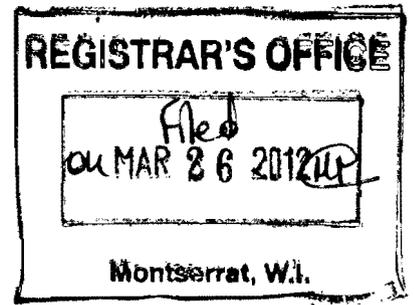


EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
MONTSERRAT
CLAIM NO. MNIHCV2005/0006



BETWEEN:

ROBERT MC EWAN

Claimant

AND

THE COMMISSIONER OF POLICE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Appearances:

Mr. David Brandt for the Claimant.

Ms. Shauna Griffith for the Respondents.

2009: October 12;

2012: March 09.

JUDGMENT

Introduction

[1] On 18th May 1995, Robert McEwan ["Mr. McEwan"] was charged with intent to defraud the Inland Revenue Department by presenting a forged document. The matter had not been tried when he filed an Originating Motion on 23rd February 2005 against the Commissioner and the Attorney General ["the Respondents"], alleging that the Crown had failed to bring the matter to trial and that

his right to a fair trial within a reasonable time by an independent and impartial Court, as provided by Section 57[1] of the Constitution of Montserrat¹ ["the Constitution"], had been infringed.

[2] Mr. McEwan has sought a declaration that his constitutional rights have been violated. Additionally, he has sought the dismissal or stay of the forgery charge, the dismissal or stay of the Learned Magistrate's order that the cash bond that he paid be forfeited and the vacation of the summons issued by the Learned Magistrate for his arrest.

[3] The trial of this claim was an example of the use of the provisions of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000, which allows the Court to use technology to take evidence from witnesses who are unable to travel into the jurisdiction for the trial. Both Mr. McEwan and Senior Magistrate His Worship Clifton Warner ["the Senior Magistrate"] gave their evidence via video conference from the United States and the Turks and Caicos Islands respectively.

Significant events

[4] In my view, it would be helpful if the significant events in this case are listed sequentially, as gleaned from the evidence of Mr. McEwan, his witness Mr. John Kelsick ["Mr. Kelsick"], who represented him at some stages of the proceedings and the Senior Magistrate Clifton Warner ["the Senior Magistrate"], who testified on behalf of the Respondents, as the custodian of all magisterial court records.

[5] On 18th May 1995, Mr. McEwan was charged with the intent to defraud, he forged a document to the Inland Revenue Department purporting to be signed by Eileen Murrain, Manager RBC, contrary to Section 24[1] of the Penal Code.

[6] On 24th May 1995, Mr. McEwan appeared before the Learned Magistrate and was granted bail on his own recognizance in the sum of \$30,000.00 cash bond payable by 25th May 1995. He posted the bond as ordered.

¹ Cap. 01.01 of the Revised Laws of Montserrat

- [7] The Magistrate subsequently granted permission to Mr. McEwan to travel out of Montserrat for medical treatment. McEwan returned to the island for a hearing of his case scheduled for 27th July 1995, which did not come off because the Prosecution was not ready. On the Prosecution's application, the matter was adjourned to 29th September 1995.
- [8] In August 1995, Mr. McEwan applied to the Magistrate to leave Montserrat once again for medical attention abroad. The application was granted and the recognizance was enlarged by the amount of \$20,000.00 to \$50,000.00. He paid the \$20,000.00 cash bond on 14th August 1995. The Recognizance, which was exhibited by the Senior Magistrate, indicates that Mr. McEwan was bound over on his own recognizance to appear before the Magistrate on 6th October 1995.
- [9] When Mr. Mc Ewan left Montserrat in August 2005, he did not provide Mr. Kelsick with any details of his whereabouts neither did he provide him with any contact information. The Magistrate's Court record disclosed that there was no mailing address or other contact information for Mr. McEwan except through his lawyer, Mr. Kelsick.
- [10] Mr. McEwan deposed as to matters related to happenings in Montserrat in 1995 in this way:
"In 1995 during the height of the volcanic eruptions the then Governor Mr. Anthony Savage informed the residents of Montserrat that all those who did not feel safe on the island should leave and those abroad [and] did not feel safe should not return. I was afraid of the volcano."
- [11] On 6th October 1995, the matter was adjourned. Mr. McEwan did not appear.
- [12] Mr. McEwan's evidence is that 8th December 1995 was the next date set down for the matter but he was not notified.
- [13] The Magistrate's court records show that matter was adjourned to 1st February 1996, and adjourned sine die in Mr. McEwan's absence.
- [14] The matter was then called on 16th February 1996 when Mr. Kelsick appeared for Mr. McEwan. Mr. McEwan himself did not appear, although a summons had been served on his solicitor for him to appear. Mr. Kelsick insisted in cross-examination that he had informed the court that Mr.

