EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2014/0008

BETWEEN:

GLENROY PIERRE

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan	Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson for the Appellant
Mr. O'Neil St. A. Simpson for the Respondent

2015: October 2;
2016: November 22.

Magisterial criminal appeal – Unlawful possession of cannabis with intent to supply – Possession and importation of a controlled drug – Offering to supply a controlled drug – Illegal entry – Applicability of force majeure – Distress as defence to charges – Whether vessel entered territorial waters of the British Virgin Islands as a result of distress – Whether vessel immune from local jurisdiction and laws for offences occasioned by its presence – Whether magistrate erred in finding that force majeure was not operative in this case

The appellant, Glenroy Pierre was one of the three occupants of the sloop, Grace Crest, who was arrested and charged with unlawful possession of cannabis with intent to supply, possession of a controlled drug, importation of a controlled drug, offering to supply a controlled drug and illegal entry. The Grace Crest was on its way to Antigua from Jamaica laden with 1440 pounds of marijuana when it was intercepted in the territorial waters of the British Virgin Islands by police officers of the marine unit. The appellant contested the charges before the magistrate and claimed, among other things, that the Grace Crest had entered the territorial waters as a result of force majeure, having been smitten by a freak

storm. The learned magistrate held that the presence of the Grace Crest in the British Virgin Islands was not a result of force majeure and that the defence does not apply as the vessel was not in distress. The appellant was convicted on all the charges and sentenced accordingly. The appellant, dissatisfied with the magistrate's decision has appealed his conviction and sentence. The appeal against sentence is only in respect of the twelve months imprisonment imposed for illegal entry. The sole ground of appeal pursued against conviction is that the learned magistrate erred in law in failing to acquit the appellant on the basis of force majeure.

Held: allowing the appeal against conviction and sentence in respect of the charge of illegal entry, setting aside the sentence imposed and dismissing the appeal against conviction in respect of the drug charges and affirming the conviction, that:

1. It is well established that a ship in distress entering a port or territorial waters of a State can attract immunity from the operation of local laws. For this to operate, the distress must be urgent and something of great necessity. The distress must not be self-induced and there need not be an actual physical necessity, a moral necessity would suffice. Additionally, the burden of proof to establish distress is on a balance of probability and lies on the person claiming exemption from the local law. In this case, the Grace Crest entered the territorial waters of the British Virgin Islands as a result of distress. There was no evidence that the distress was contrived or self-induced.

   The "Eleanor" (1809) 165 ER 1058 applied; Merk and Djakimah v the Queen Supreme Court of Helena, Supreme Court case No. 12, 1991 applied.

2. Immunity from local jurisdiction and local laws is not absolute and must be of limited import. The immunity should not apply to all local laws. It would apply to those violations committed by a ship in distress and inevitably resulting from the distress. In the circumstances, the Grace Crest cannot claim immunity from local jurisdiction in relation to the drug offences as it was patently engaged in illegal activity but can claim immunity in respect of the charge of illegal entry. While the illegal entry was a violation committed by the distressed Grace Crest and inevitably resulted from the distress, the same cannot be said for the drug charges.

JUDGMENT

[1] BAPTISTE JA: The sloop, Grace Crest, was on its way to Antigua from Jamaica laden with 1440 pounds of marijuana when it was intercepted in the territorial waters of the British Virgin Islands by officers of the marine unit of the Royal Virgin Islands Police Force. The three occupants of the Grace Crest including the appellant, Glenroy Pierre, were arrested and charged with unlawful possession of cannabis with intent to supply, possession of a controlled drug, importation of a controlled drug, offering to supply a controlled drug, and illegal entry. Two pled guilty to the charges. However, the appellant contested the charges before the magistrate. His counsel, Mr. Thompson, contended inter alia, that the Grace Crest had entered the territorial waters as a result of force majeure having been smitten by a freak storm. The engine malfunctioned and the boom was broken. The entry, being under distress, provided a defence to the charges and the appellant ought to be acquitted.

[2] The learned magistrate held that the presence of the Grace Crest in the British Virgin Islands was not a result of force majeure and force majeure had no applicability to this 'marine scenario.' The appellant was convicted on all the charges and sentenced accordingly. He has appealed his conviction and sentence. The appeal against sentence is only in respect of twelve months imprisonment imposed for illegal entry. The sole ground of appeal pursued against conviction is that the learned magistrate erred in law in failing to acquit the appellant on the basis of force majeure.

