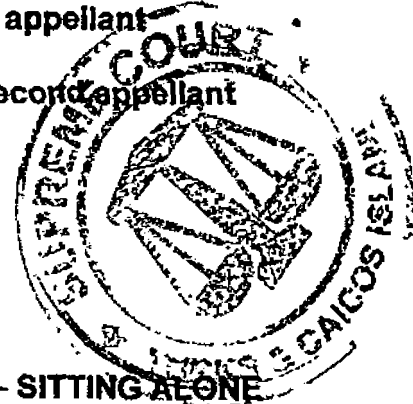


1. PAULETTE BEEN – the first appellant
 2. KEDARNAUTH MEGNATH – the second appellant
- Appellants

v

REGINA
Respondent



BEFORE THE HON Mr. JUSTICE ROBERT SHUSTER – SITTING ALONE
MR NOEL T SKIPPINGS FOR THE APPELLANTS
MS LATISHA WILLIAMS FOR THE RESPONDENT
DATE OF HEARING MONDAY - 27th APRIL 2015
JUDGMENT DELIVERED WEDNESDAY - 07th JULY 2015 @ 09.30

JUDGMENT ON APPEAL FROM THE MAGISTRATE'S COURT

1. This is an appeal against both conviction and sentences imposed in the Grand Turks Magistrate's Court; by the then Turks and Caicos Islands Resident Magistrate *Ms KELLY CHEEMA*; who on Thursday the 30th Jan 2014 dealt with matters concerning cases no; # 48/13, 52/13; 53/13; 54/13, in which convictions were entered and sentences passed by the Magistrate on both appellants.
2. Post-conviction and sentence; the appellants filed Notices of Appeal against both their conviction and sentence imposed upon them by the learned Magistrate as is their legal right.
3. There are three grounds of Appeal listed; and they are set out as follows:-
 - [a] The learned Resident Magistrate erred in law:
 - [b] There was a material irregularity which resulted in the trial being unfair:
 - [c] The sentence was manifestly excessive in the circumstances:
4. The hearing of this Appeal took place on Monday 27th April 2015, with written submissions by the parties to be supplied to the Supreme Court Office within 14 days and by 12.00 on Friday the 07th May 2015 in any event.
5. Unfortunately written submissions, were not forwarded by the Court in Grand Turk to the Judge in Providenciales until 22nd June 2015. That is one reason why there has been a delay in the Court delivering its judgment. The other reason is the

Judges commitment to another trial, for which this court apologizes.

Analysis

6. An analysis of the Magistrate's Court records reveal there was a submission of *no case to answer* at the close of the prosecution's case; after the no case submission was answered, the Magistrate made a decision to the effect the case should continue with both Appellant's being put to their election / defence.
7. It is well established in any "no case submission" that the appropriate test is laid out as follows in the celebrated English case of:-

R v Galbraith 73 Cr App R 124 per Lord Lane LCJ

[1] If there is no evidence that the crime alleged has been committed by the defendant, then there is no difficulty. The judge will of course stop the case.

[2] The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness, or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict upon it, then it is his duty, upon a submission being made to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability; or, other matters - which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

There will of course as always in this branch of the law, be borderline case they can be left to the discretion of the trial judge. In this case the Resident Magistrate proceeded with the trial on the matters upon which she eventually convicted both of the appellants.

The prosecution's case

8. The Magistrate's records show the Magistrate did not stop the case at the close of the prosecution's case the record shows the Magistrate put each defendant [now Appellant] to their election, and the case continued in the normal manner as a summary trial.
9. The Magistrates Court case against the appellant's, involved two parties who are now the Appellants in this case and they are [1] Ms Paulette Been and [2] Mr

Kedamauth Megnauth; who have been charged by the Authorities as [1] the agent of a motor vessel and [2] as the owner of the said motor vessel; identified hereafter; as the – **MV MEGA ONE TRITON**.

