

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

3
4 **SCA0012/2019: Failing to Pay Overtime**
5 **SCA0017/2019: Failure to Keep Accurate Work Accounts for an**
6 **Employee**
7 **SCA0018/2019: Failure to Produce Documents Required to be**
8 **produced**
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10
11 **RENO CIANTAR**
12 **(T/A BREAD AND CHOCOLATE)**



13
14 **v.**

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16 **REGINA**

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20 **Appearances:**

Appellant in Person

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22 **Ms. Denise Samuels-Dingwall for the**
23 **Respondent/Crown**
24

25 **Before:**

Justice Roger Chapple (Actg.)

26 **Heard:**

27 **10th June 2021 and 15th July 2021**
28

29 **HEADNOTE**

30 *Criminal Law – Appeals from the Summary Court to the Grand Court – Appeals*
31 *against Finding and Sentence*

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34 **JUDGMENT**

35 **ON APPEALS AGAINST FINDING AND SENTENCE**
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1 1. The Appellant, Mr Reno Ciantar, was summonsed to appear before the Summary
2 Court, it being alleged that, in the operation of his café and restaurant business,
3 *Bread and Chocolate*, he had committed four offences, as follows:

4 i. Failing to pay overtime, contrary to s.25(4) of the *Labour Act* (2011
5 Revision);

6 ii. Failing to keep accurate accounts for an employee, contrary to s.32(1)
7 of the *Labour Act* (2011 Revision);

8 iii. Failing to provide a statement of wages to an employee, contrary to
9 s.33(3) of the *Labour Act* (2011 Revision);

10 iv. Failing to provide details of gratuities received and the manner in
11 which they were distributed, contrary to s.38(4) of the *Labour Act*
12 (2011 Revision).



14 2. The Appellant pleaded guilty to charges (ii) and (iv) above and not guilty to
15 charges (i) and (iii).

17 3. Following a trial in the Summary Court on 13th June 2019 before Magistrate
18 McFarlane, the defendant was found guilty of charge (i), failing to pay overtime,
19 and not guilty of charge (iii), failing to provide a statement of wages to an
20 employee.

21 4. At a further hearing on 11th July, the case was concluded. The appellant was
22 conditionally discharged upon the first charge, with no conviction recorded. He
23 was further ordered to pay the sum of CI\$13,333.00 as unpaid overtime due,
24 pursuant to s.25(5) of the *Labour Act*, together with the sum of CI\$100.00 as a
25 contribution to costs of the prosecution. No separate penalty was imposed in
26 respect of charges (ii) and (iv).
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5. Mr. Ciantar now appeals to this court against both the learned Magistrate’s finding and against the financial orders imposed.

6. At his trial in the lower court, the Appellant was legally represented by Mrs Christine Bodden. He has however represented himself throughout this appeal. His grounds of appeal are contained in two documents - firstly his initial Notice of Appeal dated 18th July 2019 and, secondly, in an undated but detailed 10-page document.

7. Initially, the only record of proceedings provided by the Summary Court was a one-page manuscript note from the learned Magistrate - of the witnesses who had given oral evidence before her together with a brief summary of her findings of fact.

8. At an early stage of this appeal, Dobbs, J, having considered the issues to be raised at the hearing of the appeal and ordered that a full note of the proceedings in the lower court be provided. On 6th November 2020, Magistrate McFarlane provided a 38-page document entitled “Summary Court Case Report.” This helpful report contains comprehensive detail of the evidence placed before the Magistrate, the submissions and concessions made to the Court, and, her reasons for reaching her conclusions. This Court is grateful to her for the detail provided. Prior to the hearing of the appeal, the appellant voiced his concern that the case report was not complete, and that details which he regarded as important had been omitted therefrom. Details of that material appear in the Appellant’s document entitled “Request for Inclusion of Evidence.”



