

COURT OF APPEAL SITTING

MONTSERRAT

5th – 7th December 2011

JUDGMENTS

Case Name: Cukurova Finance International Ltd et al v
Alfa Telecom Turkey Limited
[High Court Civil Appeal No. 18 of 2010]
[High Court Civil Appeal No. 24 of 2010]

Date: Monday, 5th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellants:	Ms. Yvonne Gerald holding for the appellants'/applicants' legal representatives
Respondent:	Mr. Khari Markham holding for the respondent's legal representatives

Issues: Civil appeal – Appeal to Her Majesty in Council – Stay of execution of order of the Court of Appeal under section 7 of the Virgin Islands (Appeals to Privy Council) Order 1967 and section 39 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 – Whether the inherent jurisdiction of the Court of Appeal to stay execution and grant or continue an injunction may be exercised upon giving conditional leave to appeal to Her Majesty in Council – Whether the declaratory orders effectively granted by the Court of Appeal to the respondent can be stayed

Result and Reason: Held: granting conditional leave to appeal to Her Majesty in Council against the final decision in Claim No. BVIHC (COM) 2007/072; staying paragraphs (7C),

(7D) and (8) of the reliefs granted to the in this said claim; making a conditional injunctive order in the terms set out in paragraph 46 below pending the appeal; ordering that the costs of the application for conditional leave to appeal be costs in the appeal; and ordering that the costs in the application for stay be costs to the respondent to be paid by the appellants/applicants and if not agreed, to be assessed, that:

- 1. There is no longer any room for successfully arguing that the code of procedure for appeals to the Privy Council constituted by the Virgin Islands (Appeals to Privy Council) Order 1967 and the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (“the 2009 Judicial Committee Order”), has impliedly and altogether excluded the Court of Appeal’s inherent jurisdiction to stay an order of its own and continue or grant an injunction pending an appeal to the Privy Council, where to do otherwise may render the appeal, if successful, nugatory. There now exists a provision in section 39 of the 2009 Judicial Committee Order, which specifically recognizes the existence of that inherent jurisdiction and empowers the Court of Appeal to stay the order appealed from and grant an injunctive order, or continue or discontinue an injunctive order made in the court below.**

Commissioner of Police and another v Bermuda Broadcasting Co. Ltd. and Others [2007] UKPC 46; Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment of Belize and another [2003] 1 W.L.R. 2839; In re CVC Opportunity Equity Partners Ltd. [2000] CILR 320 considered.

- 2. A declaratory judgment cannot be stayed since it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against an appellant/applicant. Although the declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, in the meantime there is no enforcement nor any claim to it. The Court of Appeal made no**

determination of the rights of the parties requiring enforcement by making the declarations sought by the respondent in Claim No. BVIHC (COM) 2007/072 and the appellants' /applicants' application for stay in relation to those declarations must be refused.

3. The appellants/applicants have shown that their proposed grounds of appeal to the Privy Council are reasonable and that they have an arguable case. The Court should refrain from speculating on the appellants'/applicants' prospects of success on those proposed grounds. Having weighed and considered the balance of convenience and the competing rights of the parties, it appears that there is a risk that if a stay of paragraphs (7C), (7D) and (8) of the reliefs granted to the respondent is not granted, the appeal will prove abortive if the appellants/applicants succeed. Consequently, those paragraphs should be stayed pending the appeal to Her Majesty in Council.
4. The appellants/applicants have demonstrated that the undertakings offered by the respondent are inadequate to ensure that the respondent will not deal with the charged shares while the appeal is pending, in a manner that will prejudice the interests of the appellants/applicants. In the event that this occurs, damages would in fact not be an adequate remedy. However, since a stay will cause the appellants/applicants to retain control over the charged shares while the respondent will be out of money under the loan facility, then if the appellants/applicants succeed in their appeal, they will be bound to pay over to the respondent a sum as previously tendered by them in May 2007.
5. The injunction should continue therefore in the terms expressed in paragraph 2(1) to (8) of the Draft Order filed on 13th September 2001, subject to the condition that appellants/applicants pay into court the sum of US\$1,446,824,709.42 which was previously tendered by them to the respondent in payment or part payment of the loan.

APPLICATIONS AND APPEALS

Case Name: Grace Duberry v Ann Allen
[High Court Civil Appeal No. 9 of 2008]

Date: Monday, 5th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. John Kelsick
Respondent:	Mr. David Brandt

Issues: Administration of Estates – Trust – Succession –
Vesting of property to beneficial owners – Costs
awarded in court below

Result and Reason: [Oral delivery]
The appeal is stood down to tomorrow Tuesday, 6th December 2011, for counsel for the appellant and respondent to have further discussions regarding the vesting of the relevant property which is the subject of the appeal and the question of costs awarded in the court below.