10. The prosecution's case: - is that both of the appellants, acting in their respective capacities; allowed the **MV MEGA ONE TRITON**; which according to the evidence in the Magistrate's Court; was a vessel greater than 60 feet in length; the appellants allowed the **MV MEGA ONE TRITON**; to be left at anchor, in the vicinity of the Columbus Landfall National Park, Grand Turk; during the period of Oct / Nov 2012; without the written consent of the Director of DEMA. *[An offence contrary to Regulation 3 [1] [f] of the National Parks Regulations Cap 10.1; of the Laws of the Turks and Caicos Islands.]*
11. It was also the prosecution's case; that both of the appellants Magnauth and Been together -- they caused or permitted an offensive substance namely "oil" **and**; they caused the actual **MV Mega One Triton**, to be deposited onto the coast line; in the Columbus National Park, at Governors Beach, Grand Turk; during that same time frame Oct / Nov 2012. *[An offence contrary to section 5 of the Coastal Protection Ordinance Chapter 85 of the Laws of the Turks and Caicos Islands.]*
12. In addition to the two preceding "joint offences": the second appellant Kedarnauth Megnauth was charged with two [2] further substantive offences. The second appellant was charged because he was at all material times the legal owner of the **MV Mega One Triton** - as follows:-
13. A further charge reads: - "that the second appellant **KEDARNAUTH MEGNATH** did cause or permit the discharge of oil from the **MV Mega One Triton** into the marine environment of the Columbus Landfall National Park Grand Turks, during the time period of Oct to Nov 2012. *[An offence contrary to section 9 of the Marine Pollution Ordinance 2010 of the Laws of the Turks and Caicos Islands.]*
14. Also during that same time period the second appellant **KEDARNAUTH MEGNATH** was charged with causing or permitting the discharge of a noxious liquid substance, from the ship into the marine environment. *[An offence contrary to section 12 of the Marine Pollution Ordinance 2010 of the Laws of the Turks and Caicos Islands.]*

The trial of this matter.

15. On the 30th Jan 2014 the Resident Magistrate concluded a summary trial and she delivered a fully reasoned decision in open court in Grand Turk. That decision was rendered sometime after the Resident Magistrate had heard, she had recorded, and she had also considered all sworn evidence; in connection with this case from first the following Crown witnesses:-

1. Police Constable Mario Smith

2. Sergeant Dominic Missick
 3. Senior Conservation Officer Paul Dickenson
 4. Director of DEMA Ms Kathleen Wood
 5. Scientific Officer Ms Jodi Johnson
 6. Deputy Director of Ports Mr Derek Been
7. According to the Magistrate's Court records; at the conclusion of the prosecution's evidence; and, acting on the advice of her attorney Noel Skippings, the first appellant Paulette Been elected to remain silent. Ms Been declined to give evidence on her own behalf as is her legal right under the law. This Court notes the annotation contained in the Magistrate's Court record to the effect that the Magistrate certified in her written ruling, that she had drawn no adverse inference from the first appellant electing to remain silent, as is the Appellant's legal right - in accordance with our laws.
8. The second appellant KEDARNAUTH MEGNATH gave sworn evidence by video link from New York which procedure appears not to have been challenged at that time. The Magistrate's Court records reveal the Magistrate had heard / she had been informed that the second appellant was ill. That he was in the United States and he could not easily travel to the Turks and Caicos Islands for the trial. The Magistrate decided to hear the case via TCI video link procedures - as is within her right under current legislation. The appellant cannot in my respectful view complain now; and / or make this a substantive ground of appeal because accepting evidence by video link - is provided for within our legislation. The issue of using video evidence falls squarely within the Magistrates purview.
9. The Magistrate's Court record indicates the Magistrate also heard evidence from the following defence witnesses in the trial.
1. Andy Missick
 2. Cleaver Hanson
 3. Dawn Smith
 4. Peter Lightbourne
 5. Albert Capron
 6. Special Constable Wellington Butterfield.
7. This court sitting as an Appeal Court, certifies the Supreme Court has heard oral submissions from counsel Noel Skipping and from the prosecutor Ms Latisha Williams. This Court has had sight of, and the court also certifies it has read all relevant bundles submitted in this appeal as required by law.
8. The court has considered counsels written submissions as agreed at the first hearing of this appeal on Monday 27th Apr 2015 in Grand Turk, when those written submissions were received in the Supreme Court Office in Providenciales on Thursday 18th Jun 2015 and the submissions were passed to me as the presiding Judge on Monday 22nd June 2015.

