

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

**MONTSERRAT
MNIMCRAP2017/0001**

BETWEEN:

DAVID BRANDT

Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster
The Hon. Mr. John Carrington, QC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett and Mr. Karl Markham for the Appellant
Ms. Anesta Weeks, QC and Ms. Dee Connolly for the Respondent

2017: July 13;
November 6.

Criminal appeal – Montserrat Criminal Procedure Code – Jurisdiction of magistrates under section 67 of the Criminal Procedure Code – Initial hearing into indictable offences - Whether the magistrate erred in finding that he had no jurisdiction to examine validity of charges -- Magistrates Act Cap 2.02 – Montserrat Penal Code – The Constitution of Montserrat – Breach of constitutional rights – Whether the Magistrate Court has jurisdiction to grant constitutional relief – Jurisdiction of the Court of Appeal on breaches of the Constitution

The appellant, David Brandt, was charged under the **Penal Code of Montserrat** with the offences of sexual intercourse with a girl under the age of 16 years contrary to section 122(1), conspiracy with persons unknown to have unlawful sexual intercourse with a girl under the age of 16 years, sexual exploitation of persons under the age of 18 years contrary to section 141(1)(a) and conduct for the purposes of sexual exploitation of a girl under the age of 18 years contrary to section 141(1)(d).

At the initial hearing before the learned Chief Magistrate the appellant applied to have the charges dismissed. The appellant argued that the charges were defective and bad in law both in substance and form. The application was made under section 67(3) of the **Criminal Procedure Code** and the Chief Magistrate denied the application on the ground that the court had no jurisdiction to dismiss the charges. The appellant appealed on the ground that the Chief Magistrate erred in finding that he did not have power to determine the validity of the charges at an initial hearing. The appellant also argued that his constitutional right to a fair hearing had been infringed.

Held: dismissing the appeal; affirming the decision of the learned Chief Magistrate; and remitting the case to the High Court, that:

1. The magistrate does not have the power to dismiss charges against a defendant at an initial hearing. Neither section 22 of the **Magistrate's Act** nor section 67(3) of the **Criminal Procedure Code** affords a magistrate such power. In relation to initial hearings, the magistrate's powers are limited to the matters listed in section 67(3) of the **Criminal Procedure Code**.

Section 22 of the **Magistrate's Act**, Cap. 2.02, Revised Laws of Montserrat 2013 applied; Section 67 of the **Criminal Procedure Code**, Cap. 4.01, Revised Laws of Montserrat 2013 applied.

2. The Magistrate's Court does not have jurisdiction to grant constitutional relief under section 7 of the **Constitution of Montserrat**. Any redress for alleged breaches of the Constitution must be sought in the High Court.
3. The Court of Appeal does not have original jurisdiction to hear applications for breaches of the Constitution. The Court can only address breaches of the Constitution on appeal from the High Court.

Hunte and Khan v The State of Trinidad and Tobago (2015) UKPC 33 applied.

JUDGMENT

[1] **WEBSTER, JA [AG.]:** The appellant, David Brandt, was charged with the following:

- (a) unlawful sexual intercourse with a girl under the age of 16 years

contrary to section 122 (1) of the **Penal Code**;¹

- (b) conspiracy with persons unknown to have unlawful sexual intercourse with a girl under the age of 16 years;
- (c) four charges involving conduct for the purpose of sexual exploitation of persons under the age of 18 years contrary to section 141(1)(a) of the **Penal Code**; and
- (d) one charge of conduct for the purpose of sexual exploitation of a girl under the age of 18 years contrary to section 141(1)(d) of the **Penal Code**.

[2] At the initial hearing of the charges on 30th January 2017 before the learned Chief Magistrate, the appellant applied under section 67(3) of the **Criminal Procedure Code**² for the dismissal of the charges against him on the ground that ex facie they were defective and bad in law both in substance and in form. The Chief Magistrate refused the application on the ground that he had no jurisdiction to dismiss the charges against the appellant and issued a scheduling order for the appellant to appear before the High Court for a sufficiency hearing. The appellant appealed against the decision of the Chief Magistrate on the ground that the Chief Magistrate erred in finding that he had no jurisdiction to examine the validity of the charges at the initial hearing and sought an order that the charges against him were defective and should be struck out.

