellant has to say in the matter – Whether the learned magistrate erred in refusing to excuse the same witness for the appellant from the court just before the appellant was ready to call him

Result / Order: [Oral delivery]
1. The appeal is allowed.

2. Matter remitted to be heard de novo by a different magistrate.

Reason:

The Court held that judicial officers must not seek in any respect to treat persons coming before the court any differently. There should be no perception that there is inequality in the treatment of persons coming before the court.

Case Name:

**[1] Denzil Edgecombe
v
[1] The Premier
[2] The Attorney General
[MNIHCVAP2013/0003]**

Date:

Monday, 23rd June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Dr. David Dorsett

Respondent:

Ms. Karen Reid with her Ms. Amelia Daley

Issues:

Whether the learned trial judge erred by refusing to grant leave to file a claim for judicial review to the appellant – Whether there was a delay in issuing the claim for judicial review of the decision of the Government of Montserrat to approve and later ratify a national song for Montserrat after the research process has commenced in 2011, after the song composed by the appellant had been identified as the national song of Montserrat in 1995 – Whether

the initial identification of the song composed by the appellant as the national song in 1995 had been approved and ratified by the Government of the day at the time – Whether a successive Government can change or select another song as the national song of Montserrat – Whether the appellant had a legitimate expectation that his composition which has been unilaterally identified in 1995 as the national song of Montserrat should be selected and ratified by the present Government as the national song of Montserrat after the present Government had recommenced a national song of Montserrat competition in 2011 – Whether the claim for judicial decision review has a reserved has a realistic prospect of success

Result / Order:

Judgment reserved.

Case Name:

**[1] The Attorney General
[2] Planning and Development Authority
[3] Easton Farrell-Taylor (Minister
Responsible for Planning)**

v

**[1] Jon Miller
[2] Steve Price
[3] Andy Burk
[4] Ed Berger
[5] Hank Henry
[6] Eric Tomme
[7] Greg Mehring
[8] Gerry Blomquist
[9] Troy Deppermann
[10] George F. Walker, QC**

[MNIHCVAP2014/0001]

Date:

Monday, 23rd June 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal [Ag.]

Appearances:
Appellant: Ms. Karen Reid with her Ms. Amelia Daley
Respondent: Mr. John Fuller

Issues: Whether the order of the learned trial judge made on 2nd May 2014 which granted permission to the respondent to file an expert report was made in error – Whether the said order granting permission to the respondent to file an expert report was made in breach of the provision of rule 32.6(3)(a) of Civil Procedure Rules 2000 (“CPR 2000”) which prescribes that the application for permission to file an expert report must include the name of the expert and identify the area of expertise of the expert – Whether the said order was made in breach of rule 32.2 of CPR 2000 which requires that expert evidence must be restricted to what is reasonably required to resolve the issues in the proceedings justly – Whether in all circumstances of the case it was reasonably required to have this expert evidence before the court since expert evidence had previously been filed in the matter

Result / Order: [Oral delivery]
1. The application for leave to appeal is treated as the appeal.
2. The appeal is allowed.
3. The matter is remitted to the court below where the respondents shall be at liberty to make an application in accordance with rule 32.6 of the Civil Procedure Rules 2000, for permission to put in an expert report giving full particulars as are required therein, and the court below shall determine the same in accordance with its

case management powers and make any further order as is necessary.
4. There is no order as to costs.

Reason:

The order of the trial judge was not made in full compliance with rule 32.6 of CPR 2000, in that the expert was not named and the area of expertise of the said expert was not identified.

Case Name:

**[1] The Central Tenders Board
[2] The Attorney General
v
[1] Vernon White (trading as White
Construction Services)
[MNIHCVAP2012/0008]**

Date:

Monday, 23rd June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of
Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

**Appellant: Mr. Fitzroy Buffonge
Respondent: Mr. Khari Markham**

Issue:

Whether the appellant fully complied with the order of the court dated 3rd December 2013 granting conditional leave to the appellant to file an appeal with the Judicial Committee of the Privy Council

Result / Order:

**[Oral delivery]
Final leave granted to the appellants to appeal**

to the Judicial Committee of the Privy Council.