Case Name: Muriel Rose Green v Constance Mason
[High Court Civil Appeal No. 1 of 2011]

Date: Monday, 5th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]

The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jean Kelsick

Respondent: Mr. Kharl Markham

Issues:

Whether hearing in court below determined application before the court on its merits – Court order at variance with reasons for decision

Result / Order:

[Oral delivery]

- 1. The appeal is allowed.**
- 2. The Order made on 26/05/11 is set aside.**
- 3. The application filed on 30/03/11 is remitted to the Court below to be determined on its merits before a different judge.**
- 4. There is no order as to costs.**

Reason:

The learned judge's reasons for the decision filed on 21st September 2011 did not correspond with the learned judge's order made on 26th May 2011. The application and the internal contradictions showed that the learned judge failed to determine the application filed on 30th March 2011, before dismissing it.

Case Name:

Keithroy Lloyd v The Queen
[High Court Criminal Appeal No. 2 of 2011]

Date:

Monday, 5th December 2011

Coram:

The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. David Brandt

Respondent: Ms. Kathy-Ann Pyke, Director of Public Prosecutions,
and Mr. Oris Sullivan, Senior Crown Counsel

Issues: Criminal appeal against conviction – Rape –
Summation of judge to jury – Misdirection by the trial
judge to jury – Inadmissible hearsay evidence –
Prosecutorial misconduct – Prosecution using
emotive language when addressing jury – Sentencing
– Whether the Court should consider the proviso in
the circumstances – Alternative verdict – Power of
Court of Appeal to substitute sentence under section
40(2) of the Supreme Court Act

**Result / Order
and Reason:** [Oral delivery]
1. Upon no objection by the DPP, leave is granted to
appellant to amend the grounds of appeal.
2. Decision of the Court is reserved for tomorrow
Tuesday, 6th December 2011.

Case Name: Reginald Simon v The Commissioner of
Police
[Magisterial Criminal Appeal No. 1 of 2011]

Date: Tuesday, 6th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Kharl Markham

Respondent: Ms. Kathy-Ann Pyke, Director of Public Prosecutions

Issues: Magisterial criminal appeal against conviction –
Driving a motor vehicle without due care and
attention – Inferences which the learned magistrate
could reasonably have drawn having considered all

the evidence in the case – Whether the magistrate could have properly reached a finding of guilt beyond reasonable doubt in the circumstances

Result / Order:

[Oral delivery]

1. The appeal is allowed.
2. The conviction and sentence are quashed.

Reason:

The Court noted that the learned magistrate's finding of guilt was founded on her determination that, having considered all the evidence, the court could not but prefer the evidence given by the prosecution, and she found that the appellant departed from the standard of driving which would be exercised by a reasonable, prudent and competent driver in all the circumstances of the case.

The Court held that the problem with this determination was that the only evidence of the prosecution which the learned magistrate could prefer over the evidence of the appellant was the prosecution's evidence of the nature of the damage to the vehicle and the path taken and damage inflicted by the vehicle when it left the road. But that this constituted evidence of want of care by the appellant was only an inference that could be drawn by the learned magistrate; there were other inferences which the learned magistrate could reasonably have drawn and she ought to have drawn the inference most favorable to the appellant. When the appellant did present in his evidence an alternative view of how the damage to the vehicle and other post-collision issues came about, then the magistrate could not have reached a finding of guilt against the appellant beyond reasonable doubt.

Case Name

**Keithroy Lloyd v The Queen
[High Court Criminal Appeal No. 2 of 2011]**

Date:

Tuesday, 6th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. David Brandt

Respondent: Ms. Kathy-Ann Pyke, Director of Public Prosecutions
and Mr. Oris Sullivan, Senior Crown Counsel

Issues: Criminal appeal against conviction and sentence – Rape – Unlawful carnal knowledge – Section 40(2) of the Supreme Court Act, Cap. 2.01, Revised Laws of Montserrat 2008 – Substitution of an alternative verdict by the Court of Appeal – Section 39(1) of the Supreme Court Act – Corroboration – Prosecutorial misconduct – Defence put forward in conflict with defence counsel’s statement of the defence – Whether the trial judge erred in allowing hearsay evidence to be left to the jury at trial – Whether the trial judge erred in not giving adequate directions to the jury during his summing-up

Result / Order: [Oral delivery]
1. A verdict of guilty of unlawful carnal knowledge is substituted for the verdict of guilty of rape found by the jury.
2. The appellant is sentenced to 2 years imprisonment effective from this date, and the period of 4 months and 5 days which the appellant has spent in custody pending the determination of this appeal is to be subtracted from the period of 2 years.

