

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Mag. App. No. 3 of 2012**

**BETWEEN**

**NATASHA CUMBERBATCH**

**Appellant**

**AND**

**PATRICK MANNING**

**Respondent**

*Case No: 10804/09*

**AND**

**MICHAEL VASQUEO**

**Respondent**

*Case No:10805/09*

**PANEL:**

**P. Weekes, JA  
A. Yorke-Soo Hon, JA**

**APPEARANCES:**

**Mr. Raphael Morgan for the Appellant  
Mr. John Jeremie S.C; Mr. Michael Quamina; Mr Keith Scotland; D. Khan for  
Respondent  
Unrepresented - Respondent**

**DATE OF DELIVERY: July 31<sup>st</sup> 2012**

## JUDGMENT

**Delivered by: P.M. Weekes, JA**

1. These appeals are against the dismissal by the then Chief Magistrate on 14<sup>th</sup> October 2009, of a single complaint against each respondent. Separate appeals were filed (in error the Court of Appeal Registry allocated a single number to both appeals) but since the circumstances are identical, as a matter of convenience they will be dealt with together. Respondent Vasqueo was unrepresented but the submissions made on behalf of the respondent Manning were considered in his favour.

### **Facts**

2. By private complaints dated 25<sup>th</sup> June 2009, the appellant made a complaint against each respondent that on 21<sup>st</sup> May 2009 he made use of annoying language with intent to provoke her to commit a breach of the peace contrary to section 49 of the Summary Offences Act Chap 11.02 (the Act).
3. Both matters were listed for hearing on October 14<sup>th</sup> 2009 at 9:00am in the Second Magistrate's Court, Port of Spain. The matter against the respondent Manning was called at 9:20 in the Eighth Court. The appellant did not appear and the Magistrate, without more, dismissed the matter. The transcript of the proceedings then reads "other matter attended to from 9:21 to 9:22." The matter against respondent Vasqueo was then called and the transcript records "No appearance of parties. At 9:23 am, matter dismissed."
4. The record further discloses that a court officer almost immediately informed the Magistrate that Natasha Cumberbatch, the appellant, was coming and the officer invited her to sit in court. The transcript then records "Other matter attended to from 9:23 to 9:24" ("other matter" appears to refer to some unrelated matters on the list of that date). The transcript then ends with "Matter not recalled from 9:24 to end of recording at 9:42." Whilst there is a discrepancy in time between the transcript and the Magistrate's reasons in respect of the second matter, it is of no moment.

## Magistrate's Reasons

5. The Magistrate's reasons are brief, to the extent that they can be set out in full. They read as follows:

"The matters were called at 9:20 and 9:28 respectively. Mr. Quamina, Attorney-at-law appeared for the Defendant in Complaint No. 10804/09. There was no appearance of the Complainant at 9:28. No explanation was given to the Court for the non-appearance of the Complainant and the matters were dismissed for want of prosecution."

## Appellant's Submissions

6. Mr. Morgan, for the appellant, submitted that the Magistrate failed to take into account relevant considerations and in essence failed to exercise his discretion under section 59 of the Act judicially. He submitted that the Chief Magistrate failed to consider that the time and place of hearing in the appellant's copy of the summons gave the Second Court as the place of hearing and as such, since the Magistrate was sitting in the Eighth Court, he should have had enquiries made to see the appellant was at the Second Court when she failed to appear. Counsel referred the Court to *Burgess v Silverton* Mag. App. No. 98 of 2008 and submitted that it contained relevant guidelines to magistrates in the exercise of their discretion whether to dismiss a matter for want of prosecution. There John, J.A. stated at paragraph 14:

"The expeditious hearing of summary matters is something of the past. Unfortunately, however, while magistrates do have a discretion to dismiss a complaint for the non-appearance of the complainant, **they must always remember that the discretion must be exercised reasonably and judicially and not in an adhoc and arbitrary manner.** Magistrates need to be careful that their decisions are consistent. Magistrates are best advised to stand the matter down to ascertain from the prosecutor the reason for the non-appearance of the complainant, if none is forthcoming. **Good court administration and fairness demand this, although the statute does not.**" [Emphasis ours]

Mr Morgan also drew attention to the fact that this was the first time that the matters had been listed.

