

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2004**

CLAIM NO. AXAHCV/2003/0018

BETWEEN:

SHAMARI HODGE TERRENCE RICHARDSON VAUGHN BRODIE	Claimants
AND	
COMMISSIONER OF POLICE	Defendant

APPEARANCES:

Mr. Thomas Astaphan for 1st and 2nd Claimants
Mrs. Navine Fleming Kisob instructed by Messrs. Lake & Kentish for 3rd Claimant.
Mrs. Chanelle Petty Barrett for the Defendant.

**Date: 18th December, 2003
18th February, 2004**

JUDGMENT

[1] **GEORGE-CREQUE J.:** The Claimants are charged with the offences of unlawfully and maliciously inflicting grievous bodily harm pursuant to section 204 of the Criminal Code 2000 ("the Code") in Complaints Nos. 345-347/2002 which came up before the Learned Magistrate on 20th August, 2002. By virtue of the First Schedule of the Code unlawful grievous bodily harm, which had previously been an offence triable on indictment only,

became an offence which is now triable summarily and also on indictment or what is now usually called an offence triable either way.

[2] On 20th August, 2002 when the Complaints first came before the Magistrate the prosecution indicated that the matters could proceed summarily. The matters were then adjourned to 19th September for election and plea as one of the Defendants were hospitalized and counsel for the other was not available. On 19th September, the prosecution then informed the Magistrate that they intended to proceed with the matters by way of indictment and invoked Section 46 of the Magistrate's Code of Procedure Act ("the Magistrate's Code"). Counsel for the Claimants informed the Magistrate that the Claimants had elected to be tried summarily and objected to the prosecution proceeding on indictment and asserted the Claimant's right to election and urged that Section 46 of the Magistrate's Code was in conflict or collided with Sections 3 and 9 of the Fundamental Rights and Freedoms protected and enshrined in the Constitution of Anguilla ("The Constitution").

[3] The Learned Magistrate, being of the view that the issues raised were of great constitutional dimensions and not frivolous or vexatious and at the request of Counsel for the Claimants, certified the following questions for determination by the High Court pursuant to Section 16(3) of The Constitution on December 03rd 2002 :

- (1) Whether the power given to the Prosecution under Section 46 of the Magistrate's Code usurps the legislative power where said power is given and utilized without any standards and guidelines as to the circumstances under which said power may be invoked and if so:
- (2) Whether Section 46 of the Magistrate's Code is void for vagueness.
- (3) Whether Section 46 of the Magistrate's Code is void on its face because it gives the Prosecution unfettered power, and if not whether Section 46 is void as it applies to the facts and circumstances of this case .

- (4) Whether, after the Prosecution had indicated on 20th August, 2002 its intention to proceed summarily and after the Court had adjourned the matter for election and plea under Sections 45, 47 and 50 of the Magistrate's Code, the prosecution may on the date of the adjourned hearing (19th September, 2002) lawfully at that stage override the Court's decision and the Defendants' (Claimants') right of election by invoking Section 46 of the Magistrate's Code.
 - (5) Whether on the facts and circumstances herein, the subject accused are entitled as a matter of law to the right to proceed to election and to be tried summarily.
 - (6) Whether the power granted the prosecution under Section 46 without any standards or guidelines as to how, when or under what circumstances to invoke said power amounts to a usurpation of legislative power by a member of the Executive.
- [4] Further to directions for trial being given by the High Court on 15th April and 20th June 2003 written legal submissions containing the contentions on which the parties relied were filed and the matter came on for hearing on 18th December, 2003. Counsel for all the parties agreed, as do I, that no affidavit or oral evidence was necessary and invited the Court to treat the written legal submissions as the full arguments to be advanced by the parties in support of their respective contentions and in due course deliver a decision on the questions raised for determination. This I now do.
- [5] In my view questions (1), (3), (6) and to a certain extent question 2 can be dealt with together as it raises issues regarding the doctrine of the separation of powers and that of certainty in construing Section 46 within the context of sections 45, and 47 to 50 of the Magistrate's Code and Sections 3 and 9 of The Constitution. Sections 45 to 50 of the Magistrate's Code states as follows:
- "45. (1) This section applies where an adult is charged with –
- (a) An offence set out in the Schedule; or

(b) an offence that is expressed in the provision creating the offence as triable summarily or on indictment;
(referred to in this Act as an offence “triable either way”).