1 9. In about July 2013, Mr Shane A. Parish started to work for the Appellant as a
2 kitchen assistant. The Appellant explained in the course of his evidence to the
3 Magistrate that Mr Parish “*was hired from Jamaica through a friend who sent me*
4 *his credentials. He was over-qualified for that position.*”



5
6 10. Shortly after Mr Parish’s arrival, the chef at *Bread and Chocolate* resigned. It was
7 agreed that Mr Parish would take over as chef. This case centres upon the terms of
8 his employment as chef and particularly, whether, in that capacity, he was entitled
9 to be paid overtime for hours worked in excess of the standard 45-hour week
10 specified in s.24 of the ***Labour Act***, which provides as follows:

11
12 *“The standard work week shall not exceed forty-five hours in any period of one*
13 *hundred and sixty-eight hours and the standard work day shall not exceed nine*
14 *hours.”*

15
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17 11. Section 25 of the ***Labour Act*** addresses the question of payment for work done in
18 excess of those standards hours. The general rule, provided by sub-section (1), is:

19 *“An employer shall pay overtime to an employee for every hour of work in*
20 *excess of the standard week or the standard work day.”*

21
22
23 12. It is common ground that Mr Parish was required to work in excess of those
24 standard hours and thus, on the face of it, an obligation to pay overtime arises.
25 However, the Appellant’s case was and is that he agreed with Mr Parish, at the start
26 of the latter’s employment as chef, that no overtime would be payable. Section
27 25(3), which provides an exception to the general rule, is of primary importance to
28 this case. It bears quotation in full:

29
30 *“Notwithstanding subsection (1), in the case of employees at professional or*
31 *managerial level and above, the parties to a contract of employment may agree*
32 *that no overtime should be paid, in which case the obligation to pay overtime*
33 *to that employee in accordance with subsection (1) shall not apply.”*
34

1 13. According to calculations made by the Department of Labour and Pensions
2 (“DLP”), if there were an obligation to pay overtime during the period in question,
3 July 2013 through to December 2017, it would be in the sum of CI\$13,333. At the
4 outset of proceedings in the Summary Court, it was made clear that, subject to
5 liability, there was no dispute about that figure, As the Magistrate made clear in her
6 case report:

7 “The sole issue for the trial, as Mrs Bodden and Mr Wainwright (who then
8 appeared for the respondent) both confirmed when asked by the Court, was
9 whether any agreement was made between Mr Parish and the defendant that
10 no overtime should be paid to Mr Parish in accordance with s25(3) of the
11 Labour Act.”
12
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14 14. The position of the parties can be summarised succinctly.

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16 15. According to the Appellant, he and Mr Parish had agreed, prior to his promotion to
17 chef, that the latter was not entitled to overtime payments in that capacity.
18 Effectively, longer hours without additional payment were part and parcel of his
19 new employment package.

20
21 16. According to Mr Parish, there was no such agreement, and thus, the default
22 position set out at s.25(1) of the *Labour Act* applied. Mr Parish eventually left his
23 employment at *Bread and Chocolate* in November 2017 to work for another
24 restaurant. In May 2018, he enlisted the help of the DLP to recover what he
25 maintained was his outstanding overtime pay. The upshot of the DLP’s
26 investigation was this prosecution.

27
28 17. Three witnesses gave evidence before the Magistrate: (i) Mr Parish, (ii) Ms Janelle
29 Muttoo, a DLP officer and (iii) the Appellant.



1 18. It is common ground that in July 2013, Mr Parish and the Appellant both signed a
2 contract relating to Mr Parish’s forthcoming employment as a chef¹. That is the
3 only contract ever signed by both parties relating to his employment as chef – there
4 is evidence of the Appellant producing other contracts later, but none of these were
5 signed by Mr Parish. That contract signed by both parties made no mention of the
6 parties having “contracted out” of the obligation to pay for overtime worked.
7 Nevertheless, the Appellant’s case was that prior to signing the written contract, he
8 had reached agreement orally with Mr Parish that no overtime would be paid. In
9 the course of his evidence, the Appellant said this:

10
11 *“When the other chef resigned, I spoke to Mr Parish and told him we want him*
12 *to consider being chef. I told him there would be loads of hours and that he*
13 *would be paid \$400. We told him we can’t offer him overtime since chefs log*
14 *all these hours and that would be the foundation of the offer. He said he’ll take*
15 *it on the spot..... the previous chef was not paid overtime, he was in the same*
16 *scenario as Shane [Parish] was.”*

17
18 19. The Appellant’s case was properly put to Mr Parish by Mrs Bodden. According to
19 the Magistrate’s record, Mr Parish:

20 *“...was resolute during cross-examination that he at no time agreed with Mr*
21 *Ciantar that he would not receive overtime pay.”*
22

23 20. The Magistrate was then faced with a head-on conflict of evidence, that is, one
24 party alleging that there was a supplementary oral agreement, the other party
25 denying any such agreement.