## **Respondent Manning’s Submissions (applied to respondent Vasqueo by Court)**

7. Mr. Jeremie, for the respondent, submitted that the Court of Appeal had no jurisdiction to hear the appeal. He referred to s 132 of the Act (*a*) – (*j*) and submitted that the matters raised on the appellant’s behalf did not fall within any of the grounds available. S 132 provides:

“A notice of reasons for appeal may set forth all or any of the following reasons, and no others:

(*a*) that the Court had no jurisdiction in the case—

Provided that the Court of Appeal shall not entertain such reason for appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the case and before the pronouncing of the decision; or

(*b*) that the Court has exceeded its jurisdiction in the case; or

(*c*) that the Magistrate or Justice was personally interested in the case; or

(*d*) that the Magistrate or Justice has acted corruptly or maliciously in the case; or

(*e*) that the decision has been obtained by fraud; or

(*f*) that the case has been already heard or tried and decided by, or forms the subject of a hearing or trial pending before, some competent tribunal; or

(*g*) that the Court refuses to make a conviction or an order, or that the appellant is not guilty, as the case may be, either of which reasons shall entitle the appellant to maintain—

(i) that legal evidence substantially affecting the merits of the case has been rejected by the Court; or

(ii) that illegal evidence has been admitted by the Court and that there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence; or

(iii) that the decision is unreasonable or cannot be supported having regard to the evidence; or

(*h*) that the decision is erroneous in point of law; or

(*i*) that some other specific illegality, not mentioned above, and substantially affecting the merits of the case, has been committed in the course of the proceedings in the case; or

(j) that the sentence imposed is unduly severe.

8. He emphasised that the Magistrate being a creature of statute, the Court of Appeal was itself restricted in considering appeals to those grounds provided under the Act. He submitted that when there was a challenge to the exercise of a Magistrate's discretion the appropriate route was by way of judicial review and not by magisterial appeal. Counsel referred to three decisions of the Trinidad and Tobago Court of Appeal in which the exercise of a magistrate's discretion to dismiss a complaint for want of prosecution was challenged. These cases were *Burgess v Silverton (supra); Cobham v Khan* Mag. App. No. 208 of 2001; and *Housend v Tyson* (1995) 3 TTLR 782. In each, the court gave guidance on the manner in which the discretion was to be exercised. Mr. Jeremie submitted however that those cases were not authority for the proposition that the Court of Appeal had jurisdiction to consider a challenge to a magistrate's exercise of discretion to dismiss a case for want of prosecution. Instead, he submitted, the proper challenge to a magistrate's discretion regarding dismissal for want of prosecution was done by way of judicial review. Counsel referred us to three United Kingdom decisions which considered challenges to a magistrate's discretion in respect of adjournments and argued that since those were challenges to the exercise of a discretion, this Court should find that it is without jurisdiction to entertain these appeals and that any challenge to the Chief Magistrate's exercise of his discretion could only be explored by way of judicial review. The cases are *Crown Prosecution Service v Picton* [2006] EWHC 1108; *R v Aderdare ex parte Director of Public Prosecutions* (1990) 155 JP 324; and *R v Hereford Magistrates' Court ex parte Rowlands* [1998] Q.B. 110.
9. Counsel then submitted that if this Court indeed had jurisdiction, he further submits that we should not interfere with the exercise of the Magistrate's discretion, that once it was exercised judicially it should stand, even if this court would have exercised the discretion differently. He submitted that although there was no long history in the matter, the magistrate in question was the Chief Magistrate, a person of considerable experience in case management and in matters relating to the exercise of his discretion. He pointed out that when the matter was called at 9:20 there was no appearance of the appellant, her name was called outside, and still she did not appear and there was no reason proffered for her absence.

Counsel also submitted that although the matter was not set for trial, this ought to be balanced with the fact that the offence was trivial in nature. He concluded that the onus was on a private complainant to be present when a matter was called and if not, in the absence of some explanation, a magistrate would be well within his discretion to dismiss the complaint.