(2) Subject to section 46, the Magistrate may on application by the prosecutor, the accused or of its own motion consider whether an offence that is triable either way ought to be tried summarily.

(3) Before so considering, the Magistrate shall cause the charge to be written down, if it has not already been done, and read to the accused.

(4) If –

- (a) the prosecutor makes application and the accused does not object to being tried summarily;
- (b) the accused makes application and the prosecutor agrees to summary trial of the accused; or
- (c) the Magistrate moves and the prosecutor agrees and the person charged does not object to being tried summarily;

the Magistrate shall in ordinary language explain to the accused –

- (d) the meaning of the offence being dealt with summarily;
- (e) that he can consent to be tried summarily or, if he wishes, to be tried by a jury; and
- (f) that, if he is tried summarily and is convicted by the Court, he may be committed for sentence to the High Court under section 48, if the Magistrate, on obtaining information about his character and antecedents, is of the opinion that they are such that greater punishment should be inflicted than the Magistrate has power to inflict for the offence.

(5) After explaining to the accused as provided by subsection (4), the

Magistrate shall ask him whether he consents to be tried summarily or wishes to be tried by a jury, and –

- (a) if he consents to be tried summarily, shall proceed to summary trial of the accused; or
- (b) if he does not consent, shall proceed to inquire into the complaint as examining Magistrate.

Application to try offence on indictment

46. If the prosecutor indicates that an offence triable either way is to be tried on indictment, section 45 and sections 47 to 50 do not apply and the Magistrate shall proceed to inquire into the complaint as examining Magistrate.

When offence dealt with summarily

47. Subject to section 48, an adult convicted of an offence triable either way –

- (a) under the Schedule that is dealt with summarily under section 45(5)(a) is liable on summary conviction to imprisonment for a term of 2 years or to a fine of \$2,000; and
- (c) referred to in section 45(1)(b) that is dealt with summarily under section 45(5)(a) is liable to the punishment expressly provided on summary conviction for that offence in the provision creating the offence.

Committal for sentence on summary trial of offence triable either way

48. Where on the summary trial of an offence triable either way, an adult is convicted of the offence, and, if on obtaining information about this character and antecedents the Magistrate is of the opinion that they are such that greater punishment should be inflicted for the offence than the Court has power to inflict, the Magistrate may in accordance with section 49 commit him in custody or on bail to the High Court to be sentenced or otherwise dealt with in accordance with section 50.

Powers on committal by Court in respect of other offences

49. Where the Court commits a person in custody or on bail to the High Court under section 48 to be sentenced or otherwise dealt with in respect of an offence triable either way, the Court may also commit him in custody or on bail, as the case may require, to the High Court to be dealt with in respect of any other offence of which the Court has convicted him.

Powers of High Court on committal

50. Where an offender is committed by the Court to be sentenced or otherwise dealt with under section 48, the High Court shall inquire into the circumstances of the case and shall have power to deal with him -

- (a) in the case of the offence triable either way, in any manner in which it could deal with him if he had just been convicted of the offence on indictment before the High Court; and
- (b) in the case of any other offence of which the Court has convicted him and committed him under section 49, in any manner in which he could be dealt with by law, but in no event shall the High Court exceed the jurisdiction of the Magistrate in respect of such offence.”

[6] The Claimants contend that Section 46 being in such broad and sweeping terms gives an unfettered power and absolute discretion to the Prosecutor and as such is inconsistent with and therefore repugnant to the provisions of Section 45 which provides for an accused's consent to be tried summarily in cases of offences triable either way and as such collides with Sections 3 and 9 of The Constitution. Section 3 of The Constitution protects against deprivation of one's personal liberty and Section 9 provides for a person charged with a criminal offence to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Is the ultimate right of election as to mode of trial the accused's?

