EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCRAP2018/0001

BETWEEN:

THE QUEEN

Appellant

and

YOLANDA ROYER

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Oris Sullivan, Director of Public Prosecutions for the Appellant
Mr. Warren Cassell for the Respondent

2018: April 16;
September 21.

Criminal appeal – Case stated – Review of sentence by judge other than sentencing judge – Interpretation of sections 56 and 84 of Supreme Court Act of Montserrat – Procedure to be adopted when person sentenced to pay fine defaults – Section 26 of Penal Code of Montserrat

Ms. Yolanda Royer, a former employee of Delta Petroleum Montserrat Ltd ("Delta"), was charged with several offences following an audit on the accounts of Delta. In 2013, she pleaded guilty to theft and money laundering and was sentenced to pay compensation for theft in the sum of $116,035.80 within 2 years and to pay a fine of $50,000.00 within 36 months. She was also sentenced to 10 days imprisonment with time spent on remand to be deducted and to pay a fine of $100.00 for the offence of money laundering.

Ms. Royer failed to pay in full, the compensation and fine in relation to the offence of theft within the time stipulated. In October 2017, she was summoned by the Registrar of the High Court to explain why she defaulted in payment. In November 2017, Ms. Royer appeared before another judge and requested that the fine be reduced due to her difficult financial circumstances. The second judge found the sentence to be excessive and varied the fine of $50,000.00 to $3000.00. In relation to the compensation in the sum $116,035.80, the judge ordered that it be continued to be paid monthly in the sum of $500.00.

Subsequently, the Director of Public Prosecution ("DPP") made an application pursuant to section 54 of the Supreme Court Act for the case to be stated to the Court of Appeal. The judge, observing that the correct provision under which a case is to be stated is section 56, stated three questions of law to be determined by the Court. The parties having agreed on one, the following two questions remained for the Court's consideration: (1). Does section 84 of the Supreme Court Act allow any judge of the High Court to vary a sentence passed by another judge or only the original judge who passed the sentence, (2) Was a hearing enquiring into why a financial penalty had not been paid ultra vires because the court is functus from the date of sentence; so that instead, where there is a period of imprisonment to be served in default of payment of a financial penalty, and failing appeal to the Court of Appeal, a defaulter, irrespective of the circumstances is always to be sent without further hearing to prison on a warrant issued by the Registrar?

Held: the order of the second judge being a nullity:

1. It is a cardinal rule of statutory interpretation that where the words of an enactment are clear and unambiguous, the words must be given their natural and ordinary meaning. The words must be construed in the context of the statute as a whole. Section 84 provides that 'any fine or penalty imposed by a judge may, at any time before it has been paid or satisfied, be reduced or remitted by him.' This section must be read in the context of the Supreme Court Act. Sections 37 – 39 provide the general scheme within which persons who have been convicted and are aggrieved with any aspect of the trial or sentence imposed may seek relief. They are required to appeal to the Court of Appeal. Section 84 is not intended to provide a parallel appellate procedure to be presided over by another judge of the High Court. It empowers the judge who imposed the sentence to vary it before it has been satisfied. The legislature in specifically stating "by him" restricted the exercise of the power to the trial judge who passed the sentence.

   Pinner v Everett [1969] 3 All ER 257 applied; R v Morrison [2004] EWCA Crim 2705 applied.

2. Where the prosecution alleges that there is default in payment of a fine, the court is required to hold a hearing to determine whether there is a default, the extent of the default and whether the default is wilful. If there is default and no time was fixed to be served in the event of default, the court shall impose a term of imprisonment not exceeding six months. Where the default is wilful, the court may

impose a term of imprisonment not exceeding 12 months. While the second judge was correct to hold a hearing, the prosecution having alleged that there was default in payment of the fine, the judge erred when he proceeded to exercise the powers of the trial judge pursuant to section 84 to vary the sentence, when he was in fact not the trial judge. The second judge had no jurisdiction to do so.

Section 26 of the Penal Code of Montserrat Cap. 4.02, Revised Laws of Montserrat 2002 applied.