The Magistrate - made the following findings of fact in this trial.

9. There is no dispute between the parties that the **MV Mega One Triton** arrived in the Turks & Caicos Islands on or around 26th May 2012 carrying a crew of nine [9] persons one of whom was the second appellant – and the vessels legal owner **KEDARNAUTH MEGNATH**
10. Documents adduced in the Magistrate's Court trial confirmed that the **MV Mega One Titan's** recorded length as forty nine [49] metres [over 60 feet] - which fact was admitted by the second appellant Megnauth in open court.
11. The Magistrate's Court records show the Magistrate had also found as a fact that two [2] documents **PD3** and **KW10** - a Port Authority Bill officially confirmed the official agents for the **MV Mega One Titan** were **P & T AGENCY** of Palm Grove, Grand Turk; Turks and Caicos Islands.
12. The Magistrate's Court exhibit **KW 9** is a business licence whose certificate lists; the first appellant **Paulette Bean** is the registered owner of that company **P & T AGENCY**. According to the evidence **P & T Agency** was located at that same address in Palm Grove, Grand Turk the Turks and Caicos Islands. The first Appellant **Paulette Been** was found as a fact, to have been the Agent of the **MV Mega One Titans** in the TCI. This court sitting as an Appellant Court agrees with that finding of fact made by the Magistrate that **Paulette Been** was in fact and in law the **MV Mega One Titan's Agent** at all material time[s]
13. According to the evidence, before the Magistrate's Court having arrived in the TCI's jurisdiction on or about the 26th May 2012 the **MV Mega One Titan** remained stationary, broken down and at anchor, in the Turks and Caicos Islands, until the **MV Mega One Titan** was unfortunately grounded, the Magistrate's Court was told by the ferocity of passing tail winds from – "Hurricane Sandy."
14. The Magistrate's Court record indicates the Magistrate also found as a fact that **MV Mega One Titan** actually grounded on the Governors Beach Grand Turk, on 26th Oct 2012 and the vessel remains grounded to this date with no attempt to salvage same made by its owner, or, the appropriate Shipping Agent in TCI - **P & T Agency**.
15. According to the Court records; and also the Magistrates findings of fact, the grounding of **MV Mega One Triton** at Governors Beach took place some five [5] months after the vessel and its nine member crew had arrived within the territorial waters of the TCI. The evidence in the Magistrate's Court revealed the crew and captain of the **MV Mega One Triton**, had abandoned the vessel some time; before its grounding at Governor's Beach, because the vessel was broken down and was inoperative due to its breakdown. Upon any emergency arising, it

appeared any "crew" were / would unable to steer the vessel, prevent it moving, and or remove the vessel safely – prior to and after its grounding.

16. According to the evidence the MV **Mega One Triton** remains in place grounded on the coast line at Governor Beach Grand Turk - to the date of this appeal on Monday 27th Apr 2015. It is apparent from the evidence given in the Magistrates Court that the MV **Mega One Triton** condition has continued to deteriorate via the elements; of sea sand and or weather; as per the evidence of various witnesses who testified during the Magistrate's Court trial. Witnesses who each indicated the vessel had developed holes in the hull, along the water line - which holes - oozed oil into the sea and into the environment.

The Appeal

17. Formal Notice of Appeal against the Magistrate's conviction and her sentence, was issued on behalf of the Appellants. The Formal Notices of Appeal were served on the Supreme Court, within the required time limits.