Reason:

The Court was satisfied that all the requirements of the order granting conditional leave to the appellant had been met.

Case Name:

**National General Insurance Corporation
(NAGICO) NV
v
Nicholas Francis**

[MNIHCVAP2012/0001]

Date:

Monday, 23rd June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

**Mr. Thomas Astaphan with him Mr. Hogarth
Sergeant**

Respondent:

Mr. Jean Kelsick

Issue:

Application for extension of time to file skeleton arguments

Result / Order:

[Oral delivery]

Consent order:

- 1. The default judgment entered by the Registrar of the High Court on the 22nd day of June 2011 in the claimant's favour in High Court Civil Claim No: MNIHCV2011/0008**

Nicholas Francis v National General Insurance Corporation (NAGICO) NV is hereby varied so that the amount of the default judgment is reduced to fifty thousand dollars (\$50,000.00), this sum representing the full extent of the appellant's statutory liability to the respondent pursuant to section 4(1)(v) of the Motor Vehicles Insurance (Third-Party Risks) Act Cap 07.08.

2. The appellant hereby agrees and undertakes to pay the respondent a further sum of two hundred thousand dollars (\$200,000.00) in fulfilment of the appellant's contractual liability to its insured Nuthan Wallace and in full and final settlement of the respondent's claim in High Court Civil Claim No. MNIHCV2007/0020 Nicholas Francis v Nuthan Wallace, which sum is inclusive of interest and costs.
3. The appellant will therefore pay the global sum of two hundred and fifty thousand dollars (\$250,000.00) to the respondent, which sum is inclusive of interest and costs.

Case Name: **George Leonard**
v
The Commissioner of Police
[MNIMCRAP2013/0001]

Date: **Monday, 23rd June 2014**

Coram: **The Hon. Dame Janice M. Pereira, Chief Justice**
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]

Appearances:
Appellant: **Mr. Hogarth Sergeant**

Respondent: Mr. Sylvester Folorunso

Issues: Criminal appeal – Unlawful assault – Possession of an offensive weapon – Whether the evidence supported the conviction of the appellant by the learned magistrate for the offence of unlawful wounding – Whether the learned magistrate properly addressed the issue of self-defence in the trial – Whether the magistrate properly considered the fact that the appellant was going to look after his animals, therefore it was a natural act of animal husbandry to carry a cutlass or some sharp instrument – Upon the magistrate finding that the appellant was carrying the cutlass for a lawful purpose, whether the conviction of the appellant for the offence of being armed with an offensive weapon with intent to commit a criminal act was wrong having regard to the evidence and the findings of the Magistrate – Whether the words used by the appellant “well come day a me yard a day me want you” was sufficient for the Magistrate to convict the appellant of the offence of using threatening language

Result / Order: [Oral delivery]
1. The appeal is dismissed and the convictions affirmed.
2. The sentences imposed are hereby varied to run concurrently.

Reason: The magistrate heard the witnesses and saw their demeanour. The magistrate was entitled to come to the conclusion that she rejected the defence of self-defence. Based on the evidence and on the law, the Court found that the magistrate properly convicted the appellant for the offences charged.

The Court concluded that unless there are some underlying factual bases relevant to the issue

on which the Court can over-turn the decision of the magistrate, the Court of Appeal would be reluctant to reverse the decision of the magistrate; the Court found no reason to disturb the decision of the magistrate.

In relation to the sentences imposed the Court held that the convictions arose out of the same incident, as such there was no good reason why the sentences imposed should be made to run consecutively.