¹ (tab C of the trial bundle)

1 21. As this Court endeavoured to explain to the Appellant, an appeal from the
2 Summary Court to the Grand Court does not operate by way of a re-trial, save in
3 exceptional circumstances. Rather, the function of this Court is to examine and
4 scrutinise the proceedings in the court below, to satisfy itself that the case was
5 conducted by the Magistrate in accordance with law and the application of the
6 correct legal principles. If the trial in the lower court had been so conducted, this
7 court will be slow to intervene, unless the Magistrate’s findings of fact or
8 conclusions were plainly and obviously wrong. In **Benmax v. Austin Motor Co.**
9 *Ltd.*² Lord Reid explained the position thus:

10
11 *“... It is only in rare cases that an appeal court could be satisfied that the trial*
12 *judge has reached a wrong decision about the credibility of a witness. But the*
13 *advantage of seeing and hearing a witness goes beyond that: the trial judge*
14 *may be led to a conclusion about the reliability of a witness’s memory or his*
15 *powers of observation by material not available to an appeal court. Evidence*
16 *may read well in print but may be rightly discounted by the trial judge or, on*
17 *the other hand, he may rightly attach importance to evidence which reads*
18 *badly in print. Of course, the weight of the other evidence may be such as to*
19 *show that the judge must have formed a wrong impression, but an appeal court*
20 *is and should be slow to reverse any finding which appears to be based on any*
21 *such considerations.”*

22
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24 22. Having referred to those remarks, Lord Hughes in **R v Crawford**³, added this:

25 *“The advantage enjoyed by the trial judge applies equally to those*
26 *comparatively rare criminal cases tried by judge alone, with, of course,*
27 *appropriate consideration being given to the different standard of proof. The*
28 *present case is a good example of the difficulty necessarily facing an appellate*
29 *court. The trial had occupied something over six working days. The judge had*
30 *been immersed in the evidence in a way which could not be replicated in the*
31 *Court of Appeal. He did not have merely the written words of the witnesses. He*
32 *had seen the way in which the words were spoken and challenges were met,*
33 *and he had been able to read the faces and body language, as well as what*
34 *could be put on a page. That sometimes exaggerated general claims may be*
35 *made for the ability of experienced judges to determine the truth solely by*
36 *assessing the demeanour of witnesses does not alter the fact that part of the*
37 *judicial function is to read the witness as a whole, nor that demeanour may*
38 *sometimes contribute very significantly to the correct conclusion. A transcript*
39 *cannot provide the same opportunity. In the present case, the Court of Appeal*

² ([1955] A.C. at 375)

³ [2015] CILR 128



1 *did not even have a full transcript, but only the judge's note of evidence, as set*
2 *out fairly extensively in his judgment."*
3

4 23. Particular compliant is made by the Appellant about paragraph 24 of the
5 Magistrate's Case Report in which she says this:

6 *"It seemed to me that although Mr Ciantar accepted having a conversation*
7 *with Mr Parish about overtime pay, he either took something different from the*
8 *conversation or failed to appreciate that his proposal (that Mr Parish would*
9 *not receive overtime pay) was not accepted by Mr Parish such that it was*
10 *capable of being understood or interpreted as an agreement between that Mr*
11 *Parish would not receive overtime pay. It was essentially a unilateral*
12 *statement of affairs as it concerned the non-payment of overtime pay, which*
13 *did not in any way appear to seek Mr Parish's input or agreement."*
14

15 24. This conclusion, the Appellant contends, is contrary to the evidence given by Mr
16 Parish. At page 13 of the Case Report, the following exchange is noted:

17 *Ms Boddan: You worked for approximately four years, didn't you?*

18 *Mr Parish: Four and a half years*

19 *Ms Boddan: That's a long time to stay employed in a position*
20 *where you're not happy with how things are going?*

21 *Mr Parish: It wasn't a case of me not being happy. It wasn't me*
22 *having issues all the time. When I saw other people*
23 *getting paid overtime, I inquired and I was told that*
24 *I'm not entitled to it so I accepted. I loved my job. I*
25 *loved working there.*
26

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29 25. From this, the Appellant argues, it is clear that:



30 *"At some point, Mr Parish accepted the terms presented to him and continued*
31 *to work with the understanding that no overtime would be paid."*
32

33 26. With respect, this confuses acquiescence, or submission, to a current situation, with
34 an agreement. What is important is what was agreed between the parties prior to
35 the commencement of employment. That contract governs the rights and duties of

1 the parties. A contract can of course be varied subsequently by agreement, but any
2 such agreement must be consensual, with the parties in possession of all material
3 facts and their rights. The Appellant's apparent alternative suggestion that, albeit
4 there was no agreement to waive the entitlement to overtime in the first place, this
5 was later agreed by Mr Parish, by his acceptance of the situation, bears no close
6 analysis. An agreement to vary cannot be implied from an absence of complaint or
7 simply by the continuation of employment.