- [7] It is to be noted that Section 45(2) of the Magistrate's Code which gives the magistrate power to consider (*my emphasis*) whether an offence triable either way ought to be tried summarily begins with the phrase "**subject to section 46**"(*my emphasis*). This phrase in itself tend to suggest, at first blush, that Section 46 reserves or contains provisions intending to override Section 45(2). The Magistrate's Code, as has been pointed out by counsel for the Claimants, falls short of prescribing the factors the magistrate must weigh or take into consideration in deciding whether or not a matter is more suitable for trial summarily or by way of indictment. Similarly, Section 46 does not set out guidelines, or factors and circumstances by which the prosecutor must be guided in invoking the provisions of Section 46 in overriding the provisions of Section 45.
- [8] Once Section 45 of the Magistrate's Code is invoked, Sections 47 – 50 becomes operative. Section 47 prescribes the penalty on conviction on the offence being tried summarily which is imprisonment for a term of 2 years or a fine of \$2,000. On Indictment the accused is liable on conviction to imprison for a term of 5 years. Of interest however, is section 48 which allows the Magistrate, even on a summary trial of the offence, the power to commit the accused to the High Court for sentence, where the situation warrants, based on information received as to the accused's character and antecedents, in which event, the accused may be sentenced up to a maximum of 5 years as if tried on indictment. On the other hand, if Section 46 is invoked, this Section says specifically that sections 45 and 47-50 does not apply and the Magistrate **shall** (*my emphasis*) proceed to inquire into the complaint as examining magistrate. The Magistrate is therefore precluded, once Section 46 is invoked, from trying the offence summarily.
- [9] It is true to say as contended by Ms. Petty Barrett that one of the hallmarks of the criminal justice system and a right which the courts have always guarded zealously is the right of trial by jury so that in respect of offences triable either way the accused must consent (*my emphasis*) to being tried summarily. This principle is clearly borne out in the cases of **Boodram –v- The Attorney General**¹ , **R–v- Craske, ex parte Metropolitan Police**

¹ 47 WIR 459

Commissioner ² and R –v- Birmingham Justices, ex parte Hodgson³ Further, the learning in **Blackstone's Criminal Practice 1997**⁴ makes it clear that the question of mode of trial in respect of offences triable either way goes to the question of jurisdiction of the magistrate to try an offence triable either way and is not rooted in any ultimate right of the accused to elect the mode of trial. **Paragraph D 3.10** of **Blackstone** states the position thus:

“since the jurisdiction of magistrate’s courts to try offences triable either way derives solely from statute, any failure to comply with the statutory procedure laid down for determining mode of trial have the consequence that, if the magistrates do proceed to trial, the hearing together with its result will be ultra vires, a nullity and liable to be quashed by certiorari even where magistrates have purported to obtain the consent of the accused, and even where the accused is legally represented.

(Kent Justices, ex parte Machin [1952] 2 QB 355))

Because failure to comply with the procedure for determining mode of trial goes to the question of the lower court’s jurisdiction the divisional court has considered itself bound to quash the ultra vires proceedings however trivial the departure from the requirements of sections 18-23 of the Magistrate’s Courts Act (which sections are in essence similar to section 45 of the Magistrate’s Code) and regardless of whether there has been any real injustice to the party applying for review.”

This principle was recognised and applied by the Court of Appeal of Trinidad & Tobago in the case of **George –v- Francois** ⁵

These authorities all reinforce the primary proposition that where an offence formerly triable only on indictment is made an offence triable either way that what is critical to the offence being tried summarily by the Magistrate is the obtaining of the accused’s consent. It is only in this sense then, in my view, it can be said that the ultimate right of election for a summary trial lies with the accused. However, If such consent is not obtained the matter does not simply end there. As provided in Section 45(5)(b) of the Magistrate’s Code, if the accused does not consent, the Magistrate proceeds to inquire into the complaint as

² [1957] 3 WLR 308

³ [1985] @ All ER 193

⁴ D 3.10

⁵ (1969) 15 WIR 394

examining magistrate – that is as if by indictment. The position at the end of day under Section 45 appears to be that an offence triable either way can only be tried summarily if the accused and the prosecutor consents or agrees to this mode of trial. So that even if the accused makes application to be tried summarily and the prosecutor **does not agree** then the proceeding before the Magistrate is as if by way of indictment. Therefore, even under Section 45 the prosecutor's consent or agreement to summary trial is necessary. Section 46, to which Section 45 is expressly made subject, gives to the prosecutor the ultimate power to override the procedure set out in Section 45 and to proceed by indictment. Accordingly, I hold that on a proper construction of Section 45, which must be construed together with Section 46, of the Magistrate's Code, the ultimate right of election as to mode of trial does not lie with the accused in respect of offences triable either way but with the prosecutor.

Is Section 46 of the Magistrate's Code void for uncertainty or is otherwise inconsistent with or repugnant to Section 45 ?

