

MONTserrat

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO.2 OF 2003

BETWEEN:

BRIAN CAVANAUGH

Appellant

and

COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Justice Albert Redhead

Justice of Appeal

The Hon. Mr. Justice Brian G.K. Alleyne, SC

Justice of Appeal

The Hon. Mr. Justice Michael Gordon

Justice of Appeal [Ag.]

**Appearances:**

Mr. David Tuitt for the Appellant

Mrs. Esco Henry-Greer, Attorney-General for the Respondent

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2003: September 23;  
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**JUDGMENT**

[1] **ALLEYNE, J.A.:** The island of Montserrat is a British Dependent Territory. In the year 1995 there occurred on the island a serious volcanic eruption, causing a number of deaths and very severe destruction of property in the entire south of the island, which had to be evacuated. The majority of the residents of Montserrat have relocated to other islands in the Caribbean, to the U.K. and to other countries. The remaining population has been relocated to the north of the island, known as the safe zone.

[2] Under the Leeward Islands (Emergency Powers) Order in Council 1959 (1959 no. 2206), the Governor of Montserrat made the Emergency Powers Regulations

1996, S.R.O. 26 of 1996. Regulation 5 of the Regulations provides in part as follows;

5. (1) The Governor may by Order declare an area to be an unsafe area and may, in that Order direct that all unsafe areas be evacuated by a specified time and in accordance with specified procedures.

(2) Any person who without proper authorisation –

- (a) enters an unsafe area; or
- (b) is found in an unsafe area; or
- (c) being in an unsafe area fails or refuses to leave that area,
- (d) commits an offence and is liable on summary conviction to a fine of \$2000.00 but which shall not be less than \$200.00 or to a term of imprisonment of six months.

[3] The appellant Brian Cavanaugh owns a dwelling house at Logwood Road, Old Towne, Montserrat. In October 2002, while he was at his house, the Commissioner of Police came to the house and informed him that he was in the exclusion zone, and that he should leave. Shortly thereafter he left the island, and returned on 19<sup>th</sup> December. On 20<sup>th</sup> December he called the Commissioner of Police and informed him of his presence. He told him he would like to occupy his house for the holidays. The Commissioner told him that the house was still in the exclusion zone, but that Mr. Cavanaugh could go in between 9.00 a.m. and 2.00 p.m.. On 23<sup>rd</sup> December Sergeant Brade met Mr. Cavanaugh at his house and told him it was an offence to be in the exclusion zone, and requested him to leave. Mr. Cavanaugh requested the officer's name, which the officer gave. Mr. Cavanaugh then walked away. On the following day, 24<sup>th</sup> December, the police again found Mr. Cavanaugh at the house, and arrested him. They subsequently charged him with the offence of which he was convicted and has appealed.

[4] Mr. Cavanaugh was charged that he

on the 24<sup>th</sup> December 2002 at Old Towne, in Montserrat, without proper authorisation was found in an area to wit, Old Towne, contrary to section 5(2)(b) of the Emergency Powers Amendment Regulation 1997 made by the Governor under section 03 of the Leeward Island Emergency Powers Order in Council 1959 No. (2206) SRR&O No. 14 of 1997 as amended by

Statutory Rules and Orders No. 53 of 1997 as amended by Emergency Powers Order 2002 SR&O No. 49 of 2002.

[5] He was convicted of the offence on 23rd January 2003, and fined \$1000.00 to be paid in 14 days in default to be imprisoned for 30 days. He has appealed against this conviction and sentence on the following grounds;

1. that inadmissible evidence was admitted by the court and there is not sufficient admissible evidence to sustain the conviction after rejecting the inadmissible evidence.
2. that the decision is unreasonable and cannot be supported having regard to the evidence.
3. that the decision was erroneous in point of law in that the learned magistrate used the rule of judicial notice to introduce evidence which could not properly fall under this head.
4. that the judgment given or order was based on the wrong principle or was such that the court viewing the circumstances reasonably could not properly have so decided.

[6] For a proper appreciation of the issues in this appeal certain legislative provisions must be examined in some detail. I look first at the Emergency Powers Regulations SR&O 26 of 1996. Regulation 5 is in the following terms;

5. (1) The Governor may by Order declare an area to be an unsafe area and may, in that Order direct that all unsafe areas be evacuated by a specified time and in accordance with specified procedures.
- (2) Any person who without proper authorisation –
  - (a) enters an unsafe area
  - (b) is found in an unsafe area; or
  - (c) being in an unsafe area fails or refuses to leave that area,
  - (d) commits an offence and is liable on summary conviction to a fine of \$2000 but which shall not be less than \$200 or to a term of imprisonment of six months.