8
9 27. The Appellant further submits that the Magistrate did not appear to appreciate that
10 in law a separate oral agreement could supplement a written contract of
11 employment.

12
13 28. There is no reason whatever to suppose that the learned Magistrate was not
14 acquainted with this basic principle of contract law. Of course, such an
15 arrangement is possible in law. The Magistrate did not suggest otherwise. Simply,
16 in this particular instance, she was sure there was no supplementary agreement,
17 since she was sure that the parties were never *ad idem* – that is to say, there was
18 never a consensus between them that overtime would not be paid.

19
20 29. The Magistrate resolved the conflict of evidence between the Appellant and Mr
21 Parish by concluding that there was, at best, a proposal by the Appellant that Mr
22 Parish should not be paid overtime, which was not accepted by or agreed to by Mr
23 Parish. This was a conclusion to which, in the view of this Court, she was entitled
24 to come.



25
26 30. As previously noted, the fact that Mr Parish continued in his employment without
27 payment for overtime work does not mean that he had agreed to forgo such
28 payments - although it was evidence for the Magistrate to take into account when

1 deciding whether or not there was such an agreement. It is a factor which supports
2 the proposition that there was such an agreement. But there are other features of
3 the evidence that substantially detract from that proposition.

4
5 31. A substantial difficulty in this case for the Appellant is this: The alleged
6 conversation between the Appellant and Mr Parish, in which it was agreed that
7 overtime was not payable, took place prior to preparation and signature of the
8 written contract. Why then was their oral agreement not reflected in the written
9 contract? The cross-examination of the Appellant on this point is worth quotation:

10
11 *Mr Wainwright:* *So this is a contract for a management position,*
12 *correct?*

13 *Mr Ciantar:* *Yes*

14 *Mr Wainwright:* *In terms of your understanding of the Labour Law,*
15 *you knew that non-managerial employees have to be*
16 *paid overtime, correct?*

17 *Mr Ciantar:* *Yes*

18 *Mr Wainwright:* *You also knew that managerial employees could*
19 *contract out of that arrangement. You and the*
20 *employee could come to an agreement that overtime*
21 *not be paid, correct?*

22 *Mr Ciantar:* *It was my understanding.*

23 *Mr Wainwright:* *Presumably, you included that very clearly in your*
24 *contract of employment with Mr Parish when he took*
25 *over the role of chef?*

26 *Mr Ciantar:* *I didn't include it. It was the most regrettable mistake*
27 *I made with my company. I was putting together*
28 *contract by myself. I know that I fail to include that*
29 *there but it was because of the discussion Shane and I*
30 *had prior to him taking the job.*



1 When pressed about this in the course of his submissions to this Court, the
2 Appellant acknowledged that this presented a considerable difficulty.

3
4 32. This court bears in mind the ethos underpinning the **Labour Act**. Its purpose is
5 essentially to protect employees, recognising that there can be an inequality of
6 bargaining positions and a risk of exploitation. If a right provided by the Law is to
7 be contracted out of, as the Appellant suggests, clear evidence of that is required.
8 It is difficult to see why, if such an agreement had in fact been made, it was not
9 included in the written contract.

10
11 33. Before this Court, for the first time, the Appellant made complaint about his former
12 legal representative, Mrs Bodden in her conduct of the proceedings before the
13 Summary Court, particularly for erroneously indicating to the Magistrate that the
14 calculation of overtime due and owing was agreed, subject to liability. The
15 Appellant now contends that the claim is grossly over-inflated and on this basis,
16 seeks to overturn the order made pursuant to s.25(5) of the **Labour Act**.