## **Jurisdiction**

10. It is instructive to note that the appeal procedure from decisions of Magistrates' Courts in the United Kingdom (as provided for in the Magistrates' Court Act 1980) is not analogous to the procedure in Trinidad and Tobago. Bingham CJ explained the United Kingdom procedure at page 118 of ***R v Hereford Magistrates' Court ex parte Rowlands* [1998] Q.B. 110**.

“The business of Magistrates' courts is in the main handled according to the highest standards, but, as in all other courts, errors may be made and procedural lapses and irregularities may occur. To protect convicted defendants against the possibility of injustice, Parliament has conferred two rights of appeal. The first, provided by s 108 of the Magistrates' Courts Act 1980, enables a convicted defendant to appeal to the Crown Court against conviction or sentence. A defendant who exercises this right of appeal within the prescribed period of twenty-one days is entitled to full retrial before a judge of the Crown Court sitting with justices. The burden of proving the case is on the prosecutor, as in the magistrates' court. Full evidence may be called, whether or not it had been given in the magistrates' court. A decision is reached on the case as presented in the Crown Court. This is the ordinary avenue of appeal for a defendant who complains that the magistrates' court reached a wrong decision of fact, or a wrong decision of mixed law and fact.

An alternative right of appeal is conferred by section 111 of the Act of 1980 on any party to proceedings before a magistrates' court who is aggrieved by a conviction, order, determination or other proceeding of the court, who may question the proceeding on the ground that it is "wrong in law or is in excess of jurisdiction" by applying to the justices to state a case for the opinion of the High Court on the question of law or jurisdiction involved. This right also must be exercised within 21 days, and section 111(4) provides that on the making of an application for a case to be stated any right of the applicant to appeal against the decision to the Crown Court shall cease.”

11. The United Kingdom legislation that informs their appeal procedure in the matter of the exercise of magisterial discretion is foreign to this jurisdiction. In fact, the case stated procedure has its origins in the Summary Jurisdiction Act 1857, which was the first Act that

enabled courts of summary jurisdiction to state a case.<sup>1</sup> The United Kingdom legislation at that time was not similar to ours. We enacted our legislation in its original form in 1918 and similar statutory regimes in the region can be found in Guyana, Barbados, and Antigua and Barbuda. We have never had on our books legislation similar to the United Kingdom on this issue, neither has the United Kingdom ever had legislation similar to ours it appears.

12. Our local Court of Appeal has considered challenges to a Magistrate's exercise of discretion under three grounds of s 132 ,(b) *that the Court has exceeded its jurisdiction in the case (h) that the decision is erroneous in point of law; and (i) that some specific illegality, not mentioned above, and substantially affecting the merits if the case, has been committed in the course of the proceedings in the case.* The jurisdiction at (i) is directed to exercises of discretion during the course of a trial which affect its outcome.

13. In *Canning & Co. Ltd v Water and Sewage Authority* **Mag. App. No. 149 of 1973**, a magistrate, after hearing the evidence in a matter, transferred it to the County of Victoria after being satisfied that the cause of the complaint had its genesis there. The magistrate under s 53(1) of the Summary Courts Ordinance (now s 59 of the Act) had the discretion to direct the case to be transferred to the court of the district wherein the cause of the complaint arose, notwithstanding that the transferring Magistrate had jurisdiction to determine the matter. The appellants contended that the magistrate's decision to transfer the matter to the County of Victoria was **erroneous in point of law**. In dismissing the appeal, Rees, J.A. stated at page 4:

“The Magistrate at Port-of-Spain in the present matter, after hearing a substantial portion of the case, in our view rightly concluded that the cause of complaint arose in the magisterial district of the County of Victoria and exercised his discretion by transferring the case to that magisterial district. **We see no good reason to interfere with the exercise of his discretion.** The appeal is therefore dismissed.” [Emphasis ours]

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<sup>1</sup> Rigby v Woodward [1957] 1 W.L.R. 250

14. ***Francis v Singh Mag. App. No. 58 of 1986*** was another case in which the Court of Appeal considered a challenge to a Magistrate’s exercise of discretion under the rubric of s 132(h) of the Act. That case dealt with the exercise of a discretion to adjourn a case during the hearing.
15. In ***Cpl Gittens v Ramessar & ors Mag. App. 55 of 1976***, the appellant submitted that a **specific illegality substantially affecting the merits of the case** had been committed when the court unreasonably refused to stand down the hearing of the case to allow the prosecution to tender into evidence Firearms Users Licenses issued to the respondents which would have shown the quantity of ammunition they could legally have in their possession. The respondents here were alleged to have in their possession ammunition in excess of the amount they were authorised to hold in accordance with the terms of their licenses. Corbin J.A stated that the question to be considered was whether the magistrate exercised his discretion judicially. He said,