McEwan was overseas due to illness but although he had received certain information he had first-hand knowledge that he was too ill to travel. The matter was adjourned to 22nd February 1996.

[15] Mr. Kelsick testified that he stopped representing Mr. McEwan some time after February 1996 because he had not heard from him and there was the question of his fees. He however recalled a conversation during that year with the then Attorney General, who told him that no further proceedings were being taken against Mr. McEwan. At the time he was still representing Mr. McEwan but he had not put any reliance on the statement. Mr. McEwan was positive that Mr. Kelsick had called him to tell him that his case was dismissed. Mr. Kelsick was far less convinced that this was the case, his recollection was that it was likely that he had spoken to Mr. McEwan's sister-in-law, who worked in his office, on the matter. Mr. McEwan's also placed the time Mr. Kelsick had called him "*within one month after posting the \$20,000.00*".

[16] An undated entry in the court record shows that the matter was adjourned to 6th June 1996 for forfeiture of the recognizance. Mr. McEwan stated that he had received no notice of that date.

[17] Between 1997 and 2003, there is no indication that the matter came before the court at any time. Neither was there any indication that any enquiries were made about it.

[18] On 9th November 2004, Mr. Brandt wrote to the Senior Magistrate applying for the return of the cash bond paid by Mr. McEwan. On 15th November 2004, he then wrote to the Hon. Attorney General asking her to intervene in the matter in her capacity as Minister of Justice.

[19] On January 2005, in a letter to Mr. Brandt, which was copied to Mr. Kelsick, the Senior Magistrate informed him that he would bring the matter on the forfeiture list on 27th January 2005. He included that he expected Mr. Brandt to inform Mr. McEwan of the position and to remind him if he did not appear at the hearing, it would proceed in his absence. Mr. Brandt replied on 26th January 2005, setting out the reasons why in his opinion the cash bond should not be forfeited and asking the Senior Magistrate to disqualify himself from hearing the matter and alleging that he had made an extra judicial statement to the effect that Mr. McEwan could not get back the money.

[20] On 27th January 2005, the matter came up for hearing. Mr. McEwan was not present and Mr. Brandt appeared on his behalf. Mr. Brandt told the court that Mr. McEwan was under medical management in the United States and he produced a 1995 document in support of that position. At the hearing, the Senior Magistrate asked Mr. Brandt if he would accept service of a summons on behalf of Mr. McEwan. Mr. Brandt refused to accept service.

[21] On 28th January 2005, the Senior Magistrate issued a summons to Mr. McEwan to appear on 11th February 2005 to show cause why the recognizance he had entered on 14th August 1995, where he was bound to pay the sum of \$50,000.00 should not be forfeited. He ordered that the summons be served by posting it to the door at Mr. McEwan's last known address. Mr. Brandt informed the Senior Magistrate that Mr. McEwan had no address in Montserrat.

[22] On 23rd February 2005, Mr. McEwan filed the Originating Motion seeking the relief as set out in paragraph [2] of this judgment.

The Law

[23] An individual's right is established by Section 57[1] of the Constitution which provides as follows:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial tribunal established by law."

[24] This provision and others similar to it have been examined in several cases in courts throughout the Commonwealth. The locus classicus however remains the Jamaican case of **Bell v Director of Public Prosecutions**², where Lord Templeman stated that the right given under such a provision is not absolute right and the court must balance it against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions³.

[25] A court considering the right to a trial within a reasonable time is not constrained in the ambit of its considerations and it must apply a weighing process, in other words, a subjective balancing of

² [1985] 32 WIR 317

³ Ibid at 327.

several factors, on a case by case basis⁴. However, it should include as part of its consideration, the length of the delay, any reasons given by the prosecution to justify the delay and the responsibility of the accused for asserting his rights and prejudice⁵

[26] The court has a discretionary power to stay criminal proceedings if it finds that to continue them would amount to an abuse of process⁶. In **Hardeo Sinanan v Her Worship Senior Magistrate Mrs. Marcia Ayers**⁷, the Court of Appeal after considering several authorities, crystallized the principles to be taken into consideration where an application for a stay has been made:

- (i) A stay should be imposed in exceptional circumstances;*
- (ii) The burden of proving serious prejudice to the extent that a fair trial was impossible, rests on the accused;*
- (iii) While lengthy, inexplicable delay raises the question of presumptive prejudice to the core issues is whether the accused could be afforded a fair trial;*
- (iv) Where delay in the conduct of a case is so great, even when viewed against the public interest in having the guilty, it becomes an abuse and is unacceptable.”*

Findings

[27] In my deliberations on the issues raised in this case, I have adopted the approach commended by Lord Bingham in **Dyer v Watson**⁸, and identified the factors that I find to be relevant. They are the length of time, the reasons for the delay, the position put forward by the Respondents and Mr. McEwan's actions from the date on which he was charged to the filing of his Originating Motion.