Case Name: **Montserrat Utilities Ltd.**
v
Mildred Kirwan

[MNILTAP2013/0002]

Date: **Tuesday, 24th June 2014**

Coram: **The Hon. Dame Janice M. Pereira, Chief Justice**
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Kenneth Allen, QC with him Ms Chivone Gerald
Respondent:	Mr. Sylvester Carrott

Issues: **Whether the appellant served the notice of application on the respondent on 10th January 2014 – Whether the application of the appellant filed in June 2014 to strike out the appeal by way of case stated for failure to attach a statement of case to the claim form was reasonable in all the circumstances – Whether the order of the Court of Appeal should be set aside as being obtained by oppression or being**

an abuse of the process of the Court

Result / Order:

[Oral delivery]

- 1. The parties are hereby ordered to file written submissions on the following questions:
 - (i) Whether the Labour Tribunal was correct or incorrect in its conclusion that the provisions of the Labour Code apply to the determination of compensation for unfair dismissal in the circumstances of the instant case.**
 - (ii) Whether the Tribunal had jurisdiction to order compensation set out at the conclusion of the award either individually or collectively.****
- 2. Appellant to file with the court and serve by email written submissions on the above questions by Friday, 20th September 2014.**
- 3. The respondent shall file its written submissions on the above referenced questions with the court and serve if necessary by email on the appellant by Monday, 20th October 2014.**
- 4. Submissions in reply if necessary shall be filed and served in like manner by Monday, 3rd November 2014.**
- 5. Hearing of appeal adjourned to the next sitting of the Court of Appeal in Montserrat during the week of the 24th – 28th of November 2014.**

Case Name:

Montserrat Stationery Centre Ltd.

v

Aileen Ross

[MNILTAP2013/0001]

Date:

Tuesday, 24th June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**

**The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Ms. Marcelle Watts

Respondent: Mr. David Brandt

Issues:

Whether the Tribunal properly considered the reasons for dismissal which would give rise to a right of compensation pursuant to section 11(2) of the Employment Act, Cap. 15.03 – Whether the Tribunal misinterpreted section 11 of the Employment Act, Cap. 15.03 when they took into account all the factors when determining whether the dismissal was fair or unfair – Whether the Tribunal properly considered the facts before it when they determine that the employer has acted unreasonable in all the circumstances – Whether the Tribunal properly addressed the discharged for the burden of proof of the employer pursuant to section 13 of the Employment Act, Cap 15.03 – Whether the Tribunal having concluded based on the evidence that there was misconduct on the part of the respondent erred in law in finding that the dismissal of the respondent was unfair – Whether the Tribunal erred having found that there was a repeated wilful and determined to compliance with the rule by the respondent to determine that her action was not misconduct

Result / Order:

[Oral delivery]

- 1. Appeal allowed.**
- 2. The decision of the Labour Tribunal that the respondent was unfairly dismissed is set aside.**
- 3. No order as to costs.**

Reason:

The Court held that the Labour Tribunal makes critical findings of fact on the complaint or assertion of an employee that she or he was unfairly dismissed. The crux of the matter in

this proceeding was whether the employee/respondent was guilty of misconduct or otherwise.

Section 11(2) of the Employment Act, Cap. 15.03 states that the reasons for dismissal which shall not give rise to a right of compensation are:

- (a) incapability of the employee to do the work he is employed to do;**
- (b) misconduct: Provided that no employee shall be dismissed for a first breach of discipline except in case of gross misconduct;**
- (c) subject to the provisions of section 15 of this Act, where the employee is redundant;**
- (d) any other reason which in the opinion of the Tribunal makes it unreasonable for the employer to continue the employer-employee relationship.**

On page 14 of the Labour Tribunal's decision, the Labour Tribunal found that the respondent established a repeated, determined and wilful obstinacy to compliance with the rule that she should call management at home in the event that she was not able to attend work on any given day. The Tribunal went on to find that her behaviour did not merit termination but some other sanction for her conduct should be imposed. In the opinion of the Court, this was not a case where there was summary dismissal without notice. The respondent had been given warning letters that if she persisted with the noncompliance of the rule to call management at home if she could not attend work on any given day, she would be terminated.

In the opinion of the Court, the question that was posed to the Tribunal was whether or not the failure of the employee/respondent to follow the rules and directions of the business establishment was conduct which could be classified as misconduct. The finding of the Tribunal at page 14 of the decision was critical

therefore in answer to the question.