“It is only necessary to refer to his reasons to be satisfied that he did not do so. We are of the view that if a magistrate uses words like “most wicked, vicious, vindictive, malicious and pernicious lie, deliberately calculated to mislead the court”

and later on –

‘the court held the application was a flimsy and frivolous one, and as such in the interest of justice the court was not there to slavishly grant such application at the beck and call of the Prosecutor when such application for the adjournments were being made at the whims and fancies of the Prosecutor’s delight.’

It does not appear that he is displaying the necessary calm in deciding the point. **We feel constrained to say that apparently what happened here was that the discretion was exercised “at the whim and fancy of the Magistrate.”** Such language is not expected from a Magistrate. **It leads us to conclude that his discretion was not applied judicially.** The appeal is allowed and the case will be remitted to be heard de novo by another Magistrate. [Emphasis ours]

In this case the exercise of the discretion directly affected the merits of the case by denying the appellant the opportunity to put his case fully before the court. In ***Gittens***, the respondent



submitted that the grounds of appeal were “incorrect and inaccurate, in that they refer to a specific illegality and that that what has been referred to here is not an illegality.” Corbin, JA responded

“We do not think there is any merit in his submission because reference to the grounds will indicate that the real gravamen of the complaint is that the court unreasonably refused to stand down the hearing. In other words, what they are complaining about is that the Magistrate failed to exercise his discretion judicially.”

16. In *Dole Chadee v P.C. Santana* Mag App. No. 136 of 1986, the appellant had sought to withdraw his consent, previously given, to summary trial. The appellant’s ground of appeal was that **the court had exceeded its jurisdiction** in the case because the magistrate proceeded to hear the complaint summarily in spite of the appellant’s objections. Counsel for the appellant submitted that the magistrate failed to properly exercise his discretion in refusing to allow the appellant to withdraw his consent to summary trial. Mc Millan, J. A in giving the judgment of the court stated:

“The Ag. Director of Public Prosecutions has conceded, quite properly we think, that a **Magistrate has a discretion as to whether or not to allow a defendant to withdraw his consent previously given** if but that a Magistrate would be entitled to refuse to allow it if the withdrawal amounts to a sharp practice. [...] We are quite satisfied that, in a proper case, if a magistrate finds that a defendant is deliberately delaying his trial he would be entitled to take that into account in exercising his discretion, but we are unable to find that was a consideration in the instant case. The learned Magistrate merely stated that a previous election had been made and he was proceeding to deal summarily with the case. He did not expand on that statement in his report to the court and, as already indicated, it does not appear he sought to ascertain the reason for what he conceived to be withdrawal of consent to summary trial. In these circumstances we feel constrained to hold that, **he failed to exercise his discretion properly.**” [Emphasis ours]

17. Historically our Court of Appeal has jealously guarded its jurisdiction to review for error a magistrate’s exercise of a discretion. We continue so to do. It is abundantly clear that our peculiar legislative scheme confers upon this Court the jurisdiction to entertain this appellant’s appeals. In the circumstances the appellant can properly argue that the Magistrate’s exercise of his discretion, as in *Canning & Co. Ltd v Water and Sewage Authority* (*supra*) and *Francis v Singh* (*supra*) was erroneous in point of law, bringing the appellants within s 132(h). The expression “erroneous in point of law” is not to be construed

narrowly or restrictively and is wide enough to cover the error of law created by the irrational exercise of a discretion.