[28] Ten years elapsed between the date on which Mr. McEwan was charged with forgery and the filing of his Originating Motion. I think in the circumstances of this case it is important to acknowledge that and various times during that ten year period, the island of Montserrat, its people and its justice system were severely affected by the eruption of the Soufriere Hills volcano.

⁴ Dyer v Watson [2002] 3 WLR 1488 per Lord Bingham at 1508

⁵ Bell v DPP at Note 3

⁶ Hardeo Sinanan v Her Worship Senior Magistrate Mrs. Marcis Ayers Trinidad and Tobago Civil Appeal No. 137 of 2006 at para. 17

⁷ Ibid.

⁸ Supra

- [29] The position put forward by the Respondents is that the reason why the matter was not tried was because Mr. Mc Ewan having been granted permission by the Learned Magistrate to travel out of the jurisdiction, he failed to return.
- [30] Mr. Mc Ewan's case is basically that there was no reason to return because as far back as September 1995, he knew that the matter was dismissed because Mr. Kelsick had informed of that. He had given instructions since that steps should be taken to have the cash bond returned to him but nothing had actually been done until 2004.
- [31] Credibility then becomes a critical issue in this case because what Mr. McEwan has said is important in the context of the steps taken or not taken by him to assert his rights. If I accept what he has said and any failure on his part to take any action could be justified.
- [32] I have considered the evidence of Mr. McEwan and Mr. Kelsick to be relevant on this point and I think it important to add that having one witness appear in court in person and the other on a screen by way of video link did not in any way affect my ability to assess their credibility. The reception of both the audio and video images allowed the trial to proceed much in the same way as if Mr. McEwan was in the courtroom.
- [33] When Mr. Kelsick said that he could recall if he had told Mr. McEwan that the case was not proceeding, he was speaking of a period during 1996, because it related to a conversation he had in that year with the then Attorney General. On the other hand, Mr. McEwan stated that Mr. Kelsick gave him that information in September 1995.
- [34] Mr. Kelsick continued to appear on behalf of Mr. McEwan until February 1996, if what Mr. McEwan said is true, then Mr. Kelsick's action are inexplicable. He went to court and made excuses for Mr. McEwan's absence why would he have done so from September 1995 to February 1996, I cannot accept Mr. McEwan's evidence and I am buttressed in that position that Mr. Kelsick was clear that he had no contact information for Mr. McEwan. He did not even know where he was and he had information on him only through Mr. McEwan's sister-in-law, who worked in this Chambers.

[35] Interestingly, Mr. Kelsick stated that even when he had the conversation with the Attorney General he had not relied on it. It would be very strange that experienced Counsel like Mr. Kelsick would relay such information to his client.

[36] As I have stated, I would have to believe Mr. McEwan on that point to go on to consider what actions by the Respondents could amount to a violation of his rights under section 57[1] of the Constitution. I do not believe him. The matter continued in the court system from the time the charge was laid until the cash bond was forfeited, with hearing after hearing, with Mr. McEwan only being present on one occasion, which was before he was granted permission to travel overseas. His lawyers were present on some occasions, they clearly had received notice but he never appeared. I cannot therefore find a basis for concluding that any blame in the matter could lay at the feet of the Respondents.

[37] In relation to the stay, on the principles of **Hardeo Sinanan**⁹ case, Mr. McEwan has failed to show on a balance of probabilities that owing to any delay in this case that he will suffer any serious prejudice and could not be afforded a fair trial. He has in my view not addressed it in his evidence.

[38] Having considered, the authorities, the facts and the submissions in this case, it is my judgment that McEwan has failed to satisfy the court that his right to a trial within a reasonable time before an independent and impartial tribunal has been infringed. He has also failed to prove on a balance of probabilities that he is entitled to any of the relief that he has claimed.

Order

[39] For the reasons stated in my judgment, I make the following order:

- 1) Claim No. MNIHCV2005/0006 is dismissed.
- 2) The application by Mr. McEwan to dismiss or stay the charge of forgery brought against him on 18th May 1995 contrary to section 24[1] of the Penal Code is refused.
- 3) The application to vacate the Summons for Forfeiture of Recognizance issued by the Senior Magistrate on 27th January 2005, is refused.

⁹[1] Supra

4) That there is no order to costs in this Claim.


Ianthea Leigerwood-Octave
High Court Judge