- [10] Counsel for the Defendant contends that Section 46 of the Magistrate's Code must be construed in the spirit of constitutionality and that this Section provides a mechanism by which the Attorney General may exercise the powers given to him under Section 34 of The Constitution. Section 34 of The Constitution, states in part as follows:

"34. (1) The Attorney-General shall have power, in any case in which he considers it desirable so to do –

- (a) to institute and undertake criminal proceedings against any persons before any civil court in respect of any offence against any law in force in Anguilla;
- (b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted, or undertaken by himself or any other person or authority.

(2) The powers of the Attorney-General under the last foregoing subsection may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions.”

The question to be answered then is whether it is necessary to the exercise of this power by the Attorney General under Section 46 of the Magistrate's Code that legislative guidelines must be set out for the proper exercise thereof.

[11] It is to be noted that quite apart from section 46 of the Magistrate's Code, the Attorney General has been given powers under the Criminal Procedure Act RSA C150, Sections 7, 8 and 9 respectively to remit cases to the Magistrate for further inquiry, to remit cases to be dealt with summarily or to remit cases for committal to the High Court for trial. In each of those instances he may also give to the Magistrate such other directions he thinks proper. Section 10 of the Criminal Procedure Act stipulates that the Magistrate must comply with those directions. These provisions provide another example of discretionary power placed in the hands of the Attorney General. Likewise there are no legislative guidelines set out for the exercise of those powers.

[12] Counsel for the Defendant contends that this power, notwithstanding same is legislatively unfettered, its exercise is none the less circumscribed by the principles of fairness and justice which the courts have always ascribed thereto when dealing with matters involving the exercise of a discretion. She further contends that it is important to have such power given the fact that at that stage of proceedings only the prosecutor is privy to information which may be crucial in determining the best mode of trial and cites in support of these contentions the following cases.

Phillip -v- Commissioner of Police⁶

Boodram –v- Attorney General

Burnett –v- Customs and Excise Comptroller & Anr.⁷

⁶ (1996) 54 WIR 38 @ pg. 53

⁷ (1984) 38 WIR 174 @ pg.186

Rookes Case ⁸

Sharp –v- Wakefield ⁹

Tappin –v- Lucas¹⁰

DPP-v- Sullivan¹¹

In the case of **Phillip -v- Commissioner of Police** Longley J at page 53 expressed this view : *“when the Attorney General exercises his discretion to override the election or the right to elect of an accused person he is not doing so in a vacuum. He has, so to speak ,inside information consisting of, for the most part, all the evidence the prosecution would adduce at a preliminary inquiry or trial of that person.”*

All of the above authorities lend support to the view that the Attorney General, as a public official, when exercising the wide discretionary powers given to him by Parliament, must exercise such powers in good faith and in accordance with the rules of fairness, reason and justice. I accordingly hold that there is no need for legislative guidelines for the exercise of the wide discretionary powers given to the Attorney General by virtue of Section 46 of the Magistrate's Code which is buttressed in my view by the wide powers accorded to him under Section 34 of The Constitution itself since the manner in which such powers are to be exercised are settled in accordance with long standing and well established principles. Section 46 is therefore not repugnant to Section 45 of the Magistrate's Code nor void for uncertainty.

Did the Prosecutor's application for Summary Trial on 20th August 2002 having triggered the provisions of Section 45 preclude the subsequent exercise of the power given under Section 46 of the Magistrate's Code?

- [13] The case of **DPP-v- Sullivan** above cited, in which the facts were more or less similar to the factual scenario arising in this case, is instructive. In that case it was held in essence that even where application had been made on behalf of the Director of Public

⁸ 77 ER 209

⁹ [1886-90] All ER 651

¹⁰ (1973) 20 WIR 229 @ pg. 237

¹¹ (1996) 54 WIR 256 @ pg.261, 263-264

Prosecutions for a summary trial there was nothing to prevent the Director from reviewing the matter and later intimating in accordance section 34 of the Summary Jurisdiction (Procedure) Act in writing to the Magistrate that he thought that the case ought to be tried on indictment. It appears to me in the instant case, given the wide powers of the Attorney General as set out under section 34 of the Constitution itself, coupled with section 46 of the Magistrate's Code that the right to indicate may be exercised at any time during the course of the proceedings before the Magistrate and is not precluded by the earlier application for summary trial. This also accords with the powers of the Attorney General given under sections 7, 8 and 9 of the Criminal Procedure Act referred to earlier in this judgment. It is no doubt for this very reason that section 46 provides in the terms that it does so as to allow for the overriding of section 45 where the circumstances may turn out to so warrant.