[3] Just before the hearing of the appeal the respondent withdrew the charges of unlawful sexual intercourse and conspiracy ((a) and (b) in paragraph 1 above) leaving the five charges of sexual exploitation, four of them contrary to sub-section (a) of section 141(1) of the **Penal Code** and one contrary to sub-section (d) of section 141(1). This appeal concerns the five charges under section 141 of the **Penal Code** and the interpretation of the statutory provisions in Montserrat relating to the committal of persons for trial on indictment.

¹ Cap. 4.02, Revised Laws of Montserrat 2013.

² Cap. 4.01, Revised Laws of Montserrat 2013.

- [4] The issues that arise on this appeal are:
- i. The extent of the jurisdiction of the Magistrate's Court when considering an application brought by a defendant under section 67(3)(f) of the **Criminal Procedure Code** to dismiss the charges against him.
 - ii. Whether there was a breach of the appellant's constitutional rights arising from the decision of the Chief Magistrate to decline jurisdiction to examine the validity of the charges against the appellant at the initial hearing.

Issue 1 - The extent of the magistrate's jurisdiction under section 67(3)(f) to dismiss charges

- [5] The trial of persons in Montserrat charged with indictable offences commences with an initial hearing before a magistrate followed by a sufficiency hearing before a judge of the High Court. At the sufficiency hearing the judge reviews the evidence and decides, if it discloses a prima facie case, that an indictable offence has been committed by the defendant. If the judge finds that there is sufficient evidence the case proceeds to trial on indictment. Prior to the introduction of this system the trial of indictable offences in Montserrat was commenced by a preliminary inquiry before a magistrate. At the conclusion of the inquiry the magistrate decided if the evidence was sufficient to commit the defendant for trial in the High Court. It is immediately apparent that the Magistrate's Court now has a significantly reduced role in deciding whether the defendant should be tried for the offence charged. Subject to section 67 of the **Criminal Procedure Code** his or her role is now limited to sending the case to the High Court for a judge to decide if the defendant should be committed for trial.
- [6] The new procedure for trying indictable offences is contained in the **Criminal Procedure Code**. The steps in the procedure are set out section 61(1) of the Code as follows:-

“61(1) Criminal proceedings in respect of offences to be tried on indictment shall include: –

- (a) an Initial Hearing before a magistrate;
- (b) a Sufficiency Hearing before the judge;
- (c) Indictment
- (d) Arraignment; and
- (e) Trial”

This appeal is primarily concerned with the first stage: the Initial Hearing.

[7] Section 62 of the Code deals with case management hearings and sections 63 to 65 cover pre-trial disclosure. These sections are not directly relevant to this appeal.

[8] The procedure going forward from case management and disclosure for indictable offences is contained in Part 12 of the **Criminal Procedure Code** headed “Indictable offences: sending cases from the Magistrate’s Court to the High Court”. The procedure for the Initial Hearing and the magistrate’s powers at the hearing are set out in section 67 and it is helpful to set out this section in full -

“(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." (Underlining added)

The language in section 67 is mandatory and once the magistrate has completed the procedures contemplated by the section for the initial hearing his or her duty is to send the case to the High Court for the sufficiency hearing. It is then for the High Court judge to determine, based on the material before him or her, including the evidence, whether a prima facie case has been made out by the prosecution that an indictable offence has been committed by the defendant.

The appellant's application

- [9] Learned counsel for the appellant, Dr David Dorsett, applied to the magistrate under section 67(3)(f) to dismiss the charges against the appellant. He submitted that the magistrate was not obliged to send the case for sufficiency hearing if he was satisfied that the charges against the appellant were ex facie defective and bad in law, both in form and substance. As such the magistrate's powers under section 67(3)(f) to "hear and review" an application by the appellant is a power to hear and determine the application. Otherwise, the magistrate would be doing no more than performing an administrative or rubber stamp function in dealing with applications under section 67(3)(f).