18. While the foregoing is sufficient to dispose of the appellant's submission, we go further to observe that the exercise of a magistrate's discretion under s 59 has a built-in condition precedent. S 59 reads as follows:

**“If, when the case is called, the defendant appears voluntarily in obedience to the summons, or is brought before the Court under a warrant, and the complainant, having had due notice of the time and place of hearing (which shall be proved to the satisfaction of the Court), does not appear in person or in the manner provided in s 58 or by Attorney-at-law and, in the case of a police complainant, by any police officer, the Court shall dismiss the complaint, unless the Court, having received a reasonable excuse for the non-appearance of the complainant, or for other sufficient reason, thinks fit to adjourn the hearing of the case to some future day, upon such terms as the Court may think just.”** [Emphasis ours]

19. It is therefore incumbent on the Magistrate, before considering the exercise of his discretion, to satisfy himself that the complainant had due notice of time and place of hearing. In submissions before us Mr. Morgan, though not by proper way of annexure to affidavit, did submit to the court the appellant's copy of the official receipts for complaint #10804/09 (Natasha Cumberbatch v Patrick Manning) and complaint #10805/09 (Natasha Cumberbatch v Michael Vasqueo). Clearly stamped on the face of both documents is “2<sup>nd</sup> COURT.” We take notice of the endorsement and, even without it, take judicial notice of the fact that private complaints are routinely laid and heard in the Second Court of the Port-of-Spain Magistracy. While we do not question the Chief Magistrate's authority to have the matter transferred before him and/or to a court other than the Second Court, by so doing he places a duty on the Magistrate in the court of transfer to ensure that should any party to the matter be absent when the case is called, enquiries are made in the original court to ensure the absent party is not there awaiting the hearing. Neither the record, by which we are bound, nor anything in the submissions before us, suggest that this was done. It is therefore our opinion that it could not have been and was not proved to the satisfaction of the Court that the appellant had the requisite due notice. The Chief Magistrate therefore acted in excess of his

jurisdiction when he purported to exercise his discretion under s 59 of the Act before first complying with the conditions precedent.

### **Exercise of Discretion**

20. While it has been made abundantly clear that an appellate court will not interfere with an inferior court's exercise of a discretion, simply because the appellate court would have exercised its discretion on the same facts differently: (*Kearne Govia v Gambling and Betting Authority, Anslem Warrick and The Incorporated Trustees of St. John's (London) Baptist Church Mag. App. 145 of 2005; Cobham v Khan Mag. App. No. 208 of 2001; Charles Osenton & Co. v Johnston* [1941] 2 All ER 245) it will intervene in circumstances in which a magistrate is found to have exercised his discretion unjudicially or improperly.

21. In the instant case there are certain matters of note:

- (a) This was the first time the matter was being called;
- (b) The matter was transferred from the court of original notification;
- (c) The cases were called at 9:20 and 9:22: respectively, and neither was stood down;
- (d) No indication that any enquiry was made in the Second Court to determine if the appellant was there present;
- (e) According to the record the appellant did turn up immediately after the matters were dismissed and from the record was given no opportunity to explain her delayed arrival;
- (f) The matters were not reinstated, despite the fact that an appellant who could reasonably be expected to be interested in prosecuting her matters, appeared.

22. While the instant matters could be considered trivial, there is a larger principle at stake, that person must have access to court system, and be treated fairly. In *Burgess v Silvertown* (*supra*) John, J. A. stated the following at paragraph 17:

“Magistrates must not be too anxious to fall prey to applications by defence counsel to dismiss a case simply because a complainant is absent. They must bear in mind that there

is an important public interest in the outcome of all criminal prosecutions, more so where the offence is a serious one (see R v Fairbanks). The public has an interest in criminal trials. The public interest in criminal trials is that the defendant should be convicted where it is proven that he has committed the offence and he should be acquitted where it is proven that he has not committed the offence. **The interests of justice are not severed when matters are dismissed without a trial. It erodes public confidence in the criminal justice system. Magistrates must always be alive to this.**” [Emphasis ours]

23. In the above premises, we are of the view that the Magistrate acted with unjudicial haste and therefore improperly in the exercise of his discretion and the discretion was exercised in an ad hoc and arbitrary manner.
24. The appeals are allowed. The orders of the Magistrate are quashed and both matters are remitted to the Magistrates’ Court for rehearing. While we are aware that the magistrate in question has since retired, out of an abundance of caution our order is that the matters be re-tried before another magistrate.

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P.M Weekes  
Justice of Appeal

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A. Yorke-Soo Hon  
Justice of Appeal