- (e) For the purpose of paragraph (1) "proper authorisation" means authorisation issued by or on behalf of the Governor or the Police Commissioner.
- (f) A police officer may, in an unsafe area, arrest any person reasonably suspected of committing an offence under paragraph (2).
- (g) Notwithstanding the description of an unsafe area specified in an Order made under this Regulation, a police checkpoint established in respect of an unsafe area shall be deemed to be located on the perimeter of that unsafe area and a person who crosses that checkpoint without proper authorisation so to do commits an offence and is liable on summary conviction to a fine of \$2,000 or to a term of imprisonment of six months.
- (h) And Regulation 2 provides the following definitions;

"order" means an order published at the notice board located at the Salem Police Station or at the Cudjoe Head Police Station, or where in the circumstances such publication is not expedient, to give directions through the media or otherwise, orally or in writing or by any method which is expedient in the circumstances.

"unsafe area" mean an area declared by the Governor under Regulation 5 to be an area in which a person is likely to suffer damage or injury through seismic activity.

[7] The Emergency Powers (Unsafe Areas) Order 2002, paragraphs 2 and 3 reads as follows;

- 2. DESIGNATION OF UNSAFE AREAS: Notwithstanding anything contained in the Emergency Powers (Unsafe Areas) Order 1998 the unsafe areas shall be –
  - (a) All that area located south of a line, shown for descriptive purposes only on the plan annexed hereto, running from a point commencing from the northernmost part of the runway of W.H. Bramble Airport and continuing westward to the road at Mournful Ghaut to the point where it is

gated and thereafter to a point bisecting the Belham Valley northwest of Molyneux and continuing westward along the Belham Valley to Belham Bridge and thereafter west south west to the sea; and

- (b) The area commencing from the mouth of the ghaut at Lime Kiln Bay south-eastwards along the ghaut to the roundabout in Old Towne; and from there eastward along the Logwood Drive to Olveston House; then continuing eastwards to the Happy Hill / Friths Main road junction; and from there south-eastwards to the Water Works Estate.

- 2. DAYTIME OCCUPATION OF UNSAFE AREAS:
- 3. Notwithstanding anything to the contrary in this Order entry to the area hereinafter described shall be allowed with the express written permission of the Commissioner of Police between the hours of 6.00 a.m. to 6.00 p.m. each day.
- 4. The areas aforesaid encompass all those areas –
  - (a) shown for descriptive purposes only as the Day Time Entry Zone on the plan annexed hereto;
  - (b) described in paragraph 2(b); and
  - (c) north and west of a line running eastwards from Sturge Park to the southern base of St. Georges Hill but excluding Lovers Lane and then northwards past the ghaut at Lees road at the point marked by the notice prohibiting unauthorised access, and continuing to a point bisecting the Belham Valley northwest of Molyneaux.
  - (d) The Commissioner of Police may from time to time and as and when he thinks it necessary restrict the entry to the Day Time Entry Zone permitted by this Regulation.

[8] Annexed to and forming part of the SR&O is a plan or map of Montserrat dated 12 April 1999 demarcating areas shown respectively as the Exclusion Zone, within the Exclusion Zone the Day time Entry Zone, and the Northern Zone. This is the plan or map referred to "for descriptive purposes only" in Regulations 2 (a) and 3 (2)(a). Old Towne is shown on that map as located some distance north of the line demarcating the Exclusion Zone (and the Day time Entry Zone), and well within the Northern Zone. Apart from Old Towne, none of the locations mentioned in Regulation 2 (b) is shown on the map, which consequently is of no assistance in determining the precise boundaries of the unsafe area established by the Emergency Powers (Unsafe Areas) Order 2002, Regulation 2(b), the area within which the Crown alleges that the appellant committed the offence of which he has been convicted. The respondent needed to establish that the appellant was within the said area by other evidence. The first three grounds of appeal concern precisely this matter.

[9] The unsafe area in Regulation 2(a) is described as being south of the described line. In Regulation 2(b) the dividing line is defined as commencing at the mouth of the ghaut at Lime Kiln Bay, south-eastwards along the ghaut to the roundabout in Old Towne; from there eastwards. The learned magistrate stated in his reasons for decision that evidence from the police indicated that Old Towne was designated an unsafe area. That is not strictly correct. It appears that only parts of Old Towne were so designated. In any event the mere contention by the police would not in itself be sufficient to establish that fact. However, the magistrate stated further that the prosecution contended that the appellant's house was in the exclusion zone because it was approximately 110 yards west of the Old Towne roundabout. Assuming that the unsafe zone was south of the dividing line, that is not an unreasonable contention. It is a matter of common knowledge, borne out by the map annexed to the Order, that the volcano, and the unsafe zone, is in the south of the island, and that the north is the part of the island to which the population has been relocated from the unsafe area. It would therefore be safe, in my view, to make the assumption that the intention of the Order was to declare the