[3] It is well established that a ship in distress entering a port or territorial waters of a state can attract immunity from the operation of local laws. This proposition finds expression in **The "Eleanor"**,[1] an authority of vintage antiquity in which Sir William Scott (later to be known as Lord Stowell) provided his seminal definition of distress. The facts were that the Eleanor was owned by an American national. It entered the port of Halifax in Nova Scotia in breach of a law which stated that only

[1] (1809)165 ER 1058.

ships owned and crewed by British nationals could enter British ports in North America with produce from the United States. A violation of that law could result in seizure. The Eleanor entered the port but claimed distress. The issue was whether or not the plea of distress was established. The court found that distress was not established on the facts. The claim for distress was fraudulent and made with the intention of evading the law and selling its cargo.

[4] Sir William Scott stated at page 1068:

> "Upon the fact of importation, therefore, there can be no doubt; and consequently the great point to which the case is reduced, is the distress which is alleged to have occasioned it. Now it must be an urgent distress; it must be something of grave necessity; such as is spoken in our books, where a ship is said to be driven by stress of weather. It is not sufficient to say it was done to avoid little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act, where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: … Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner. It is evidence which comes from himself, and from persons subject to his power… and therefore it is liable to be rigidly examined".

[5] In Buelvas v Pierre and Anthony[2] a case of more recent vintage, the Court of Appeal of Trinidad and Tobago recognised and accepted force majeure as a defence. The master of a ship was convicted for possession and importation of marijuana. The ship was boarded by the coast guard officers while it was anchored off Huevos Island. The appellant stated that he had proceeded to the nearest port, when his ship, en route to Martinique with a cargo of marijuana, had developed engine trouble 70 miles off Trinidad.

[2] [1985] LRC (Crim) 462.

[6] On appeal against conviction, it was argued, inter alia that, the trial court had exceeded its jurisdiction, for under international customary law a foreign vessel taking refuge in port by reason of force majeure is immune from local jurisdiction for offences occasioned by its presence. The Court of Appeal held that the defence that where the presence of a ship in territorial waters is due to force majeure, there is immunity from prosecution for offences which are occasioned by that entry, can only arise when the issue arises on the evidence. The court stated that the issue of immunity because of an entry in distress clearly arose on the evidence. The onus therefore fell on the defendant (as a fact peculiarly within his knowledge) to establish, on a balance of probabilities, that the ship entered the territorial waters by reason of distress.

[7] The court stated that in order to establish the immunity, it was necessary for the appellant to do no more than to create a reasonable doubt as to whether or not the ship had entered the waters by reason of distress. The court noted that it was submitted before the magistrate that the prosecution had failed to discharge the onus which rested upon it to disprove distress. The court stated that the evidence was far from adequate to disprove the defence of distress as raised in the explanation given by the appellant and in support of which the appellant himself gave evidence on oath. The court further observed that the magistrate's reasons did not show what view he took of the law with regard to distress, the onus of proof where this was raised or the facts which he found in relation the defence of distress. The court concluded that the appellant's case created a reasonable doubt on the question of distress and quashed the convictions and sentence.

[8] The case of Merk and Djakimah v the Queen,[3] a decision of the Court of Appeal of St. Helena, is also instructive. The M V Frontier left the Maldives for Ghana with cannabis on board; not having sufficient fuel for that journey, it intended to rendezvous with a ship off Walvis Bay in Namibia, to transfer its cargo and receive fuel. This plan was thwarted as it was intercepted and searched off the coast of South Africa. No cannabis was found. Being alive to the danger of re-fuelling at

[3] Supreme Court of Helena, Supreme Court case No. 12, 1991.

Walvis Bay, it was decided to proceed to St. Helena, even though fuel was essential. The reason given for entering St. Helena was not lack of fuel, but engine trouble. This was to allay suspicions which might arise by a ship being in the South Atlantic with so little fuel. Merk, the captain of the MV Frontier, was convicted of several drug charges, consequent upon the vessel entering St. Helena with the cannabis.

[9] It was submitted that the MV Frontier was a ship in distress and St. Helena had no jurisdiction over it. The court applied the definition of distress in **The "Eleanor"** and found that the distress was self-induced. The court reasoned that the fuel shortage at St. Helena was entirely the making of those in charge of the ship and was caused by reluctance to refuel before St Helena, solely attributable to the illegal nature of the enterprise and to the presence of drugs concealed on board. It was hoped that St. Helena would not offer the same danger of detection. In the circumstances, there was no immunity from applying local laws including the charge of importing drugs into St. Helena.

[10] From the cases referred to, the following propositions can be deduced for determining distress. Distress must be urgent and something of great necessity; the distress must not be self-induced; there need not be an actual physical necessity, a moral necessity would suffice; the burden of proof to establish distress is on a balance of probability and lies on the person claiming exemption from the local law.