3. The power to state a case or reserve a question of law for the Court of Appeal to consider pursuant to section 56 of the Supreme Court Act is to be exercised by the judge who conducted the trial in the High Court.

JUDGMENT

[1] THOM JA: This is a case stated by a judge of the High Court for the Court of Appeal to determine, among other things, whether pursuant to section 84 of the Supreme Court Act,[1] a judge other than the judge who imposed a sentence has jurisdiction to vary the sentence.

[2] The background facts are that Ms. Yolanda Royer was employed as an accountant with Delta Petroleum Montserrat Ltd ("Delta"). In 2011, as a result of an audit on the accounts of Delta, investigations were carried out and Ms. Royer was charged with the following offences: (a) obtaining property by deception contrary to section 218(1) of the Penal Code;[2] (b) forgery contrary to section 241(1) of the Penal Code; (c) uttering contrary to section 243(1) of the Penal Code; and (d) conspiracy contrary to the common law.

[3] At the end of the preliminary inquiry she was committed to stand trial for the offences of money laundering, theft, uttering a forged document and forgery of certain documents with intent to defraud.

[1] Cap. 2.01, Revised Laws of Montserrat 2002.
[2] Cap. 4.02, Revised Laws of Montserrat 2002.

[4] At her trial before Astaphan J [Ag.], she acknowledged appropriating $150,605.49 from Delta and she pleaded guilty to theft and money laundering. She was sentenced by Astaphan J [Ag.] as follows:

(a) Theft:

i. to pay compensation to Delta in the sum of $116,035.80 to be paid within two years or at such sooner time as the property, registered as block 13/11 parcel 73, is sold.

ii. to undertake to keep the peace for two years, supported by two sureties in the sum of $50,000.00 and to be imprisoned for up to one year until the sureties have been taken.

iii. to pay a fine of $50,000.00 within 36 months or face six months imprisonment in default.

iv. to two years imprisonment suspended for two years.

(b) Money laundering:

i. to ten days imprisonment with time spent on remand to be deducted.

ii. to pay a fine of $100.00

All sentences to run concurrently.

[5] Ms. Royer failed to pay in full the compensation and fine in relation to the offence of theft within the time stipulated. In October 2017, she was summoned by the Registrar of the High Court to attend court to give evidence in relation to her default in paying the compensation and fine. On 24th November 2017, she appeared before Morley J who, having heard her evidence of her financial circumstances and submissions on her behalf by Mr. Cassell (the Director of Public Prosecutions did not participate in the proceedings), found the sentence to be excessive and made the following order: (i) The fine of fifty thousand dollars ($50,000.00) imposed on Yolanda Royer is hereby varied to a fine in the sum of three thousand dollars ($3000.00) of which there is a balance of seven hundred dollars ($700.00) to be paid. (ii) The order of compensation in the sum of one

hundred and sixteen thousand and thirty-five dollars and eighty cents ($116,035.80) is to be continued to be paid monthly in the sum of five hundred dollars ($500.00) to Delta.

[6] Morley J having varied the sentence imposed by Astaphan J [Ag.], the Director of Public Prosecutions (the "DPP") made an application pursuant to section 54 of the Supreme Court Act for Morley J to state a case to the Court of Appeal. The basis of his application as outlined in paragraph 19 of the application is as follows:

> "1) It is contended that the learned trial judge did not have any jurisdiction to hear and review the sentence imposed by Astaphan J [Ag];
>
> 2) That Morley J, not being a superior court had no authority to alter a sentence imposed by a judge of similar standing.
>
> 3) That any alteration of the sentence had to be done by the judge which tried the matter or alternatively the Court of Appeal."

[7] The DPP requested that the following questions be determined by the Court of Appeal: (a) in a case where the High Court imposed a fine, can the fine be altered by any judge of the High Court; and (b) in a case which involves a joint enterprise where both convicts were fined and where the sentence is reduced, does fairness necessitate the alteration of the sentence of the other convicted person?

