

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2020/0013

COMMISSIONER OF POLICE

V

GLENFORD NEPTUNE

APPEARANCES

Ms Kristen Taylor-Hilton and Ms Safiya Moore for the Crown.

The defendant was unrepresented and not required to attend.

2021: DECEMBER 02

RULING

On a case stated by the Chief Magistrate on whether in the Magistrate's Court

there is power to 'amend' a complaint for an indictable only offence

- 1 **Morley J:** The Learned Chief Magistrate has sought the guidance of the High Court by stating a case for consideration¹, filed at the Registry on 26.07.21, with further information gathered by the court from the Crown during brief hearing on 26.11.21 and 01.12.21 for clarification of what happened below. The case concerns assault occasioning actual bodily harm allegedly by Glenford Neptune on Alkis Bramble on 26.07.20, where Bramble's tooth was chipped. Complaint

¹ Note, under **s241(1) Criminal Procedure Code**, an appeal by a party for a case to be stated would go to the Court of Appeal, but here it seems being raised by the Magistrate for clarification as to law and procedure, not as an appeal, has been sent to the High Court.

without oath was filed on 04.08.20 by Officer Murrain, but on it seems 21.10.20 the Crown sought to 'amend' the charge to common assault, by offering handwritten alteration of the existing charge, which Senior Magistrate Weeratunga agreed, but about which on 21.01.21 Chief Magistrate Chatoor inheriting the case expressed reservation as to the procedure. The purpose of this ruling is to determine procedurally what should happen if 'amendment' is sought of a matter indictable only.

- 2 The precise questions offered to be determined were:
 - a. Should an application for an amendment to an indictable offence filed on complaint without oath in the Magistrate's Court be granted;
 - b. If granted, is the Magistrate's Court compelled to proceed on the amended complaint;
 - c. Does the decision of **David Brandt v DPP 2017** MNIMCRAPP 2017/0001 apply?
- 3 Analysis has required attention to the **Penal Code** (PC) and **Criminal Procedure Code** (CPC), as at 2019 and as further amended. This matter is not uncomplicated and has identified oddities in the **CPC**. In particular, the court observes there is often misunderstanding on Montserrat common assault is a summary only offence, when it is not: it is triable either way. More, though triable either way, it is not an offence the Magistrate can send to the High Court, but instead the defendant can elect to do so. Overall, how to deal with 'common assault' in the Magistrate's Court is causing confusion which this ruling will attempt to end, particularly where offered as a lesser offence, as often happens, in place of indictable only 'assault occasioning actual bodily harm'.
- 4 Setting out the relevant sections of statute, as referred to in the statement of case, and further, they are:

PENAL CODE

Common assault

206. Any person who unlawfully assaults another is guilty of an offence and, if the assault is not committed in circumstances for which a greater punishment is provided by this or any other law, shall be liable on summary conviction to imprisonment for one year.

Assault causing actual bodily harm

207. Any person who commits an assault occasioning actual bodily harm is guilty of an offence and shall be liable to imprisonment for five years.

CRIMINAL PROCEDURE CODE**Meaning of indictable only offence**

50. An indictable only offence is an offence—

- (a) that any law states is to be tried by the High Court; or
- (b) that does not so state and does not fall under section 51 or 52.

Meaning of offences triable only summarily

51. An offence is triable only summarily if any law states that the offence is to be—

- (a) tried by the magistrate's court; or
- (b) tried summarily.

Meaning of offences triable either way

52. An offence is triable either way if—

- (a) any law states that the offence is punishable on summary conviction or conviction on indictment;
- (b) any law expressly gives the magistrate's court a discretion as to whether to try the offender summarily or to send him or her to the High Court for committal and trial on indictment; or
- (c) the offence is punishable, on summary conviction only, by imprisonment for a term exceeding six months².

Power of magistrate's court to choose mode of trial

59. If an accused is charged with an offence referred to in subsection 52(a) or 52(b) then, at the Initial Hearing, whether or not on application made by the prosecution or the accused person, if it appears to the magistrate that the case is one which ought to be tried by—

- (a) the High Court, the magistrate shall proceed with the Initial Hearing in accordance with section 66 and afterwards the case shall be continued as if the person had been charged with an indictable-only offence;
- (b) the magistrate's court, the magistrate shall stay all further proceedings in respect of the trial of the matter as an indictable offence, proceed with the Initial Hearing in accordance with Part 25 and afterwards the case shall be continued as if the person had been charged with an offence triable only summarily.