[11] In the present case, the Crown led evidence that when the Grace Crest was intercepted, the sail was broken and the engine was malfunctioning; it was not seaworthy and had to be towed to the marine base. The appellant testified before the magistrate that the Grace Crest did not intend to sail to Tortola. Its destination was Antigua. It drifted into the territorial waters of the British Virgin Islands as a result of encountering a freak storm about 200 miles from Antigua. The storm resulted in the boom being broken as a result of which a motor engine was used; the engine subsequently broke down. After the failure of the engine, the Grace

Crest drifted for about two to three days until they came to the north east of Tortola; they were unable to make any repairs to the vessel before that time.

[12] Given that scenario, Mr. Thompson submits that the evidence shows that the appellant had discharged the burden of demonstrating that the Grace Crest entered the territorial waters as a result of force majeure and that this provides a defence to charges occasioned by its presence. In that regard, Mr. Thompson relies on the cases of Buelvas v Pierre & Anthony and **The "Eleanor"**.

[13] It would be instructive at this stage to consider how the learned magistrate dealt with the matter. The magistrate stated that the unseaworthiness of the Grace Crest did not make it a vessel in distress. He reasoned that distress imports a very high sense of urgency; a condition of imminent danger to life, to survival. The magistrate sought to buttress his position by pointing out that when the police boarded the Grace Crest, the men on board did not have life jackets on them. The magistrate saw 'a significant situational difference between not being seaworthy and being in distress'.[4]

[14] The magistrate held that 'distress implies utter helplessness where the survival imperative is the operational principle and existential situation' and noted that 'they survived a freak storm'. The learned magistrate found that 'while the defence of force majeure exists as a matter of international law, it does not apply as the vessel was not in distress.' The magistrate stated that the presence of the vessel in the Territory was not as a result of force majeure. He reasoned that if it were force majeure it would have been appreciated by the authorities and would have legitimised their entry into the Territory. In my judgment that is not a proper basis for a finding against force majeure.

[4] See: Lower court's findings, decision and sentencing, record of appeal at p.148.

[15] The learned magistrate also found that force majeure was not operative in this 'marine scenario'. He reasoned that force majeure applied to a situation where one has absolutely no control of the vessel. The learned magistrate proceeded to give a scenario as to when one can rely on force majeure. He stated that:

> "where your sole mast is broken, the engine is not functioning, the rudder is broken, the current is against you in relation to the proximity of a safe haven and a storm is imminent. Then you are in a situation of distress. Then you can rely on this notion of force majeure".[5]

[16] The learned magistrate further emphasised his point by stating that, "the Grace Crest was not in distress. They were not helpless, they were not being towed. The mast did not fall overboard: it was there and attempts were being made to repair it". The magistrate stated that the vessel could have been steered, albeit slowly, and it had not lost the rudder – a very important equipment. The learned magistrate thereupon proceeded to furnish another example as to when, in his view, a ship would be in distress. He stated:

> "Had the vessel been caught up in the waters of Terra del Fuego at the southern tip of Chile and with, only three men on board, it would have been in distress, with or without a rudder. But it was not. The Grace Crest was heading very slowly but inexorably towards Anegada [an island in the British Virgin Islands]."[6]

[17] Mr. Thompson submits that the learned magistrate was in error when he sought to limit the defence of force majeure to the categories he mentioned. Relying on The **"Eleanor"**,[7] he stated that there need not be an actual physical necessity at the moment. A moral necessity would suffice and if the ship had been previously damaged and it would be dangerous to prosecute the voyage then the defence of force majeure would arise. Mr. Thompson states that force majeure need only exist to justify the appellant's entry into the Territory. He argues that the learned magistrate appeared to be of the view that the distress must have existed at the time that the appellant was seen by the police and it is for this reason the learned

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[5] See: Lower court's findings, decision and sentencing, record of appeal at p.155.
[6] See: Lower court's findings, decision and sentencing, record of appeal at p.156.
[7] (1809)165 ER 1058 at p.1068.

magistrate was skeptical as to why the appellant did not seek to 'hail' the police. Mr. Thompson says that the distress need only exist to permit the appellant to have entered the Territory since the offence was completed once the vessel had entered the territorial waters. Mr. Thompson points out that the Crown led evidence that when the Grace Crest was intercepted, the sail was broken, the engine was malfunctioning, and it was not seaworthy; it had to be towed to the Marine base. He submits that the Crown was duty bound to rebut the defence of force majeure and the defence was properly made out on the case for the Crown. The appellant was therefore entitled to be acquitted.