18. The Appellants Notice of Appeal succinctly sets out - three [3] grounds of appeal. According to our Supreme Court records, this appeal was listed for hearing before me; Shuster J on Monday 27th Apr 2015 in Grand Turk. On the agreed date Monday 27th Apr 2015 the appeal was heard in open court. At the conclusion of the hearing both counsel were asked to submit written submissions within 14 days, and the court reserved its decision until then.

19. The court announced a written decision on this appeal would be delivered within three [3] weeks from today's date, **IF BOTH** counsels written submissions were delivered as requested on time, and in a timely manner. Unfortunately as I indicated earlier counsel's written submissions were only received by the Supreme Court in Providenciales by fax on 18th & 22nd Jun 2015; late and they were passed to me the same date 22nd Jun 2015.

There are three grounds of Appeal

1. The Learned Resident Magistrate erred in law.
2. There was a material irregularity which resulted in the trial being unfair.
3. The sentence was manifestly excessive in the circumstances.

The lower court hearing

20. After hearing all the evidence in this case and after convicting both appellants on the 30th Jan 2014 the Magistrate confirmed on the Court record that she heard mitigation from Mr Skipping on behalf of the first appellant Paulette Been - as to sentence and her mitigation has been recorded as follows.

- *My client is a business person. She has no previous convictions. Her involvement in the matter has been passive. She has been operating the business P & T Agency since 2010. She is aged 37 years of age. The combined income for her and her husband Mr Gillian Been after all outgoings is a profit of \$30,000.00. The family is breaking even as her husband does some work in construction. There are three children of the family aged 5, 9 and 17. They all reside at home. There is one apartment that the family has that is a source of rental income. The money from that is used to pay the mortgage. I invite the court to impose a lenient fine.*
21. The Magistrate then heard mitigation from the second appellant Kedernauth Megnauth carried out in person via video link. Court records show the second appellant was not represented by counsel during the course of his trial and upon conviction. As to mitigation the second appellant stated:-
- *I am 52 years of age. I have a family and we all reside in New York. I took a mortgage out to finance the vessel. I have not made any money since the past years and a half. My wife and family help me so that I can make my mortgage payments. I am already in arrears. The vessel and shipping is the only source of income that I have. Prior to that I was in real estate. I am in arrears with all my bills and my mortgage. I have a son who is in college. I have no previous convictions. I have spoken to a number of contractors who are willing to move the vessel and also purchase it in its current condition.*
22. The Court records show the Magistrate's Court also heard from the Crown Prosecutor Ms Williams and from a Mrs Kathleen Wood who was at that time the Director of DEMA prior to the Magistrate passing sentence on both appellants. This court notices the submission [recorded below] were not taken on oath and they were not formally agreed to / or; with the consent of the parties.
- *A quote was obtained from a salvage company in Providenciales to move the motor vessel off the Governors Beach in Grand Turk. That quote is dated January 15th 2013 to remove the vessel and the oil, to repair the damage that has been caused and replace the sand will cost \$112,000.00. Another quote was received from the Ministry of Finance and that was in the sum of three and a half million dollars. I don't believe the Government can afford that.*

Sentences

Paulette BEEN following conviction after trial:-

- *Depositing offensive substances on the coast contrary to section 5 of the Coastal Protection Ordinance Chapter 85:- That you during the period Oct 2012 to Nov 2012 did cause or permitted an offensive substance namely oil and the vessel Mega One Triton to be deposited on the coast, namely the*

Columbus Landfall National Park at Governors Beach.