17
18 34. As the Appellant put it in oral submissions to this Court:

19
20 *“I don’t want to throw her under the bus, but I was poorly represented*
21 *throughout. The Magistrate had to guide her throughout the proceedings.”*

22
23
24 35. Rather than arrears of overtime payments in the order of \$13,000, the true figure,
25 the Appellant now contends, is nearer \$3000. He agreed that the Magistrate was at
26 pains to ensure that the parties were agreed about the figures, but said that Ms
27 Bodden *“failed me on multiple occasions.”*



1 36. The Appellant gave no indication before the lower Court that the figure was in
2 dispute, either when he gave evidence on 13th June or, on 11th July, when the case
3 was finally concluded. This Court finds extreme difficulty reconciling his silence
4 on what was plainly an important issue in the case with what it has gleaned of the
5 Appellant in the course of these proceedings. Both in his lengthy oral and written
6 submissions to this Court, he has left no stone unturned, exploring every possible
7 avenue in detail. Despite this Court emphasising on many occasions that the appeal
8 was not a re-hearing of the case, the Appellant lost no opportunity to give again his
9 side of the case. He was not backward in coming forward. Had the Appellant not
10 agreed with the calculation of the claim, this Court is altogether confident that he
11 would have made that clear to the Magistrate. This Court treats with considerable
12 scepticism these complaints as to Ms Bodden's conduct, coming as they do, so late
13 in the day. There are no proper grounds for concluding that when indicating
14 agreement as to the figures, Mrs Bodden was doing otherwise than acting upon her
15 client's instructions.

16
17 37. As already noted, following receipt of the Magistrate's Case Report the Appellant
18 served a "Request for Inclusion of Evidence." He did so at my suggestion. It was
19 hoped that such inclusions could be the subject of agreement between the parties
20 although sadly this proved difficult given the change in Respondent's Counsel
21 between the lower Court and this Court. The Appellant's requests concerned four
22 (4) items, as follows:



- 23
24 i. The Magistrate's intervention restricting Mrs Bodden's cross-
25 examination of Mr Parish as to the alleged oral agreement concluded
26 prior to the commencement of his employment as chef;

- 1 ii. Ms Muttoo’s opinion, in answer to a question from the Magistrate, that
2 a clause appearing in an unsigned written contract dated 1st September
3 2017 was compliant with the *Labour Act*;
4
5 iii. Ms Muttoo’s evidence that overtime pay is not necessarily required for
6 a manager, as provided by s.25(3) of the *Labour Act*;
7
8 iv. Evidence that the Appellant “*presented an offer to Mr Parish to settle*
9 *the matter amicably whilst maintaining my innocence.*”

10
11 38. I can deal with each of these briefly:

- 12
13 a. Ms Samuels-Dingwall for the Respondent was unable to assist as to whether
14 this happened and I therefore work on the basis that it did. Any tribunal of fact
15 has both a right and a duty to control the proceedings before them, including
16 the restriction of questioning, generally because the matter has already been
17 canvassed in sufficient detail for the fact-finder’s consideration. In this case,
18 the issues for the Magistrate’s decision were fully before her. The Magistrate
19 records that Mr Parish “*was resolute during cross-examination that he at no*
20 *time agreed with Mr Ciantar that he would not receive overtime pay.*” This
21 strongly suggests that, at least in the Magistrate’s mind, the matter was fully
22 canvassed. Further cross-examination on the point is surely unlikely to have
23 altered Mr Parish’s resolute denials of the suggestion put to him.
24
25 b. The terms contained in a draft contract dated September 2017 but not signed
26 by Mr Parish could not be of any assistance to the Magistrate in relation to the
27 questions she had to resolve.

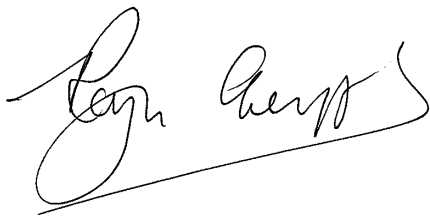


1 c. The provisions of s.25(3) were never in any doubt or dispute. An employee at
2 the managerial level can agree that overtime is not payable. The question was
3 whether Mr Parish did so.

4
5 d. Offers to settle a case are, as a matter of practice, not generally referred to at
6 the hearing of a case, lest that cause prejudice to the maker of the offer. I do
7 not know if the existence of such an offer was made known to the Magistrate,
8 but assuming it was, it would surely have no effect upon an experienced
9 professional Magistrate.

10
11 e. It follows from all the foregoing that this appeal is dismissed.

12
13 **Dated this the 8th September 2021**



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17 **Justice Roger Chapple**
18 **Acting Judge of the Grand Court**
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