[18] Mr. Simpson contends on behalf of the respondent, that there is no automatic right of entry available to a vessel in distress that can absolve the vessel from guilt for any infraction of the local laws. Mr. Simpson argues that the British Virgin Islands submit to a dualist, as opposed to a monist, application of international law, which requires conventions, statutes and principles to be converted specifically into local provisions. Accordingly, the appellant's case would fail on the basis that there is no application that can be afforded to the principle of force majeure in the Territory.

[19] I understand Mr. Simpson to be saying that force majeure is a principle of international law which has to be specifically legislated to be applicable in the Territory. In my judgment this submission is not supported by the authorities. In any event, Mr. Simpson's submission cannot gain traction in view of the fact that the learned magistrate recognised the existence and effect of force majeure (as legitimising entry into the Territory) but essentially found that it was not made out on the evidence as the Grace Crest was not in distress.

[20] Alternatively, Mr. Simpson supports the magistrate's position that the principle of force majeure does not apply on the facts of the case. Mr. Simpson seeks to distinguish BueIvas on the bases that the operating ground for the appeal was the Comptroller's tripling of the penalty for the offence and that the defence of force majeure arose in terms of seeking to confirm on which party the burden of proof

would rest. In my view, Mr. Simpson's attempt at distinguishing Buelvas on these bases is misconceived as it does not represent an accurate assessment of what was held in Buelvas. Buelvas made it clear that the presence of a ship in territorial waters as a result of force majeure is a defence to charges occasioned by that presence. The charges before the court in Buelvas were importation of marijuana, possession of marijuana and failing to bring the vessel to an approved port.

[21] Mr. Simpson cites Sir William Scott's statement in **The "Eleanor"** that 'where the party justifies that act upon the plea of distress, it must not be a distress which he created himself', in support of the proposition that distress arising from the action of the parties who then seek to rely upon the distress to thwart the laws of the landing territory cannot provide a defence in criminal law. I agree. This proposition is aptly demonstrated in **The "Eleanor"** and Merk. There must, however, be evidence that the distress was self-induced. Was there evidence that the distress was self-induced or contrived? There is no evidence that the distress of Grace Crest was self-induced or contrived.

[22] Mr. Simpson contends that given that the vessel was engaged in patently illegal activities at the time when impacted by the storm, it was not able to benefit from force majeure sanctuary in relation to the drug offences. I am sympathetic to Mr. Simpson's argument that as the Grace Crest was engaged in a patently illegal activity, it cannot claim exemption from the application of local laws in respect of those offences. I note, however, that no case was presented in support of that proposition, although the views of academic writers were referred to. In that regard, it is suggested that the immunity would apply to those violations committed by the ship in distress and inevitably resulting from the distress[8]

[8] D.P.O'Connell: The International Law of the Sea (Volume 2, Oxford University Press1984).

[23] Essentially, the magistrate held that the presence of the Grace Crest in the territorial waters of the British Virgin Islands was not a result of distress. The reasons given by the magistrate for arriving at his decision are unsatisfactory and in my judgment he erred in arriving at his conclusion. This error became more apparent when the magistrate sought to limit situations of distress to the categories he had identified. In my judgment, the Grace Crest entered the territorial waters of the Territory of the Virgin Islands as a result of distress. There was no evidence that the distress was contrived or self-induced.

[24] Accepting that the Grace Crest entered the territorial waters as a result of distress, would that render it absolutely immune from the local jurisdiction, local laws and regulations? I am persuaded that the immunity should not be absolute and must be of limited import. The immunity should not apply to all local laws. I agree that the immunity would apply to the violations committed by the ship in distress and inevitably resulting from the distress. In the circumstances, the Grace Crest could not claim immunity from the local jurisdiction in relation to the drug offences but could claim immunity in respect of the charge of illegal entry. While the illegal entry was a violation committed by the distressed Grace Crest and inevitably resulted from the distress, the same cannot be said for the drug charges.

[25] As a matter of interest, I note that article 108 of the United Nations Convention on the Law of the Sea[9] enjoins all States to 'co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions'. Although the article refers to the high seas, it would be surprising if as a matter of principle, a coastal State would be rendered incapable of suppressing the illicit traffic in drugs by a ship in its territorial waters, by that ship relying on distress.

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[9] United Nations Convention on the Law of the Sea of 10 December 1982.

[26] My analysis above necessarily and inevitably entails a departure from the authority of Buelvas. The result is that I would allow the appeal against conviction and sentence in respect of the charge of illegal entry and set aside the sentence imposed. I would dismiss the appeal against conviction in respect of the drug charges and affirm the conviction, though for reasons different from those of the magistrate.

[27] This is the judgment of the Court.