- **Fined 15,000.00. To be paid in full in 3 months, or 6 months imprisonment in default. 5 days to appeal**

Kedernauth Megnauth following conviction after trial:-

- *Depositing offensive substances on the coast contrary to section 5 of the Coastal Protection Ordinance Chapter 85:- That you during the period Oct 2012 to Nov 2012 did cause or permitted an offensive substance namely oil and the vessel Mega One Triton to be deposited on the coast, namely the Columbus Landfall National Park at Governors Beach.*
- **Fined 15,000.00. To be paid in full in 4 months, or 8 months imprisonment in default. 5 days to appeal**

Mr Kedernauth Megnauth following conviction after trial:-

- *Discharging of oil into the Marine Environment contrary to section 9 of the Marine Pollution Ordinance 2010:- That you as the owner for Mega One Triton during the period Oct2012 to Nov 2012 did cause or permitted the discharge of oil from Mega One Triton into the marine environment of Columbus Landfall National Park Grand Turk, Turks and Caicos Islands*
- **Fined 25,000.00. To be paid in full in 4 months, or 8 months imprisonment in default. 5 days to appeal**

Mr Kedernauth Megnauth following conviction after trial:-

- *Discharging of Noxious Liquid Substance into the Marine Environment contrary to section 12 of the Marine Pollution Ordinance 2010:- That you as the owner for Mega One Triton during the period Oct 2012 to Nov 2012 did cause or permitted the discharge of a noxious liquid substance from the ship into the marine environment*
- **No separate penalty. 5 days to appeal**

1. Rulings the Learned Resident Magistrate erred in law.

- **Depositing offensive substance on coast.** Jodi Johnson said in evidence she knew "it was oil." The Magistrate after hearing the evidence took a common sense approach she heard evidence that there was oil floating on water. Johnson knew it was oil. The Magistrate accepted her evidence that "it" was oil.
- **Section 18 summary /indictable matter. UK Law MCO Cap 2.03** Counsel should have taken up this point during the course of the trial; more particularly at the start of the trial - as a preliminary point. Was the Resident Magistrate asked to forfeit the vessel? The vessel appears to have been abandoned. Not salvaged.
- **What constitutes the coast?** The answer is common sense, defined in statute and involves issues concerning riparian rights. The Magistrate accepted where the vessel was deposited was the coast and she decided that as a fact. According to

- the evidence the various witnesses talked about high and low water marks.
- Offensive material its smell the condition of the sea and its surroundings – that is direct evidence which appears to have been accepted by the Magistrate in her reasoned detailed decision.
 - Agent – and agent is a person responsible for loading or unloading cargo – oil materials – this point taken up during the course of the trial. Ruling ALL of the paper evidence accepted by the Magistrate points to Paulette Been as being the ships agent.

2. *There was a material irregularity which resulted in the trial being unfair.*

- Evidence of Kathleen Wood given from the gallery and or the bar table.
- Evidence by Audio Link – Audio Visual Link Ordinance Cap 2.08 sections 4(1) and (2) - Up to the court so trials move on and on time – this process helps to reduce costs and is a case management point. Should have been addressed earlier. The fact is the Court decided to proceed that way and it is perfectly within the courts discretion to hear evidence by video link more especially if the witness is ill and unable to travel to avoid unnecessary adjournments.

3. *The sentence was manifestly excessive in the circumstances.*

- This court will address this issue because the court does on reflection believe the sentence was perhaps “slightly excessive,” simply because the Resident Magistrate did not make any enquiries as to the monetary status of the Appellants, their record, employment, or business records or record any details of their costs of housing, food via a means enquiry.

Conclusions

23. Accordingly and having heard from counsel and upon reading the evidence adduced in the lower court, and having had sight of the submissions including the skeleton arguments from counsel Noel Skippings in relation to the subsequent convictions of the appellants - this court agrees with the respondent in this case; applying the Commonwealth case of *Pa'ila v Ma'u (2002) TLP 114* - states :-

- a. *A Higher Court will only interfere with the factual findings of a lower court in the clearest of cases: - for example: - if the appellant court was able to conclude that the learned Magistrate's decision was unsound or, the court were to find the Magistrate clearly came to the wrong conclusion. From considering all of the papers submitted to it this court certifies that it can come to no such conclusion.*

24. Having carefully studied the evidence bundle; this court can find NO evidence that the Magistrate's decision was unsound: – neither can this court find that the Magistrate clearly came to the wrong conclusion - on the facts of this case.