Does section 46 of the Magistrate's Code contravene any of the fundamental rights of the accused and in particular the rights protected under sections 3 and 9 of The Constitution?

- [14] As alluded to earlier, section 3 of The Constitution affords a person protection against deprivation of his personal liberty save for the circumstances as set out in that section which are not germane to this issue and therefore need not be set out. In the cases of **Ramson –v- Barker**¹² and **Hope and the AG –v- New Guyana Co. and Teekah**¹³ cited by counsel for the Defendant, the Court of Appeal of Guyana expressed and adopted the view that an infringement of the fundamental right to personal liberty must be one which is both direct and tangible. Further, that *“the effect of a statute.... on a fundamental right does not become a hindrance unless that effect of the impugned legislation on the fundamental right is directly to entrench thereon. ...if the effect of the legislation is merely indirect, incidental or consequential, there is no contravention or hindrance within the meaning of the article under considerationthe point to bear in mind is that an*

¹² (1982) 33 WIR 183

¹³ (1979) 26 WIR 233

indirect effect of the impugned legislation on the fundamental right will not constitute a hindrance or contravention of the constitution.”¹⁴

Counsel for the Claimants though acknowledging that section 46 is not directly penal in effect assert that none the less section 46 impacts upon the personal liberty of the accused as this section in essence exposes the accused to the risks of a more severe custodial sentence and thus a greater threat to his personal liberty. This argument by counsel for the Claimants though ingenious contains a fallacy as it fails to take account of section 48 which gives power to the Magistrate even on a summary trial to commit the accused for sentence in the High Court in like manner as if tried by indictment which becomes operational once section 45 is triggered. It also fails to take into account the discretionary powers of the High Court in respect of punishment provided for under section 79 of the Criminal Procedure Act. The risks to the personal liberty of the accused is therefore the same whether the procedure under section 45 or section 46 is invoked irrespective of the mode of trial adopted. I hold therefore that Section 46 of the Magistrate’s Code does not create any direct hindrance to nor does it directly entrench upon the fundamental right to personal liberty and, accordingly does not contravene or collide with section 3 of the Constitution.

- [15] Section 9 of The Constitution states in effect that whenever a person is charged with a criminal offence he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Counsel for the Claimants contend that section 46 of the Magistrate’s Code violates this right because it purports to sweep away the accused’s right of election as to the mode of trial by the accused without any guidelines being afforded the accused as to the circumstances under which he may lose the right of election. The statement made by Kentridge Ag. J in the case of **State-v-Zuma**¹⁵ to the effect that the test of constitutionality of a fair trial is whether the trial was fair in accordance with notions of basic fairness and justice is accepted and adopted. It is also accepted and adopted that when considering fundamental rights and freedoms a court must adopt a non rigid and generous or purposive construction, as enunciated in the

¹⁴ Hope and AG -v- New Guyana Co. and Teekah - Per Crane JA @ pg. 265.

¹⁵ (1995) LRC 145

cases of **Huntley -v- AG**¹⁶ , **Re Williams and Salisbury**¹⁷ and **Sharma-v- Satish**¹⁸ But as was stated by Hanes C in **Re Williams and Salisbury** at page 147 *"Of course this doctrine of liberal interpretation cannot imply that we are free to stretch or pervert the language of it in the interests of any preconceived constitutional theory or spirit. The question is still not what may be supposed to have been intended, but what is intended by what is said"*

Further, in the Privy Council decision in the case of **Johnson -v- The State**¹⁹ Lord Hutton at page 419-420 in approving the dictum of Lord Steyn in case of **Allie Mohammed -v- The State** (also a decision on of the Privy Council) stated as follows:

" where an argument is advanced that a conviction..... in accordance with the proper application of well recognised principles of common law is a breach of the constitutional right to a fair hearing it must be remembered as Lord Steyn stated..... that in framing the constitution of Trinidad and Tobago the legislature was not writing on a blank sheet and the argument must be assessed against the background of settled practices of the courts which are intended to ensure fairness to the accused."