area south of the line as unsafe. The court would give effect to this clear intention, as the magistrate appears to have done when he held that all the area to the right or south of the ghaut falls in the unsafe zone. In my view the learned magistrate was also not wrong in taking judicial notice of what he held to be common knowledge, that the only ghaut which comes up from the sea at Lime Kiln is north of the entire Old Towne district. He was entitled, in the words of *Halsbury's Laws of England* fourth edition, volume 17 paragraph 573 under the rubric *Notorious facts*, to act upon his general knowledge of local affairs. In stating that the house was "right and south of the ghaut", the magistrate was in my view drawing a conclusion from the evidence of Sergeant Brade that it was west of the roundabout, and what he held to be common knowledge as to the location of the ghaut in relation to the Old Towne district. West of the roundabout would, in those circumstances, necessarily be south of the ghaut. What is more, at page 14 of the record the appellant in his evidence spoke of a "Government house next to me to the north towards the roundabout". That tends to confirm the conclusion that the appellant's house is south of the line demarcating the unsafe area.

- [10] The learned Attorney-General for the respondent submitted, and I agree, that the appellant admitted being "in the zone" "during the proper times that we were allowed ... of 9.00 and 2.00 p.m.", and further "I was in my house during the prescribed times. I think this was an unfair arrest."
- [11] Learned counsel for the appellant contended that the consequence of the Governor's failure to specify the time and procedure for evacuation in the Order as provided by Regulation 5 of the Emergency Powers Regulations 1996, is that evacuation cannot be enforced. The provision for evacuation is permissive, and the Governor is required to exercise a discretion as to whether the situation that exists requires mandatory evacuation, or some lesser action, such as a warning to the residents of the area of the danger of damage or injury from seismic activity. In this regard, learned counsel laid emphasis, not only on the permissive nature of the language in Regulation 5, but also on the definition of "unsafe area" in

Regulation 2. This definition does not in itself presuppose evacuation, but relates to the likelihood of damage or injury from what may be a more or less intense level of seismic activity. Counsel contends that there may well be levels of activity which warrant a warning but would not call for evacuation, and that this judgment is within the competence of the Governor, who must exercise a discretion.

[12] Section 65 of the Montserrat Constitution Order 1989 gives limited immunity to things done under the authority of any regulation made under *inter alia* the Leeward Islands (Emergency Powers) Order in Council 1959, which may be in contravention of certain constitutional protections including the protection from deprivation of property under section 64 of the Constitution. Nevertheless, section 64, as well as section 58, of the Constitution illustrate the importance which the law of Montserrat gives to property rights. Limitations on the right to occupy one's home will not be readily conceded, and legislative or executive incursions on that right will only be upheld if stated in clear terms.

[13] I agree with learned counsel for the appellant that the Emergency Powers Order 2002 does not by its terms "direct that all unsafe areas be evacuated by a specified time and in accordance with specified procedures" as permitted by the Emergency Powers Regulations 1996, under which Regulations the Governor made the Emergency Powers Order 2002. It follows, in my view, that neither the Governor nor the Commissioner of Police had lawfully assumed the power to enforce evacuation of householders in the unsafe area.

[14] The appellant, in those circumstances, would not have required special authorisation to enter or be in his home at the relevant time, could not be subjected to a mandatory requirement to leave the area, and therefore could not be properly convicted of the offence under Regulation 5(2) as charged. I do not agree with the learned Attorney-General that it is an offence to be in an unsafe area, and that it is not necessary that an evacuation order be made under section 5(1) of the Emergency Powers Regulations in order for section 5(2) to come into

play. To hold otherwise would be to deprive of all meaning the specific statutory provision in section 5(1) empowering, but not requiring, the Governor to direct that all unsafe areas be vacated by a specified time and in accordance with specified procedures.

[15] Learned counsel for the appellant submitted that the learned magistrate was wrong in law to rely on the Emergency Powers Order 2002, because that Order had not been admitted into evidence in accordance with the Statutory Instruments Act 1946, section 3(2). However, learned counsel did not raise that objection at trial, and indeed he referred in some detail in the no case submission which he made at the close of the prosecution's case to the Order. He relied on the terms of the Order.

[16] In response to counsel's submissions on the point, learned counsel for the respondent relied on the terms of section 23(4) of the Interpretation Act, which provides that judicial notice shall be taken of a copy of any instrument of subsidiary legislation bearing on its face a certificate of a public officer that the instrument has been published by exhibition in accordance with the section. However, the learned Attorney-General for the respondent was unable to show that such a copy was in evidence before the court. Nevertheless, I am of the view that the appellant having failed to take the point at trial, he should not be permitted to rely on it on appeal.

[17] For the reason that the Emergency Powers Order No. 49 of 2002 made no provision and contains no direction in respect of the evacuation of persons from the unsafe area, I hold that the appeal succeeds, and I would therefore quash the conviction and sentence. I make no order as to costs.

**Brian G. K. Alleyne, SC**  
Justice of Appeal

I concur.

**Albert Redhead**  
Justice of Appeal

I concur.

**Michael Gordon**  
Justice of Appeal [Ag.]