[10] Dr Dorsett supported his submissions by reference to section 22 of the **Magistrate's Court Act**³ which sets out in general terms the criminal jurisdiction of the Magistrate's Court –

“The magistrate's court shall have jurisdiction –

(a) subject to the Criminal Procedure Code, to exercise any power in respect of receiving complaints, informations or other process, or issuing warrants or other process for all offences;

(b) subject to the Criminal Procedure Code,

(i) to try summarily any person charged with an offence triable summarily under the criminal code or any other law; and

(ii) to conduct any proceedings, other than trial, for all offences.”

He submitted that section 22 shows that Parliament intended that the magistrate's power to conduct “any proceedings other than trial” means that the magistrate can hear and determine any application in an indictable charge other than the trial itself and that this power includes the power to hear and determine an application by the appellant under section 67(3)(f) to dismiss the charges against him. The magistrate therefore had the power to hear and determine the application by the appellant that the charges against him were defective and the magistrate should have dismissed the charges.

[11] Counsel for the respondent, Ms. Anesta Weeks, QC submitted that the types of applications contemplated by section 67(3)(f) are the matters listed in the section such as bail, disclosure and assignment of counsel for the defendant, and not issues relating to the charge itself such as whether it is defective in form or in substance. The latter issues are reserved to the High Court judge at the sufficiency hearing or later. The magistrate did not have the power to dismiss the charges against the appellant. If Parliament intended that the magistrate should have had this power it would have been the simplest thing to include it in the various powers given to the magistrate by section 67.

³ Cap. 2.02, Revised Laws of Montserrat 2013.

[12] I prefer Ms Weeks' submissions. The scheme that was introduced by the new system of an initial hearing followed by a sufficiency hearing contemplates that the magistrate's powers are limited to the matters listed in section 67(3). He or she is not required to review evidence to be led by the prosecution nor to question the validity of the charges against the defendant. A brief comparison with the former system of committal by the magistrate illustrates the point. Under the old system at the end of the preliminary inquiry the magistrate was required to either dismiss the charges against the defendant or commit him or her for trial in the High Court. The magistrate no longer has the power to dismiss the charges against the defendant. I must assume that this was Parliament's intention and that it deliberately used the phrase "hear and review" in section 67(3)(f) to allow the magistrate to determine whether applications made under section 67 fall within his jurisdiction under the Code.

[13] On the other hand I find that Dr. Dorsett's reliance on section 22 is misplaced. Section 22 was inserted into the **Magistrate's Court Act** by section 312 of the **Criminal Procedure Code** which repealed the old section 22. The repealed section 22 provided, inter alia, that the magistrate had jurisdiction, subject to the provisions of the **Criminal Procedure Code** -

"to investigate all charges which are not triable summarily, or which, under section 75 of the Criminal Procedure Code, the magistrate considers to be tried by the High Court, and to dismiss or commit him for trial before the High Court."

The repealed section 22 gave the magistrate a clear mandate to dismiss or commit the defendant for trial before the High Court, presumably at the end of the preliminary inquiry. It is apparent that Parliament saw fit to take away the magistrate's power to dismiss the charges against a defendant or commit him for trial in the High Court by repealing section 22 and replacing it with the more general power to "conduct proceedings other than trial" that is now contained in section 22. The more general power is consistent with the scheme of the new procedure which transfers all issues relating to the charge against the defendant,

including the power to dismiss the charge, to the High Court at the sufficiency hearing or later during the trial.

- [14] I am satisfied that the magistrate's powers under the new system is to review the material before him or her for compliance with section 67 of the **Criminal Procedure Code**, deal with any application that is contemplated by the paragraph (f) of sub-section (3) made by the defendant or the prosecutor, and then send the case to the High Court for the sufficiency hearing. The magistrate does not have the power to dismiss the charges against the appellant.

Section 141 of the Penal Code

- [15] The charges against the appellant allege that he committed various acts for the purpose of sexual exploitation contrary to section 141(a) and (d) of the **Penal Code**. Dr. Dorsett submitted that there is nothing in any of the allegations against the appellant to suggest that they were committed for the purpose of sexual exploitation as that term is defined in subsection (3) of section 141. Ms. Weeks countered by submitting that subsection (3) should not be given a narrow interpretation and the use of the expression "... includes the following acts..." in subsection (3) before listing the four categories of sexual exploitation does not mean that sexual exploitation for the purposes of section 141 is limited to these four acts.
- [16] Both counsel made compelling submissions supported by authorities regarding the sufficiency of the charges under section 141 of the **Penal Code** and in particular whether the particulars of the charges disclose allegations of sexual exploitation within the meaning of section 141. However, it is unnecessary for me to refer to these cases in this judgment and to decide which of the two sets of submissions is correct. Having found that the magistrate did not have jurisdiction to decide on the validity of the charges against the appellant, this issue will, if necessary, be resolved by the High Court at the sufficiency hearing after the judge has reviewed the evidence against the appellant and considered the charges. The learned