- [16] From an examination of the various enactments such as the Magistrate's Code of Procedure Cap. 46 (which then applied to St. Christopher Nevis and Anguilla up to 1959, and The Magistrate's Code of Procedure Act (Amendment) Ordinance, 1978 in keeping with what accorded with the settled practice prior to the enactment of the constitutional provisions guaranteeing the individual's fundamental rights and freedoms, I am satisfied that the settled practice in Anguilla, as with other common law jurisdictions, was that once the prosecutor indicated that a hybrid offence was to be tried by indictment the procedure for trial by indictment was followed. Section 46 of the Magistrate's Code in my view therefore does no more than give legislative recognition to the practice and procedure already in place. I am therefore not persuaded by the argument put forward by counsel for the Claimants in their assertion that section 46 of the Magistrate's Code contravenes section 9 of The Constitution but rather I am persuaded by the argument put forward by

¹⁶ (1994) 46WIR 218

¹⁷ (1978) 26 WIR 133

¹⁸ [1954] SCR 1077

¹⁹ (1999) 55 WIR 410

counsel for the Defendant that, even giving the right to a fair hearing a broad and liberal construction, provided an accused receives a fair hearing before an independent and impartial court then the protection afforded by section 9 of the Constitution remains intact whether that court be the Magistrate's Court or the High Court. To hold that section 46 of the Magistrate's Code violates or offends against the right to a fair hearing in the instant case would in my view be tantamount to stretching the language to accord with some constitutional theory of what may supposed to have been intended and this the court is not permitted to do. As Byron CJ stated in **Spencer –v- Attorney General of Antigua et al** ²⁰ at page 11 of his judgment *"Our Court is not a super legislature and does not have the power to expand the rights given in the constitution."*

Does section 46 of the Magistrate's Code offend against the principle of separation of powers?

[17] In **Astaphan -v- Comptroller of Customs of Dominica**²¹ referred by Counsel for the Claimants Sir Vincent Floissac at page 157 of his judgment stated thus:

"....the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of the separation of powers. There is no such inconsistency if the legislature retains effective control over the executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power"

At page 158 he went on further to say as follows;

".....if the legislature delegates or transfers its legislative power to the executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the legislature should be deemed to have surrendered or abdicated the power. In that event, the delegation or transfer of legislative power is inconsistent with the basic principle of separation of powers."

Counsel for the Claimants contend that Section 46 offends against the principle of separation of powers enshrined in the Constitution in that it permits the Attorney General,

²⁰ Civil App. No. 20A/ 97 Antigua & Barbuda (unreported)

²¹ (1996) 54 WIR 153

so to speak, to re-legislate the offence into an indictable one only without the imposition of limitations or guidelines and without any advance notice to the accused. In paragraphs 10-12 of this judgment I have already dealt with the powers given to the Attorney General by virtue of Section 34 of the Constitution and referred to the well established principles circumscribing the exercise of the discretionary powers given to him thereunder. I do not propose therefore to re-state these principles here. Suffice it to say however that the propositions above postulated are equally applicable in a consideration of this issue and are adopted. I am of the view that the instant case is distinguishable from the case of **Astaphan** referred to by Claimants' counsel in their legal submissions. In that case it was clearly left to the "proper officer" to exact (in addition to the duty payable on certain goods) under section 27(4) of the Customs (Control and Management) Act "a further sum as the proper officer may require". This further sum which was not circumscribed by any maximum sum or which was without any guidelines for its exercise constituted an abdication of powers of the legislature which was inconsistent with the doctrine of the separation of powers. In the instant case it is established and accepted that the offences with which the accused are charged are offences triable either way- that is either by indictment or summarily. As already stated, if the accused himself does not give his consent to summary trial then the matter would per force have to be proceeded with by indictment. These are the two modes of trial stipulated and the prosecutor under section 46 is not empowered to pursue any other mode of trial other than trial by indictment. By invoking section 46 therefore to determine the mode of trial as being by way of indictment in respect an offence which is specifically expressed to be an offence triable either way, does not in my view amount to a usurpation of legislative power or an abdication by the legislature of its powers to the executive. Accordingly I find that there is no breach of the doctrine of separation of powers warranting the striking down of section 46.

Is the accused entitled as a matter of law to proceed to election and be tried summarily under the facts and circumstances of this case?

[18] Given the answers to the questions as posed and the reasons therefor, as set out above I hold as a matter of law that the accused are not entitled to proceed to election and to be tried summarily in light of the clear indication by the prosecutor to proceed by indictment pursuant to section 46 of the Magistrate's Code which indication the Magistrate is obliged to follow.

.....
Janice M. George-Creque
High Court Judge