[8] Morley J considered the application and observed that section 54 makes no provision for a case to be stated to the Court of Appeal. Rather the correct provision is section 56. He stated the following questions of law to be determined by the Court of Appeal:

> "(a) Does section 84 of the Supreme Court Act allow any High Court Judge to act or only the original judge?
>
> (b) Was a hearing *ultra vires* enquiring into why a financial penalty had not been paid because the court is *functus* from the date of sentence; so that instead, where there is a period of imprisonment to be served in default of payment of a financial penalty, and failing appeal to the Court of Appeal, a defaulter, irrespective of circumstances, is always to be sent without further hearing to jail on a warrant issued for default by the Registrar?

(c) Does the DPP have locus to argue either point if it chose to make no appearance below?"

[9] At the hearing before this Court both sides agreed that the DPP had locus standi. The matter therefore proceeded on issues (a) and (b).

Issue A – Section 84 of the Supreme Court Act

[10] Section 84 reads as follows:

> "Any fine or penalty imposed by a Judge may, at any time before it has been paid or satisfied, be reduced or remitted by him."

[11] The learned DPP submitted that section 84 is unambiguous and should be given its literal meaning, being, only the judge who passed the sentence could vary the sentence. He relied on the following passage in Blackstone**'s** Criminal Practice[3] where in considering the provisions of section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A) the learned authors stated:

> "a sentence imposed or other order made by the Crown Court when dealing with an offender may be varied or rescinded within 56 days of being passed or made. The judge who makes the variation must be the judge who originally passed sentence; if however, he was accompanied by justices on the first occasion, they need not be present for the variation."

[12] The DPP further contended that Morley J, in reviewing the decision of Astaphan J [Ag.] and finding it to be excessive, sought to exercise an appellate jurisdiction which he did not possess. The DPP posited that such a review could only be done by the Court of Appeal. He submitted further that if a judge of concurrent jurisdiction could review the decision of another judge, then it would make the Court of Appeal redundant, since any judge would be able at any time to vary or rescind any sentence without the convicted person having to resort to the Court of Appeal.

[3] (26th edn., Oxford University Press 2011) p. 1862 at para. D20.97.

[13] Mr. Cassell, in response, submitted that the case stated by Morley J had no basis in law. He argued that section 56 specifically provides for a case to be stated by the trial judge who conducted the trial and since Morley J did not conduct the trial, he had no jurisdiction to state a case for the Court of Appeal to consider. He submitted further that the scope of section 56 is very narrow. It is limited to the court determining issues arising from the trial and does not apply to post-conviction events such as default in the payment of a fine.

[14] Section 56 (1) reads as follows:

> "Where any person is convicted on indictment the trial judge may state a case or reserve a question of law for the consideration of the Court of Appeal and the Court of Appeal shall consider and determine such case stated or question of law reserved and may either –
>
> (a) confirm the judgment given upon the indictment;
> (b) order that such judgment be set aside and quash the conviction and direct a judgment and verdict of acquittal be entered;
> (c) order that such judgment be set aside, and give instead thereof the judgment which ought to have been given at the trial;
> (d) require the judge by whom such case has been stated or question has been reserved to amend such statement or question when specially entered on the record; or
> (e) make such other order as justice requires."

[15] Having regard to the provisions of section 56, I agree with Mr. Cassell that the effect of section 56 is that the judge who conducts a criminal trial, where a person is convicted, may state a case or reserve a question of law in relation to that trial to the Court of Appeal. The provisions of section 56 are unambiguous. The exercise of the power is specifically limited to the trial judge. The section does not empower a judge who did not conduct the trial to state a case or reserve a question of law to the Court of Appeal in relation to that trial. I also agree with Mr Cassell that section 56 does not extend to post trial issues such as inability or refusal to pay a fine imposed by the court.

[16] Mr. Cassell also submitted that the correct interpretation of section 84 is that it permitted any judge of the Supreme Court to vary a sentence passed by another

judge of the Supreme Court. He contended if it were otherwise, an absurd situation would arise if the judge who imposed the sentence has since died or is otherwise incapable of performing the functions of a judge.