Reason: The Court found that there were material irregularities and errors which would impact on the appellant’s conviction for rape. Furthermore, it would have been open to a jury properly directed to properly find that the appellant did have sexual intercourse with the virtual complainant, but that the virtual complainant may have consented to sexual intercourse. Consequently, there would be no miscarriage of

justice if the Court were to substitute a verdict of guilty of unlawful carnal knowledge for the verdict of guilty of rape found by the jury at the trial.

With regard to the appellant's sentence, the Court held that a sentence of 2 years was appropriate for the offence of unlawful carnal knowledge, having taken into account the aggravating and mitigating factors in the case, including the time that the appellant had spent in custody, pending the hearing of the appeal.

Case Name	Kenroy Hyman v The Commissioner of Police [Magisterial Criminal Appeal No. 2 of 2011]
Date:	Tuesday, 6th December 2011
Coram:	The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.] The Hon. Mr. Francis Belle, Justice of Appeal [Ag.] The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Kharl Markham
Respondent:	Ms. Kathy-Ann Pyke, Director of Public Prosecutions and Mr. Oris Sullivan, Senior Crown Counsel
Issues:	Unlawful assault – Self defence – Whether the magistrate erred in law on the issue self defence – Whether the burden of proof shifted from the prosecution to the defence when self defence was raised by the appellant
Result / Order:	The decision is reserved.

Case Name	William White v Vanessa White as lawful
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**attorney of Fitzroy Neale
[Magisterial Civil Appeal No. 1 of 2011]**

Date: Tuesday, 6th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jean Kelsick

Respondent: Mr. Kharl Markham

Issues: Rent – Increase in rent – Frustration – Force majeure
– Authority – Whether power of attorney had retroactive effect

Result / Order: By Consent of the parties in the appeal:
1. The appellant do pay to the respondent the sum of \$1500 in damages.
2. No order made as to costs.

Reason: (The parties consented to the making of the order)

Case Name: Grace Duberry v Ann Allen
[High Court Civil Appeal No. 9 of 2008]

Date: Tuesday, 6th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. John Kelsick

Respondent: Mr. David Brandt

Issues: Administration of Estates – Trust – Succession – Vesting of property to beneficial owners – Costs awarded in court below

Result / Order: [Oral delivery]
1. The appeal against the court order made by Leigertwood-Octave J. in the judgment delivered on 17/10/08 is allowed and the costs order made at paragraph 56(2) for the claimant to pay the defendant's costs in the sum of \$14,000.00 is set aside.
2. No order as to costs in the appeal.
3. By consent of the parties it is ordered that the respondent do transfer Parcel 233 Block 14/4, St. John's Registration Section to the appellant Grace Duberry and Parcel 235 Block 14/4, St. John's Registration Section to Mary Blake.

Case Name: Fitzroy Farrell v The Commissioner of Police
[Magisterial Criminal Appeal No 1 of 2011]

Date: Tuesday, 6th December 2011

Coram: The Hon. Mde. Ola Mae Edwards, Chief Justice [Ag.]
The Hon. Mr. Francis Belle, Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. David Brandt
Respondent: Ms. Kathy-Ann Pyke, Director of Public Prosecutions

Issues: Dogs Act, Cap. 9.07, Revised Laws of Montserrat 2008 – Destruction of dog – Preconditions to be satisfied before magistrate can make an order for the destruction of dog – Whether the magistrate erred in law

Result / Order: [Oral delivery]

1. The Appeal is allowed and the order made on 09/06/11 that the said black dog be destroyed by the Government Veterinary Officer forthwith is set aside
2. No order as to costs.

Reason:

Before a magistrate can exercise his/her discretion and make an order for a dog to be destroyed under section 12 of the Dogs Act, there must be evidential proof beyond a reasonable doubt:

- i) properly identifying the dog and its owner;
- ii) that the said dog was at large in a public road, street, alley, thoroughfare, open space or other place; or
- iii) that the said dog had attacked, worried or put in fear a person, horse or other animal; and
- iv) that a previous complaint in respect of the said dog was made against the dog's owner under section 12 of the Dogs Act.