25. It is and it should remain quite clear to anyone; that the Magistrate during the course of this trial in the court below; had the benefit of observing each of the witnesses called on behalf of both the prosecution and also the defence; when each witness gave evidence before her in open court. A witness's reliability is for the Magistrate alone to determine; and in this case the Magistrate does appear to this Court, to have properly assessed all of the evidence – and assessed it very carefully in her detailed ruling.
26. It is a fact that the Magistrate had sight of ALL the witnesses, both while giving evidence in chief and during cross examination. The Magistrate has been the one person in a proper position to be able to assess credibility, reliability and their demeanour during the trial. The court papers reveal the Magistrate was able to make a properly determined decision based on all the evidence placed before the court; by this court studying the Magistrate's well-reasoned judgment.
27. So; after considering all the papers in this case and upon hearing the oral representation of both counsel; this court cannot either say; or, conclude that the Magistrate made any decision in this case; with which this court should interfere at this time; concerning either appellant's convictions on this Appeal which the Supreme Court is considering today.

Decision.

28. Accordingly the appeals against the first and second appellant's convictions are dismissed. This court affirms the convictions recorded in the Magistrate's Court in cases no. # 48/13, 52/13; 53/13 and 54/13 upon which the appellants were convicted by the Magistrate in Jan 2014.


On sentencing

29. However this court does find that there may or there might have been a material irregularity in this case, which requires correcting in regard to the Magistrate's sentencing procedure. This irregularity occurred just before the appellants were sentenced by the Magistrate for their part in these offences.
30. By accepting the unsworn evidence of Ms Kathleen Wood from the public gallery, concerning Woods estimate of the cost of the damage caused by pollution to the T&C environment by the MV **Mega One Triton's** grounding. This court agrees with counsel for the first appellant Paulette Been, that the Magistrate may have been influenced after hearing "an unsworn assessment" concerning "Woods perceived "cost of damage to the environment," caused by the MV **Mega One Triton** grounding" on the Grand Turk coastline, immediately before the Magistrate passed sentence on the appellants and she fined the appellant without conducting a specific means enquiry test.

Rectification and orders.

Accordingly the appeal against sentence is allowed [in part] to this extent:-

- This court **reduces** the \$15,000.00 fine imposed on the first appellant Paulette Been; by the Magistrate's Court - by three [3] thousand dollars. The first appellant Paulette Been is hereby **ORDERED** to pay a fine of **\$12,000.00** in substitution for the \$15,000.00 Magistrate's Court fine - which \$12,000.00 is to be paid into court within 21 days of today's date. She will serve **EIGHT** months in default of payment of \$12,000.00
- This court also **reduces** the \$15,000.00 fine imposed on the second appellant Kedernauth Megnauth by the Magistrate's Court - by three [3] thousand dollars. The second appellant Mr Kedernauth Megnauth is **ORDERED** to pay a fine of **\$12,000.00** in substitution for the \$15,000.00 Magistrate's Court fine, which \$12,000.00 is to be paid into court within 21 days of today's date. He will serve **EIGHT** months in default of payment of \$12,000.00
- This court also **reduces** the \$25,000.00 fine imposed on the second appellant Kedernauth Megnauth by a like sum of three [3] thousand dollars - to **\$22,000.00**. The second appellant Kedernauth Megnauth is **ORDERED** to pay a fine of **\$22,000.00** into court in **SUBSTITUTION** for the \$25,000.00 Magistrate's Court fine which - fine of **\$22,000.00** to be paid into court within 21 days of today's date. He will serve **TWELVE** months in default [concurrent]
- The default provisions ordered by the Resident Magistrate are thereby altered.
- In the circumstances there will be **NO** order for the costs of today's hearing.


Shuster J
Judge of the Supreme Court