Accused's right to elect trial on indictment

60. (1) Subject to subsection...(3), if an accused is charged with an offence referred to in subsection 52(c) then, at the Initial Hearing, he may elect, if he so desires, to be tried before the High Court, and the magistrate shall inform him of this right at the commencement of the Initial

² Section 52(c) Criminal Procedure Code as amended by SRO 38/2020, cured of a misplaced 'not'.

Hearing and before any issue in relation to trial is dealt with, explaining to him the difference in the procedure between summary trial and trial on indictment and the probable time at which he might be brought for trial before the High Court. If the accused then elects for trial before the High Court, the magistrate's court shall proceed with the Initial Hearing in accordance with section 66 and afterwards the case shall proceed as if the person had been charged with an indictable only offence....

(3) This section does not apply to curtail the summary jurisdiction of the magistrate's court in any case brought under any law which expressly provides that the offence charged shall be tried only summarily or which expressly gives the magistrate's court a discretion as to whether to try the accused summarily or to commit him for trial on indictment.

Initial Hearing of indictable only offences

67. (1) The Initial Hearing shall commence on the return date of the summons or warrant or when the accused first appears before the Magistrate after having been arrested without warrant and shall continue on the date to which the Magistrate adjourns the Hearing from time to time.

(2) If the defendant has not been granted bail, the Initial Hearing shall take place within seventy two hours of arrest.

(3) At the Initial Hearing the Magistrate shall—

- (a) verify the defendant's identity and contact information;
- (b) record the name and contact information for the defendant's counsel if the defendant is represented by counsel and record counsel's appearance;
- (c) read the charges to the defendant or cause the charge to be read to the defendant in a language that he or she understands;
- (d) explain to the defendant the rights set out in section 68;
- (e) consider bail in accordance with Part 7;
- (f) hear and review any applications made by the prosecution or the defendant;
- (g) make a scheduling order filing dates—
 - (i) for the Sufficiency Hearing in the High Court;
 - (ii) by which the defendant must retain counsel or seek the appointment of counsel at the expense of the Crown;
 - (iii) by which the defendant's application for appointment of counsel must be determined; and
 - (iv) by which counsel, whether retained or appointed, must file notice of appearance with the Magistrate's court, if a notice of appearance has not been filed.

(4) At the end of the Initial Hearing, the Magistrate shall send the case to the High Court in the manner set out in the rules of court.

(5) Nothing in this paragraph shall be construed as preventing a defendant from retaining counsel at a subsequent stage of the proceedings.

(6) Scheduling orders made at the Initial Hearing are to be served on the prosecution, the defendant, counsel for the defendant, and the Director of Public Prosecutions.

Amendment of charge

198. (1) If, at any stage of a trial before the close of the case for the prosecution, it appears to the Magistrate's court that the charge is defective, either in substance or in form, the Magistrate's court may make an order for the alteration, substitution or addition of a charge, as the Magistrate's court thinks necessary to meet the circumstances of the case.

Limitation of time for proceedings for summary offences

201. (1) Except where a longer time is specially allowed by law, a Magistrate's court shall not try an accused for an offence triable only summarily unless the charge (in proceedings commenced by arrest and charge) or the complaint (in proceedings commenced by complaint) relating to it was laid within six months from the time when the matter of such complaint or charge arose or the date on which evidence sufficient to justify proceedings first came to the actual or constructive knowledge of a competent complainant.