Discussion

[17] The question which arises from this issue is, does the phrase "by him" referto the judge who imposed the sentence or any judge of the High Court?

[18] It is a cardinal rule of statutory interpretation that where the words of an enactment are clear and unambiguous, the words must be given their natural and ordinary meaning. The words must be construed in the context of the statute as a whole. Lord Reid puts it this way in Pinner v Everett.[4]

> "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other permissible meaning of the word or phrase."

[19] While this Court considered the construction of section 84 in The Attorney General v Albion Hodge et al,[5] in my view this case does not provide assistance in the resolution of the issue in this matter. In Albion Hodge, the appellants were convicted of various offences including conspiracy, procuring the execution of a valuable security by deception, obtaining pecuniary advantage by deception and neglect of duty. Their sentences varied from nine (9) months imprisonment to reprimand and discharge. Approximately six weeks later, they urged the trial judge to vary their sentence by extending the time within which to pay the fine. The judge varied the sentences. The Attorney General applied to this Court to set aside the variation. One of the issues raised was whether the trial judge had jurisdiction to subsequently vary the sentences (both fines and imprisonment) imposed by him. This Court found that pursuant to section 84 of the West Indies Associated States (Virgin Islands) Ordinance,(which is in pari materia with section

[4] [1969] 3 All ER 257 at p.258.
[5] BVIHCRAP2004/0001,0002,0003,0004,0005 (delivered 23rd June 2004, unreported).

84), the power to reduce or remit by the trial judge included the power to vary the terms of payment and further the word "penalty" was wide enough to include a term of imprisonment. The trial judge therefore had jurisdiction to vary the sentences. This is quite different to the instant case where it is not the same judge who passed the sentence that varied it. The issue raised in the instant matter was not under consideration in Albion Hodge.

[20] The issue of variation of sentence is addressed in the UK in section 155 of the UK Powers of Criminal Courts (Sentencing) Act 2000. The relevant subsections are (1) and (4). They read as follows:

> "(1) Subject to the following provisions of this section, a sentence imposed, or other order made, by the Crown Court when dealing with an offender may be varied or rescinded by the Crown Court within the period of 56 Days beginning with the day on which the sentence or other order was imposed or made.
>
> (1A) The power conferred by subsection (1) may not be exercised in relation to any sentence or order if an appeal or an application for leave to appeal, against that sentence or order has been determined.
>
> (4) A sentence or other order shall not be varied or rescinded under this section except by the court constituted as it was when the sentence or other order was imposed or made, or, where that court comprised one or more of those justices."

[21] Section 155(4) was considered by the English Court of Appeal in R v Morrison[6] where the recorder died shortly after sentencing Mr. Morrison. The sentence was in excess of the maximum and another recorder reviewed the sentence and altered it. On appeal by the Crown, the Court of Appeal stated at paragraph 13:

> "It is not difficult to indicate what the position is. The position is plain. There is no power for a judge, other than the judge who sentenced, to review a sentence. Thus, where judges, recorders or others die, the only way of rectifying what may be an unlawful sentence or any other way in which a review is sought, is for the matter to come to this court. That is, of course, something which regularly occurs when the 28-day period, as it frequently does, in any event expire."

[6] [2004] EWCA Crim 2705.

[22] In my view, quite like the UK legislation, although worded differently, the wording of the section 84 is very clear. Section 84 must be read in the context of the Supreme Court Act with particular consideration with respect to the scheme established in the Act for how matters are to be dealt with when the High Court has made its order after trial. Sections 37 – 39 provide the general scheme within which persons who have been convicted and are aggrieved with any aspect of the trial or sentence imposed may seek relief. They are required to appeal to the Court of Appeal. Section 84 provides an additional avenue for relief to a convicted person, but it is limited only to the sentence imposed. Section 84 is not intended to provide a parallel appellate procedure to be presided over by another judge of the High Court. It makes provision for a judge who has sentenced a convicted person, to be able to vary that sentence before the sentence has been satisfied. The section does not extend the power to vary a sentence to any judge of the Supreme Court. The legislature in specifically stating "by him" restricted the exercise of the power to the judge who passed the sentence. The concerns raised by Mr. Cassell and by which Morley J seemed to be persuaded, about the possible absurd situation that could arise if the judge who passed the sentence had since died, is without merit. In such circumstances, a convicted person could seek relief by appealing to the Court of Appeal. It must be noted that the Court of Appeal has wide powers to extend the time within which to appeal.