The Court found that this was not merely a case where the respondent had failed through inadvertent to comply with the rule in place at the appellant's establishment. This was a case where the employee had repeatedly and wilfully decided that she was not going to comply with the rule in place to call the Managing Director at home if she was able to attend work on any given day.

In deciding whether this wilful failure would establish misconduct then, the letter of 18th July 2011 referred to page 13 of the Tribunal's decision that if she did not comply with the directive to call the Managing Director at home if she was unable to attend work on any given day, she would be terminated, placed the respondent on notice that if she did not intend to follow those instructions or management directions, then certain consequences will follow.

That letter coupled with the Tribunal's findings of a wilful obstinacy to comply with the work rule, was therefore sufficient, in the Court's view, to establish a finding of misconduct on the part of the employee/respondent.

In the opinion of the Court, the comparison between the respondent and the other employees with the management rules was not relevant to the question. What was important was what the respondent did as the Head Cashier. The Tribunal found that what the respondent sought to establish as a practice of the establishment that the employees call the work place instead of the Managing Director whenever they were unable to attend work on any given day was not supported on the facts of the case.

Accordingly, the Labour Tribunal erred in arriving at this conclusion which was clearly inconsistent with the findings of fact.

Case Name: **Donaldson Roldon Ellis Romeo**
v
Malverna Rhoda Romeo Nee Lewis

[MNIHCVAP2012/0005]

Date: **Tuesday, 24th June 2014**

Coram: **The Hon. Dame Janice M. Pereira, Chief Justice**
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]

Appearances:

Appellant:	Mr. Jean Kelsick
Respondent:	Mr. Hogarth Sergeant

Issues: **Whether the learned trial judge erred in granting a decree nisi on the ground of the appellant's cruelty when this ground was not pleaded and the decision and the pleadings was not amended either before or at the trial – Whether the court has jurisdiction to grant a decree nisi on the ground of the petitioner's adultery when section 3(1) of the Matrimonial Causes Act, Cap. 5.02 makes it clear that where adultery is being relied on, it must be the adultery of the respondent – Whether the learned trial judge had the jurisdiction to go outside of the pleadings and grant the respondent a decree nisi on the additional ground of the appellant's alleged cruelty which was not pleaded when the petition was not amended in accordance with section 14 of the Matrimonial Causes Rules, 1937**

Result / Order: **[Oral delivery]**

1. Appeal allowed.
2. The decree nisi granted on 1st March 2012 on the grounds of the respondent's own adultery and the cruelty of the appellant which was not pleaded, is hereby set aside.
3. No order as to costs.

Reason:

The Court held that the petitioner's own adultery could not succeed as a matter of law having regard to section 3(1) of the Matrimonial Causes Act, Cap. 5.02 of the laws of Montserrat.

Case Name:

Sean Knights

v

The Queen

[MNIHCRAP2013/0003]

Date:

Monday, 23rd June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. David S. Brandt

Respondent:

Mr. Oris Sullivan

Issues:

Criminal appeal – Unlawful wounding

Result / Order /

[Oral delivery]

Reason:

Appeal struck out for want of prosecution.

Case Name:

**Marie Ryan
v
Mervin Browne**

[MNIMCVAP2012/001A]

Date:

Wednesday, 25th June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Ms. Marcelle Watts

Respondent:

Ms. Chivonne Gerald

Issues:

Whether the learned magistrate erred in adjourning the application of the appellant for the enforcement of maintenance arrears to December 2012 – Whether the learned magistrate erred in varying the order of maintenance entered by consent in June 2011 for the payment of EC\$700.00 monthly downwards to EC\$500.00 monthly without documentary evidence establishing the change in circumstances of the respondent – Whether the learned magistrate erred in not allowing the clerk of the magistrate's court to give evidence on oath of the non-payment of the maintenance sums by the respondent

Result / Order:

[Oral delivery]

- 1. Appeal is allowed. The order of magistrate refusing to hear the application of the appellant for enforcement of outstanding arrears is set aside.**
- 2. The magistrate is hereby ordered forthwith to fix a date for the hearing of the application for enforcement of the outstanding arrears of maintenance payments no later than 29th**

August 2014.

- 3. The variation order is also hereby set aside and the consent order is hereby reinstated.**
- 4. The Registrar is ordered to serve a copy of the order on the magistrate no later than Friday, 11th July 2014.**
- 5. The respondent is to pay the costs of the appeal in the sum of \$1,500.00 by 18th July 2014.**

Reason:

Section 53 of the Magistrate's Court Act, Cap. 2.02 does not prescribe that only the mother of the minor child can give evidence about the arrears of maintenance payments. Accordingly, the magistrate erred in not allowing the clerk of the magistrate's court to give this evidence.

Further, the variation order made by the learned magistrate varying the payment of maintenance of the minor child downwards from EC\$700.00 to EC\$500.00 monthly, was made without documentary evidence establishing a change in circumstances of the appellant.

Case Name:

Samuel White

v

Kathleen Greenaway (by her agent Caleb Greenaway)

[MNIMCVAP2013/0002]

Date:

Wednesday, 25th June 2014

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

**The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

In person

Respondent: Ms. Marcelle Watts

Issues: Civil appeal – Landlord and tenant – Notice to quit – Mesne profits

Result / Order: [Oral delivery]

1. The judgment of the magistrate is affirmed in respect of the payment by the appellant to the respondent of the sum of \$1,500.00 for arrears of rent in the sum of \$1,500.00.
2. The matter be remitted for hearing by another magistrate in relation to the following issues : (i) whether the appellant had received a notice to quit from the respondent for him to quit the rented premises by 31st December 2012; (ii) whether the appellant did quit the premises by that date; (iii) whether the appellant is liable to pay mesne profits and if so for what period and at what rate.
3. There be no order as to costs on the appeal.

Reason: The learned magistrate held that she could not make an order for possession in the absence of the notice to quit being put into evidence yet made an order for mesne profits. Mesne profits are in the nature of compensation payable to the former landlord by a former tenant who holds over after the termination of his tenancy. As an order for possession can only be made after the expiry of a notice to quit, if the magistrate was not satisfied that there was a notice to quit and made no finding otherwise that the tenancy had been determined thereby bringing to an end the appellant's legal right to occupy the rented premises, it follows that she could not be satisfied that a liability to pay mesne profits had arisen. This is moreso in light of the amendment to the claim which suggested that the tenancy had ended since 31st December 2011 so that mesne profits, if any, should have been payable for 20 rather

than 8 months.

The learned magistrate issued a written ruling but did not seek to justify her conclusion concerning the award of mesne profits nor did she make a finding that the tenancy had been determined. In the circumstances, the award of mesne profits cannot stand. However, if the tenancy had not been determined, the respondent would have been entitled to further arrears of rent. If on the other hand, the tenancy had been determined and the appellant had quit the premises, of which there was no evidence or finding by the magistrate, neither rent nor mesne profits would arise.

While there was no ground of appeal that the award of mesne profits was inconsistent with the lack of a conclusive finding with respect to the notice to quit or termination of the tenancy, the Court was inclined to consider the fact that the appellant, who has no formal training in law, represented himself in the court below and in this Court, and was prepared to allow his notice of appeal to be amended accordingly to raise this ground of appeal which the Court upheld.

Case Name:

Terrence Abdulla Charles

v

The Queen

[BVIHCRA2013/0011]

Territory of the British Virgin Islands

(VIDEOCONFERENCE)

Date:

Wednesday, 25th June 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of
Appeal**

**The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

Appellant: In person with McKenzie friend Mr. Warren Cassell

Respondent: Ms. Tiffany Scatliffe

Issues:

Criminal appeal – Murder

**Result / Order /
Reason:**

[Oral delivery]

Appeal adjourned to the next sitting of the Court of Appeal in Montserrat during the week of the 24th to 28th November 2014 as the appellant was not served with the respondent's written submissions.