- 5 Reviewing the legislation above, it can be discerned, concerning mode of trial, assault occasioning actual bodily harm as an offence under **s207 PC** is indictable only and under **s206 PC** common assault is triable either way.
 - a. This is because **s207 PC** does not state its mode, and is not covered by **s51 CPC** or **s52 CPC**, being by elimination therefore indictable only; and
 - b. **s206 PC**, though confusingly referring only to liability on 'summary conviction', allows for imprisonment on summary conviction for up to a year, which being more than six months means by implication it is caught by **s52(c) CPC** and therefore triable either way.
- 6 Under **s201 CPC** an offence 'triable only summarily' must be preferred within six months of the event, meaning here by 26.01.21, so that an application acceded to after 26.07.21 might arguably be well out of time (though recalling it appears the application was made within such time on 21.10.20). In the case statement there is concern expressed at paras 11 and 12 it is too late under **s201 CPC** to prefer common assault. However, common assault under **s206 PC** is not summary only, being triable either way, and therefore not governed by **s201 CPC**. It follows therefore there is no six month time limit on preferring its charge.
- 7 Being different offences, it is not strictly correct for the suggested change of offence under **s207 PC** to **s206 PC** to have been characterised as an 'amendment', akin per the prosecution argument at para 4i of the case statement to an amendment for defect of substance or form under **s198 CPC** prior to close of the prosecution case during a summary trial. Instead it is more

- accurately a 'substitution', where, subject to agreement by the Magistrate who has inherent power to control the propriety of proceedings ensuring no abuse of process, the first charge is discontinued by the Crown under the one section, while there is charge afresh substituted under the other, then to be processed per the usual court rules. The reason charge under **s207 PC** may be sought substituted can include offering argument in all the circumstances, there being here only a chipped tooth, prosecution for a lesser offence, and in the lower court, may be in the public interest as saving time and expense.
- 8 Further, because it is then the Crown discontinuing, not the Magistrate, therefore the Magistrate is not making any decision to discontinue, or 'amend', and so it cannot be said the Magistrate is dismissing or reviewing a matter indictable only: instead the Magistrate is only deciding whether to allow common assault to be charged, and if allowed, it is the Crown's decision to discontinue the assault occasioning actual bodily harm.
- 9 Whether the offence is best captured under **s206 PC** or **s207 PC** will usually remain a matter for prosecutorial discretion, noting it is evident a chipped tooth is legally capable of being 'actual bodily harm', though the issue is whether it needs to be, given a sentencing power of up to a year for common assault.
- 10 In short, the Crown can always ask to substitute a lesser offence for an indictable only offence, though depending on the reasons offered the Magistrate might refuse, which may include for example if the Crown is perceived as improperly attempting to prevent a jury trial, (though which cannot arise here as the defendant can elect on the common assault, as will be discussed further below).
- 11 In this case, it is not wholly clear what has happened to the charge of assault occasioning actual bodily harm under **s207 PC**, as to whether it persists or was wholly discontinued on 21.10.20.
- 12 Assuming it persists, and there remains at large an application commenced on 21.10.20 to substitute common assault under **s206 PC**, it is now for the Magistrate to decide whether to allow substitution (if this did not happen already on 21.10.20), and if so then to determine mode of trial, recalling **s206 PC** is triable either way under **s52(c) CPC**.

- a. However, per the language of **s206 PC**, it is supposed to be a summary offence, referring to liability only on summary conviction, and so the legislation does not grant power of election to the Magistrate to send it to the High Court under **s59 CPC**, which instead only empowers this if dealing with an offence triable either way under **s52(a) CPC** or **s52(b) CPC**, which in short is where election by the Magistrate is expressly given in the **PC**.
 - b. While the Magistrate cannot elect, instead under **s60(1) CPC** the defendant can, specifically of matters triable either way under **s52(c) CPC** so that here he can choose trial by jury on common assault.
 - c. Considering why there is this power for the defendant to elect jury trial in the **CPC**, it appears to be consequent on the sentencing power of the Magistrate being greater than six months in the **PC**, which is otherwise the Magistrate's normal limit. However, election by the defendant does sit oddly, as the **CPC** has on its face thwarted the **PC** which plainly contemplated in specific types of summary offence to give the Magistrate a greater sentencing power, and yet the **CPC** then allows the defendant to avoid the Magistrate, which seems contradictory and inconsistent.
- 13 Concerning **David Brandt v DPP 2017 MNIMCRAPP 2017/0001**, the case deals with how a Magistrate cannot under **s67 CPC** review the legal parameters of a matter indictable only with a view to dismissing it, not here arising, as review or dismissal of the offence under **s207 PC** was not invited, only that it be substituted by a new charge under **s206 PC**.
- 14 Obiter, the court expresses a number of cautious views.
- a. 'Assault occasioning actual bodily' harm under **s207 PC** ought perhaps to be triable either way, as in other Commonwealth jurisdictions, as it is relatively minor, and would invite the attention of the Attorney General to changing the law.
 - b. Further, 'common assault' ought perhaps to be summary only, as elsewhere, as it is the least serious form of assault, while also it strikes an odd note a possible sentence is more than six months, up to twelve months, begging whether it should be; specifically, it is difficult to imagine an assault under **s206 PC** meriting more than six months but which causes no bodily harm (which can be physical or mental), when if there is bodily harm then instead an

offence might be under an amended **s207 PC** as suggested and triable either way, or charged even more seriously.

- c. It is with regret the court suggests the legislation making 'summary offence' cases triable either way under **s52(c) CPC** and giving a defendant power to elect under **s60 CPC** is confusing, and wonders if it might make sense simply to revoke both, leaving offences otherwise captured under **s52(c) CPC** as summary though perhaps with the greater sentencing power.
- d. Moreover, the **CPC** contemplates under **s59** the Magistrate can elect for offences under **s52(a)** and **s52(b)**, but not **s52(c)**, and vice versa under **s60** the defendant can elect, meaning only for **s52(c)**, begging why is there mutually exclusive election, instead of both the magistrate and the defendant having a right of election for any offence triable either way.
- e. Finally, to my mind it is difficult to discern what is meant by **s60(3) CPC**, particularly as to how **s60(1) CPC** 'does not apply to curtail the summary jurisdiction of the magistrate's court', which on one interpretation seems to mean there shall be no defendant election where an offence is expressed to be summary only, as it curtails summary jurisdiction, and which arguably therefore applies to all offences³ caught by **s52(c) CPC**, meaning **s60(3) CPC** would then wholly negate **s60(1) CPC** rendering it of no effect, begging whether **s60(3) CPC** should be rewritten to be clear as to its meaning, whatever that is.

15 Reviewing the precise questions offered for determination at para 2 above:

- a. *'Should an application for an amendment to an indictable offence filed on complaint without oath in the Magistrate's Court be granted'* – it is not amendment, but application to substitute by discontinuance and fresh charge, which the Magistrate may refuse, depending on the reasons offered;
- b. *'If granted, is the Magistrate's Court compelled to proceed on the amended complaint'* – yes, the Magistrate is compelled to proceed on the substituted charge if it has been accepted;
- c. *'Does the decision of **David Brandt v DPP 2017 MNIMCRAPP 2017/0001** apply'* – no, as above at para 13.

³ Note for example, under **s52(c) Criminal Procedure Code**, the defendant can elect in respect of apparently summary offences under the **part 25** of the **Penal Code** at **s325** (abuse and false statements), **s326** (obeah), **s331** (offensive weapon), **s333** (throwing missiles), **s336** (removing boats), and **s339** (gambling), as contemplated in **s347**, where each such offence can attract on summary conviction up to one year imprisonment.

- 16 In summary then, in my judgment concerning the case stated, the Magistrate is right not to accede to Crown application to 'amend' from **s207 PC** to **s206 PC**, if that was the application, but instead the application is more accurately to 'substitute' common assault, which is not subject to a six month time limit, and is permissible if agreed, the Crown then discontinuing assault occasioning actual bodily harm, so that the way forward for the Magistrate is:
- a. Decide if the reasons for substitution are satisfactory; if not disallow it, and the matter as **s207 PC** is sent to the High Court under **s67 CPC**, or discontinued by the Crown.
 - b. If satisfactory, allow the prosecution to substitute **s206 PC**, with **s207 PC** then discontinued by the Crown.
 - c. If proceeding as common assault, then allow the defendant to elect jury trial under **s60(1) CPC**, which if declined means the case can be tried summarily with a sentencing power of up to one year.
 - d. Alternately, if the defendant elects, then send the case to the High Court under **s67 CPC**.
- 17 Delay in this decision arises from 26.07.21 to today 02.12.21 only because from 23.07.21 until 22.11.21 there has been no assize on Montserrat, though with the Judge now back on island, with some further inquiry of counsel, the decision has now been rendered.
- 18 The court extends its compliments to the Learned Chief Magistrate and thanks Her Honour for raising the case stated.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

2 December 2021