magistrate was correct to find that it was premature to rule on the validity of the charges, and that in any event he did not have jurisdiction to do so. His finding at page 64 of the record of appeal that -

“This court is of the view that the legislator never intended to give jurisdiction to the Magistrate’s Court to determine the validity of a charge in an indictable offence during an Initial Hearing. Under the new Criminal Procedure Code, the jurisdiction to hold a sufficiency hearing is not vested with the Magistrate’s Court. Therefore, if the Magistrate Court decide on the validity of a charge in relation to an indictable offence it would be trespassing on the jurisdiction of the High Court.”

I agree with and affirm the finding of the learned magistrate that the Magistrate’s Court did not have jurisdiction to pronounce on the validity of charges relating to indictable offences and I would dismiss the appeal on this ground which was the only ground in the notice of appeal.

The Constitutional Points

- [17] The appellant complained that his constitutional right to a fair trial guaranteed by section 7(1) of the **Constitution of Montserrat**⁴ was breached by the magistrate when he failed to hear and determine the application to dismiss the charges against him. There was no separate ground of appeal setting out this complaint but no objection was taken by the respondent. The essence of the complaint to be gleaned from Dr. Dosett’s submissions is that it is an abuse of process for the prosecution to further prosecute the charges in their current defective form and that the application to dismiss the defective charges against the appellant should have been considered at the earliest opportunity. The earliest opportunity to have considered the charges was at the initial hearing and the appellant should not be subject to the charges beyond this hearing. The Chief Magistrate’s failure to hear and determine the application at the initial hearing was therefore irrational, unreasonable and fundamentally unfair and a contravention of the appellant’s right to a fair trial. Dr. Dorsett did not suggest that the new procedure for bringing persons charged with indictable charges to trial is unconstitutional, only that, properly interpreted, the appellant was entitled to have his application to dismiss

⁴ Cap 1.01, Revised Laws of Montserrat 2013.

the charges heard and determined at the initial hearing.

- [18] Dr Dorsett also submitted that the charges against the appellant did not comply with the requirements of section 193 of the **Criminal Procedure Code** which provides that the charges must contain a statement of the offences charged and particulars giving reasonable information of the nature of the offences charged and the acts or omissions alleged to have given rise to the offences. Further, that the entitlement to proper particulars is not just a statutory right but also right under section 7(2)(b) and (c) of the Constitution which reads –

“Every person was charged a criminal offence –

(b) shall be informed promptly, in a language that he or she understands and in detail, of the nature and cause of the accusation against him or her;

(c) shall be given adequate time and facilities for the preparation of his defence.”

- [19] The proper place for the appellant to seek redress for these alleged breaches of the Constitution is in the High Court. The Chief Magistrate did not have jurisdiction to grant any of the constitutional relief sought by the appellant and he was correct not to make a ruling on the constitutional points. The recent Privy Council decision in **Hunte and Khan v The State** also settled the point that this Court does not have original jurisdiction to hear applications for breaches of the Constitution.⁵ We will only be able to deal with the alleged breaches of the Constitution on an appeal from a decision of the High Court.

Conclusion

- [20] In all the circumstances I find that the learned magistrate acted according to law and that there was no breach of the provisions relating to the initial hearing. The appellant’s application to dismiss the charges against him is premature as well as his claims for breaches of his constitutional rights. All his rights remain available to him at later stages of the proceedings.

⁵ (2015) UKPC 33.

[21] I would dismiss the appeal and order that the case be sent to the High Court for a sufficiency hearing as soon as possible.

I concur.

Gertel Thom

Justice of Appeal

I concur.

John Carrington, QC

Justice of Appeal [Ag]

By the Court

Chief Registrar