[23] In my view, section 84 is clear and unambiguous. It is only the judge who imposed the sentence who can vary the sentence

.

Issue B – Procedure where there is default in payment of fine

[24] This issue brings into focus the procedure to be adopted when a convicted person is sentenced to pay a fine and default in so doing.

[25] Section 26 of the Penal Code provides guidance on this issue. It reads:

> "26. (1) In the absence of express provisions in any laws relating thereto, the term of imprisonment which may be ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section

> 29 or compensation under section 28 or in respect of the non-payment of a fine or of any sum adjudged to be paid under any law relating to the offence of which the offender has been convicted, shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed a maximum of six months:
>
> Provided that the High Court may impose a term not exceeding one year in any case in which it is satisfied that the offender has the means to pay the sum concerned and refuses so to do."

[26] The effect of section 26 is twofold. Firstly, it sets a maximum term of six months imprisonment where a convicted person has defaulted in payment of the fine, compensation (pursuant to section 28) or costs (pursuant to section 29). Secondly, it gives the court a discretion to increase the maximum default term of imprisonment, which however must not exceed one year, where the court is satisfied the convicted person is simply refusing to pay the fine, although he has the ability to do so. In order for the court to be so satisfied to exercise this discretion, the court must hold a hearing at which evidence may be adduced by the convicted person and the prosecution.

[27] It is an elementary principle of natural justice that no person must be condemned unless given prior notice of the allegation against him and a fair opportunity to be heard. This principle applies to all judicial proceedings as is illustrated by the case of Re Hamilton[7] where warrants of committal for default in payment were quashed because no notice was given to the convicted persons and therefore they had no opportunity to be heard.

[28] The learned DPP accepted that section 26 contemplates a hearing but submitted that the power of the judge at such a hearing was limited to increasing the default period to one-year imprisonment where the court finds that the convicted person had the ability to pay and wilfully refused to pay the fine. He contended that the section does not empower a judge to grant the convicted person additional time to pay the fine. I agree that the power to grant additional time to pay a fine can only

[7] [1981] AC 1038.

be exercised pursuant to section 84 by the trial judge who sentenced the convicted person, since this amounts to a variation of the sentence and a variation could only be done by the Court of Appeal or the trial judge in the limited circumstances outlined in section 84.

[29] In my view, having regard to the provisions of section 26, Morley J was correct in conducting a hearing in relation to the non-payment of the fine. However, in such circumstance, the power of a judge under this section is limited to determining whether there is default in payment, the extent of the default and whether the default is wilful. Where there is default and no time of imprisonment was fixed to be served in the event of default, the judge may impose a term of imprisonment not exceeding six months. Where the judge determines that the default is wilful, the judge has discretion to fix a period of imprisonment which period cannot exceed twelve (12) months.

[30] In conclusion, the answer to Issue A is that section 84 empowers the judge who imposed the sentence to vary the sentence before it has been fully satisfied. This power is not extended to any judge of the High Court.

[31] In relation to Issue B, where the prosecution alleges that there is default in payment of a fine, the court is required to hold a hearing to determine whether there is a default, the extent of the default and whether the default is wilful. If there is default and no time of imprisonment was fixed by the sentencing judge, the court shall fix a term not exceeding six months. Where the default is wilful the term of imprisonment may be extended to a maximum of 12 months.

[32] Thus, while Morley J was correct to hold a hearing, the prosecution having alleged that there was default in payment of the fine, Morley J erred when he proceeded to exercise the powers of the trial judge pursuant to section 84 to vary the sentence, when he was in fact not the trial judge. Since Morley J had no jurisdiction to exercise the powers under section 84, his order is a nullity.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar