

BARBADOS

**IN THE SUPREME COURT OF BARBADOS
COURT OF APPEAL**

Magisterial Criminal Appeal No. 17 of 2020

BETWEEN

RACHELLE HUSBANDS APPELLANT

AND

COMMISSIONER OF POLICE RESPONDENT

**Before: The Hon. Sir Patterson Cheltenham, KA, Chief Justice,
The Hon. Francis Belle and The Hon. Margaret A. Reifer, Justices of Appeal**

Dates of Hearing 2021: February 4, 16, 24

Date of Decision 2021: September 14

Mrs. Duana Peterson and Ms. Rita Evans for the Appellant.

Mr. Rudolph S. Burnett for the Respondent.

DECISION

REIFER JA:

INTRODUCTION

[1] This is a magisterial appeal against conviction and sentence. The Appellant was convicted on 6 July 2020 of the unlawful and malicious wounding of

complainant Terry Jordan on 22 May 2018, contrary to the provisions of **section 17** of the **Offences Against the Person Act Cap. 141**.

- [2] Under **section 17** the offence of unlawfully and maliciously wounding or inflicting serious bodily harm is triable on indictment or summarily. This matter was heard summarily. **Section 44(b)** provides that “a person convicted summarily of an offence against this Act is liable to imprisonment for a term of 2 years or to a fine of \$2500 or to both”.
- [3] The Appellant was sentenced on conviction by the magistrate for District “E” to perform 160 hours of community service and pay the complainant the sum of \$5000.00 in compensation for the injuries and loss sustained by him.

BACKGROUND

- [4] The complainant and accused were a couple living together at an apartment in Saint Lucy with their three children, ages 14, 9 and 4. The eldest child (TG) was the child of a previous relationship of the Appellant, the latter two the children of the Appellant and complainant.
- [5] The incident, the subject of the criminal proceedings in the Magistrate’s Court, took place in their home around 6 am while the Appellant was ironing her clothes for work and the complainant standing at the foot of the ironing board in conversation with her. At the time of the incident there was a mutual protection order in place prohibiting both parties from harassing each other

and from going to each other's room unless invited to do so. The 11 year relationship between these two parties appeared at that period to be shaky.

[6] The parties each gave conflicting accounts of the incident. The Appellant's account outlined injuries inflicted on the complainant with an iron in self-defence, after he beat her. In summary, she alleged that she hit him with the iron after he attacked her and punched her in the mouth. She admitted to hitting him a second time, this time in the head when they had another confrontation in the bedroom. The Appellant alleged, in direct conflict with the complainant's account, that he followed her into the bedroom.

[7] In contrast, the complainant outlined an unprovoked attack upon him by the Appellant. She allegedly struck him on the mouth with the iron as he stood at the toe of the ironing board when, in a conversation initiated by the Appellant, he confronted her about rumours in the neighbourhood to the effect that she was involved with another man. After the first attack he went straight to the bathroom in the master bedroom to assess the damage to his mouth and teeth and to stem the flow of blood. The Appellant met him outside the bathroom where he showed her his injuries. There was another conflagration and the Appellant struck him again with the same iron, this time to his head. It was his evidence that he disarmed her when he observed she was about to strike him a third time.

- [8] The complainant and two police officers gave evidence for the prosecution conducted by police prosecutors. The Appellant and her daughter gave evidence for the defence. Three other persons were called to give evidence by the defence. A Station Sergeant Seale of the Crab Hill Police Station who produced the station diary with evidence of two calls to the station (one of which was on the day of this incident) by the Appellant. A Station Sergeant Ronald Moore attached to District 'E' Police Station also gave evidence. He denied that numerous complaints were made to that station by the Appellant. He asserted from his knowledge as administrator of that station, that any report made to the station is recorded in the station diary. The failure to record a report is an offence occasioning investigation, if substantiated.
- [9] Dr. Ronald Chase, Consultant Psychiatrist attended court, was sworn and accepted as an expert, but his testimony was aborted after the magistrate made an inquiry of counsel as to its content and as a result of the response received, deemed it inadmissible.

THE MAGISTRATE'S REASONS FOR DECISION

- [10] In her Reasons for Decision the magistrate reviewed the conflicting evidence for the prosecution and defence and expressed acceptance of the evidence of the complainant and other witnesses for the prosecution as credible. She did not find the Appellant to be a credible witness and pointed out at page 6 of her

Reasons the discrepancies between the evidence of the Appellant and her daughter, which in her view cast doubt on the credibility of these two parties.

[11] She explained in her analysis of the evidence of the various witnesses why she concluded that the defence case that the complainant was the aggressor was not believable. Among this evidence was the lack of defensive wounds on the Appellant, from which the court concluded that the complainant was taken by surprise on each occasion that he was struck and that he did not strike the Appellant as she alleged. Generally, the medical evidence appeared supportive, in some material particulars, of the complainant's recital of the events.

[12] The magistrate examined the Appellant's claim of self-defence and rejected it. She similarly rejected the Appellant's claim that she was injured and this fact ignored by the police officers. It was implied by the Appellant that the fact that the complainant was a former police officer was significant in this regard, but the evidence of the police officers was to the effect that when the Appellant visited the police station to provide her statement she neither showed evidence of injury or complained of any.

[13] While agreeing with the Appellant's counsel that PC Headley should have given the Appellant a medical report form since she complained of being beaten by the complainant, the court did not consider this omission so serious

as to result in the acquittal of the Appellant. The magistrate explained at pages 7 and 8 of her Reasons her findings of fact as it related to the Appellant's injuries as follows:

“... the accused was released from custody shortly after she was charged. If she had sustained any injuries from the complainant nothing precluded her from requesting medical attention while she was at the police station or going to see a doctor after she was released from custody. Sergeant Barker testified that he did not observe any injury on the accused neither did she ask to see a doctor. Even her daughter TG did not mention seeing the accused with any injuries. Given the acts of violence the accused said were perpetrated on her by the complainant, it would have reasonably been expected that she would have sustained a number of bruises, cuts and swelling to various parts of her body, yet at no point did she mention sustaining any injuries. The Court's view is that the reason for this is that the complainant did not inflict any injuries on the accused. Hence, the accused defence was rejected.”

[14] It is clear that the police investigation turned on the significant injuries sustained by the complainant. While the Notes of Proceedings reveal that the medical report form was admitted into evidence as an exhibit, it did not form part of the record filed with respect to this appeal. Nonetheless, it is clear from the Reasons for Decision that the magistrate viewed the complainant's injuries to his mouth and head as serious and the offence committed so serious that a custodial sentence was dismissed only because the Appellant was the sole caregiver of her three minor children. In her Reasons for Decision, the magistrate addressed the complainant's injuries as follows:

“...Sergeant 1259 Julian Barker was the next witness for the prosecution. He issued the complainant with a medical report form which was subsequently returned to him. That medical indicates that the complainant had lacerations to his left upper lip and his left scalp over the parietal region of the skull which was bleeding. He also had shaky upper molars. The wounds were sutured and the patient was referred to have the lacerations dressed. Dr. Crump who examined the patient, opined that the force used was severe.”

THE *IN LIMINE* APPLICATION DETERMINED

[15] Ground 2 of the Grounds of Appeal alleged that the decision of the court below was against the weight of evidence. This allegation was grounded solely in the Appellant’s argument that there were material omissions in the summary of notes of evidence as provided by the trial magistrate. In short, this absence fueled the inference that the trial magistrate failed to take into account material evidence in making her determination.

[16] In an attempt to have the record rectified the Appellant on 15 February 2021 filed a Notice of Application on the face of the document pursuant to **Parts II** and **62.13** of **CPR** (but later admitted to be an incorrect reference) seeking, *inter alia*, “to add and/or correct and/or rectify material discrepancies and omissions in the summary of the notes of evidence as provided by the learned trial magistrate.” The authority relied on for this procedure is the case of **State v Solomon (1982) 33 WIR 149**, which sets out a process to correct defective records: see **Crane C** at page 166 and **Flax v Legal Assistant (1958) 1 WIR**

61, Pitman v Southern Electricity Board [1978] 3 All ER 901, Pile v The Queen Criminal Appeal No. 61 of 1993, Cummins v R Criminal Appeal No. 56 of 1995, relied on by counsel for the Appellant.

- [17] An affidavit in support of even date deposed by counsel for the Appellant iterated alleged discrepancies and omissions in the evidence of the complainant, Constable Headley, Sergeant Julian Barker, the Appellant's daughter TG, Station Sergeant Seale, Dr. Ronald Chase, Station Sergeant Ronald Moore as well as counsel's notes of the sentencing hearing.
- [18] It is to be noted that the Appellant was represented in the lower court by counsel Mr. Arthur Holder in association with counsel Mrs. Peterson. It appears that counsel Mrs. Peterson was able to take a note of questions asked and answers given, in detail; in short, a verbatim note. The Notes of Proceedings submitted for the record show that the magistrate also took an extensive note, but it was largely a summary of what took place. In this regard, we are guided by and adopt the words of **Megaw LJ** in **Pitman v Southern Electricity Board** (supra) as follows:

“... the judge is under a duty to take a note of the evidence. He is not, of course, under a duty to attempt to take down every word that is said, or to provide anything that could be said to be a complete note of all the evidence. It is his duty to provide a note which, so far as possible, gives a fair summary of the relevant evidence which has been given... but, of course, there are cases where one party or the other, or both, may regard that note of the judge as being incomplete, or even inaccurate...”

[19] Nonetheless, it was our observation and conclusion on reviewing the listed omissions and/or discrepancies that in most cases this evidence had been summarized or adverted to by the magistrate in the Notes of Proceedings and Reasons for Decision. In other words, if in fact there were omissions and discrepancies, those omissions and discrepancies were not material to the just determination of this matter. There was in our opinion a clear record of the case for the accused and the evidence of the prosecution. It was our ruling on this Application, delivered on 24 February 2021, that the record was more than adequate for a proper consideration of and fair hearing of the appeal.

[20] This was an issue recently addressed by this Court in **Grenville Delpeache v Commissioner of Police Magisterial Criminal Appeal No. 3 of 2018**. In that case, in a decision written by **Belle JA**, this Court made a finding of similar import to the one at bar when it stated as follows at paragraph [125]:

“...We are not persuaded by the record of the evidence of the witnesses for the prosecution and for the defence on many of the important points raised, that any defects exist which would make it impossible to determine why the learned magistrate decided the case as he did or made it inadequate for the proper consideration of the Appeal: See **Chabedi** referred to above.”

[21] We adopt those words in our determination of this issue.

[22] We look next at the Grounds of Appeal.

THE GROUNDS OF APPEAL

[23] The Appellant filed and argued four Grounds of Appeal as follows:

1. That admissible evidence substantially affecting the merits of the charge has been rejected by the magistrate;
2. That the decision was against the weight of the evidence;
3. That the decision to convict was erroneous in point of law;
4. Appeal against sentence on three grounds:
 - (i) that the decision is erroneous in point of law;
 - (ii) that some specific error not hereinbefore and substantially affecting the merits of the case has been committed in the course of the proceedings in the case; and
 - (iii) that the sentence imposed is excessive.

[24] These Grounds are discussed *seriatim* with the exception of Ground 2 which was argued *in limine* and discussed above.

GROUND 1

[25] The Appellant alleges in this Ground “that admissible evidence substantially affecting the merits of the charge has been rejected by the magistrate”.

[26] This submission is based solely on the magistrate’s refusal to allow the evidence of Dr. Ronald Chase on the basis of irrelevance, after an inquiry of counsel for the Appellant as to its content. The records of magistrate and counsel for the Appellant are not at odds over this circumstance. This is counsel for the Appellant’s account to be found at paragraph 2.3 of her written submissions filed 1 Feb 2021:

“2.3 The Defence called the expert witness Dr. Ronald Chase, Consultant Psychiatrist, Psychiatric Hospital. Dr. Chase gave evidence of his qualifications and an application was made for him to be deemed an expert without objection from the prosecution. Dr. Chase’s evidence was that he examined the complainant over a period of 21 days from 18 January 2019, approximately one year after the incident. He gave evidence that the complainant was diagnosed with Alcohol Abuse Disorder. The learned trial magistrate then halted his testimony and enquired from Defence Counsel as to whether Dr. Chase could say whether the complainant was suffering from this condition on the day in question. Defence Counsel replied that she could not speak to that, since she was not the expert, but that Dr. Chase as the expert could answer the question. The learned trial magistrate disallowed the evidence of Dr. Chase and discharged him without him being permitted to answer the question as to the nature of the said Alcohol Use Disorder or whether it could have affected the complainant on the date of the incident that led to the Appellant being before the Court. It is submitted that this evidence was of critical importance to the Appellant’s defence.”

[27] Counsel in her written submissions of 1 February 2021 argued the entitlement of an accused under **section 18(2) of the Constitution** to be afforded facilities and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution. Counsel relied on the case of **R v Bidwell**, a 26 June 1991 unreported decision of the Court of Appeal of Jamaica referred to with approval by the Privy Council in **Franklyn and Vincent v R (1993) 42 WIR 262** in attempting to bring the definition of ‘facilities’ within the context of the case before us.

- [28] In our opinion, this was not a case of denial of “facilities” as discussed by the **CCJ** as a constitutional or fair trial issue in **Frank Errol Gibson v The Attorney General [2010] CCJ 3 (AJ) (Frank Gibson)** for reasons explained below.
- [29] In her further written submissions filed 22 March 2021, counsel relied on that part of the **Evidence Act Cap. 121 (Cap. 121)**, specifically **section 66**, dealing with expert testimony and the opinion rule. But it is relevant to remember that the admission of expert testimony is an exception rather than a rule and that **section 64 (1) of Cap. 121** specifically reinforces the point that “evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion was expressed.”
- [30] In support of this line of argument counsel referenced the decision of this Court in **Sargeant v R Criminal Appeal No. 2 of 2006**. However, this Court observed to counsel at the hearing, that the significance of this case lay in a court’s determination of the competence (qualifications and experience) of an expert witness to give evidence, while the issue at bar was the admissibility of expert testimony. In this case Dr. Chase was accepted as an expert witness, but his evidence disallowed for other reasons.

[31] The magistrate in her Notes of Proceedings articulated her ruling as follows:

“Court disallows evidence of Dr. Chase who came to speak of the effects of alcohol on persons with disorders.

I asked Counsel specifically if Dr. Chase could say whether the complainant was suffering with this condition on the day in question and she said she cannot speak to that she is not the expert.”

[32] In our opinion, counsel for the defence made a fundamental error when she refused to tell the magistrate in summary the content of the expert’s evidence.

Before a court can assess the value and relevance of an opinion it must know the facts upon which it is based and that this is a proper case for that evidence to be admitted. If, as counsel argued before this Court, this evidence was critical to the Appellant’s defence, it was incumbent on her to provide the magistrate with the information necessary to ground a consideration by the magistrate of whether to admit this evidence.

[33] In **R v Reynolds [1989] Crim LR 220**, where the English Court of Appeal addressed a refusal by a judge in a criminal court to admit psychiatric evidence, **Woolf LJ** spoke as follows to the process to be followed and test to be applied by a trial judge in such circumstances in the following terms:

“... it is clear that each case has to be considered on its own facts and a decision reached in accordance with them. In approaching the facts the practice of the courts is to require those who seek to adduce such expert medical evidence to establish that it is a proper case for that evidence to be admitted. The authorities show that the approach of the courts has been pragmatic,

recognizing that there can clearly be disadvantages in allowing psychiatric evidence to be given on issues in the trial when there is no need for it. To allow psychiatric evidence to be given when it is unnecessary for the determination of the issue before the jury can unduly complicate and lengthen the trial, and instead of assisting the jury can, in some cases, at any rate, distract them from the real issue before them.”

[34] In short, in our consideration and interpretation of the circumstances of the magisterial hearing, it appears to us that the magistrate rightly determined that the matter before her turned on what happened on the morning of 22 May 2018. Not only was there an issue as to whether the expert could say one year after the incident whether the complainant suffered from alcohol use disorder on that date or, in our opinion, whether he was under the influence of alcohol on that date, but this evidence could not prove or disprove who was the aggressor on that date, while the evidence of eyewitnesses could. Expert testimony could not resolve this issue of fact.

[35] It must always be remembered that it is for the magistrate or judge or tribunal of fact to determine what weight, if any, to put on expert testimony and that, most importantly, expert testimony cannot usurp the function of the magistrate or other judicial officer (or jury for that matter) as the finder of fact, especially in a criminal proceeding. It is also important to remember that opinion evidence is not always admissible, especially in those circumstances where the magistrate or judicial officer is in a better position to form an opinion from

the facts without the benefit of expert guidance. In other words, it calls for no special skill, knowledge or experience, but rather is well within ordinary human experience. See **R v Turner [1975] QB 834** and **R v Reynolds** (supra).

[36] Our view of this matter is aligned with the submission of counsel for the Respondent to the effect that, in refusing to hear Dr. Chase, the trial magistrate was exercising her discretion under **sections 114 and 115 of Cap. 121** to exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in an undue waste of time.” In our view, there was a danger of all these things occurring.

[37] In the case of **Dwayne Alleyne v R Criminal Appeal No. 9 of 2016** (per **Goodridge JA**) this Court discussed **sections 114 and 115 of Cap. 121** in detail and compared it with sections 135 to 137 of the Australian Evidence Act on which the Barbados Act has been modelled.

[38] It was a matter for the magistrate to decide questions of admissibility. Thus, it was for the magistrate to decide whether she was going to allow an expert to give evidence of opinion in these circumstances. Was expert testimony necessary in these circumstances? Or was this a circumstance where the

magistrate was capable of forming an opinion without the benefit of expert guidance? : See **R v Turner** (supra) and **R v Reynolds** (supra).

[39] We are of the opinion that the magistrate did not need expert guidance.

[40] Counsel for the Respondent argued further that the evidence of Dr. Chase did not meet the “relevance” test of **section 44(1)** of **Cap. 121**, which provides as follows:

“The evidence that is relevant in the proceedings is evidence that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.”

[41] Also relevant and referenced by counsel is **section 45(1)** which provides:

“Evidence that is relevant in proceedings is, subject to this Act, admissible, and shall be admitted, in the proceedings; and evidence that is not relevant in the proceedings is not so admissible.”

[42] We observe, however, that while relevance is an important first consideration or condition precedent, relevance is not the sole test of admissibility. As outlined at paragraph [36] above, if on the proven facts a judge or jury can form their own conclusion without help, then the opinion of an expert is unnecessary: see **Lawton LJ** in **R v Turner** (supra). Stated differently, an expert’s opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.

[43] Counsel raised another point as to why the expert evidence should have been disallowed which in our opinion was a submission grounded in procedural fairness and balance. In this regard, he made reference to **Brooke LJ** in the case of **Director of Public Prosecutions v Wynne [2001] All ER (D) 53** where he gave the following advice to judges:

“It is, in my judgment, incumbent on any bench of justices acting judicially to approach the evidence of an expert critically, even if no expert is called on the other side and to be willing to reject this evidence if it leaves questions unanswered ... I only mention these matters in order to put justices on notice to be careful before accepting uncritically the evidence of an expert called on one side when no expert is called on the other.”

[44] This touches on an entirely different issue as to whether the prosecution should have been given advance notice of the defence’s intention to adduce expert evidence or disclosure of the expert’s testimony before the trial. This aspect of the matter appears not to have been raised before or addressed by the court below and we will take this discussion no further other than re-iterating the words of their Honours in the **Frank Gibson** case at paragraph [44]:

“A fair trial is not one that is fair only to the accused. It is a trial that is fair to all.”

[45] We find no merit in this ground of appeal.

GROUND 3

[46] This Ground, in its general articulation, submits “that the decision to convict the Appellant was erroneous in point of law”.

[47] Specifically, it is based solely on the argument that in her Reasons for Decision the magistrate’s rejection of the Appellant’s case of lawful self-defence “does not adequately address the law with respect to self-defence and what the court must consider where the issue of self-defence arises and that the learned trial magistrate misdirected herself relating to the same and her decision was erroneous in point of law”.

[48] Counsel relied on several well-known authorities on self-defence speaking, *inter alia*, to what had to be proven by the prosecution and how the jury had to be directed by a trial judge (not a magistrate) where the issue of self-defence arose. Counsel referenced **Beckford v R [1988] AC 130**, in particular **Lord Griffiths** at page 145 where he stated that “the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.” Also relied on was the dicta of **Collins J in R v Owino [1996] 2 Cr. App. Rep 128**, the Privy Council in **Shaw v R [2002] 1 Cr. App. Rep 77**, **Palmer v R (1971) AC 814**; by this Court (differently constituted) in **Jones v The Queen Criminal Appeal No. 3 of 2002**.

- [49] Counsel for the Respondent argued that the trial magistrate considered the Appellant's defence and that the material issue arising is whether the magistrate "carefully and accurately identified the evidence supporting the Appellant's defence of self-defence and its possible legal effect properly explained in light of the directions in law."
- [50] It is, we think, important to bear in mind that in summary trials, the magistrate performs the function of both judge and jury in relation to the law and the evidence and that summary process and trial by indictment before a jury are two separate processes. Procedurally, as an 'inferior court' (in contrast to an 'intermediate' or 'superior court' of record) a magistrate is required to give Reasons for Decision in which he/she sets out the facts he/she finds to be proved and where there is a conflict of evidence, his/her method of resolving the conflict. In other words, a reasoned decision.
- [51] A review of the magistrate's Reasons for Decision shows that she addressed her mind to the issue of self-defence and carefully evaluated the evidence before her and made an assessment of the credibility of the parties before coming to her final determination that the complainant was not the aggressor on the date of the incident, nor was he armed. The magistrate made a finding of primary fact that the Appellant struck the complainant twice with an iron and that he never responded until she attempted to hit him a third time. The

magistrate made a further finding that the Appellant had no injuries although she alleged that she was beaten by the complainant. The magistrate found it significant that, when interviewed by the police (Sergeant Barker), the Appellant never complained of injuries but merely responded: “The police officers saw my nightie ripped away.”

THE APPELLATE FUNCTION AND PROCESS

[52] We take this opportunity to remind ourselves of the principles which govern the review of findings of fact by an appellate court. In general, an appellate court will not interfere with the conclusions on primary facts of the court below unless it is satisfied that the trial judge was “plainly wrong” and should not interfere unless the inferences drawn by the trial judge were “plainly unreasonable”. There are limited circumstances in which an appellate court can interfere with findings of fact made by a lower court which has had the advantage of seeing and hearing oral evidence. An appellate court must be cautious when exercising its discretion to overturn a finding of credibility. It is only if the factual conclusion is one which no reasonable judge could have reached on a consideration of the relevant evidence or demonstrated a failure to consider relevant evidence that an appellate court will interfere with the finding of fact. It does not matter if the appellate court would not have reached

the same conclusion as the court below as long as the decision reached is one that is reasonable.

[53] On an application of this test we can find no fault with the trial magistrate's findings of fact based on her assessment of the credibility of the witnesses and her evaluation of the facts. The finding reached was not unreasonable or against the weight of the evidence.

[54] The conviction is affirmed and this ground of appeal dismissed.

GROUND 4

[55] This Ground was an appeal of the sentence on three grounds as follows: (i) that the decision was erroneous in point of law; (ii) that some other specific error not hereinbefore and substantially affecting the merits of the case has been committed in the course of the proceedings in the case; and (iii) that the sentence imposed is excessive.

[56] As indicated above, the magistrate imposed a non-custodial sentence of 160 hours of community work and a compensation order of \$5000.00.

THE COMMUNITY SERVICE ORDER

[57] Not much was said by counsel in her oral remarks with respect to this order and nothing in her written submissions. Similarly, counsel for the Respondent said little on the subject. The magistrate in her Reasons for Decision purported to apply the provisions of the **Penal System Reform Act Cap. 139**

(**Cap. 139**) and declined to order a custodial sentence as the Appellant was the sole caregiver of her three children. “Hence, the accused was ordered to perform 160 hours community service.”

[58] In the context of the circumstances of this incident, the magistrate’s findings of fact as to the extent of the injuries sustained and the statutory penalty for this offence, 160 hours of community service is not demonstrably excessive.

[59] But, a defendant must consent to community service and if he/she does not specifically consent after the magistrate follows the mandatory steps of **section 13(3)** and **(4)** of **Cap. 139**, which include the consideration of a written report by a probation officer in respect of the offender and the offender’s circumstances and the explanation by the magistrate of the matters set out in **section 13(4)** of **Cap. 139**, then the magistrate must impose a different sentence. Community service being a statutory creation, the provisions of the statute have to be strictly complied with. In short, the use of the word “shall” in **section 13** is mandatory.

[60] It is clear from the record and oral submissions of the parties when the matter was raised by this panel that there was no compliance with **section 13(3)** and **(4)**.

THE COMPENSATION ORDER

- [61] It is not the subject of dispute that a magistrate has the jurisdiction to make a compensation order where a complainant has sustained personal injury and financial loss as a result of the offence committed by the accused, if the complainant consents. This is provided for by **section 72(1) and (2)** of the **Magistrate's Courts Act Cap. 116A (Cap. 116A)** which empowers a magistrate to “make an order for the accused to pay the complainant such compensation as the magistrate may deem just and reasonable”. This is in addition to the sentence or penalty.
- [62] **Section 16B (1)** of **Cap. 139** and **section 73(6)** of **Cap. 116A** require a magistrate, in determining whether to make an order and in determining the amount to be paid, to have regard to the “means” of the accused.
- [63] **Section 74** restricts the amount payable under a compensation order of magistrates to an upper limit of \$5000.00.
- [64] Such an award of compensation releases an accused person from all civil proceedings in respect of the offence committed and is enforceable as an amount adjudged to be paid by conviction or order.
- [65] The process adopted by the magistrate in making the compensation order was the focus of the Appellant's appeal against sentence. Counsel argued that the complainant claimed medical bills and loss of earnings, but produced no bills

or receipts in the face of the Appellant's dispute of the quantum of his medical bills and loss of earnings. Counsel submitted that special damages cannot be inferred from the nature of the act and have to be specifically pleaded and proven. We note however that as an 'inferior court', a magistrate's court is not a court of pleading, but accept that basic principles as it relates to proof and the burden of proof are applicable.

[66] Counsel took issue with the fact that in spite of her strong objections, the trial magistrate awarded the sum of \$5000.00 which the magistrate stated included the special damages claimed by the complainant as well as general damages. Counsel argued that since the special damages had not been proved strictly, there therefore ought not to have been an award for special damages.

[67] Counsel's second submission was that the trial magistrate failed to investigate or adequately enquire into and take into account the "means" of the Appellant and her ability to pay the amount of \$5000.00 imposed in accordance with **section 41(2) (4) of Cap.139** and **section 63 of Cap. 116A**. Counsel submitted further that in spite of the fact that the Appellant indicated in open court that she was no longer working at Sandals and did not qualify for unemployment benefits, that she had to leave her residence and was under welfare assistance, the magistrate nonetheless ordered payment of the sum of \$5000.00 in one year or three months imprisonment.

[68] Counsel for the Respondent disagreed with the Appellant's argument on special damages. On the authority of **Sandy v Antigua Public Utility Authority et al (ANUHCV1998/0156)**, he argued that special damages do not have to be specifically pleaded and proven in every case. He quoted **Mitchell J** in that judgment where he stated:

“The standard applicable to the proof of special damages is the balance of probability. Where a claimant by oral testimony in court establishes the value of a claim for special damages, and the value placed on this claim is not challenged, then unless the value claimed appeared unreasonable the only course of action properly opened to the assessor is to accept the claimant's claim in full.”

[69] The obvious difference here is that the claim was challenged.

[70] It appears to us that the process followed by the trial magistrate in making the compensation order was defective. In the face of counsel for the Appellant's challenge to the expenses incurred, evidence of these expenses should have formed part of the evidence. In addition, little attention seems to have been paid to the nature and extent of the injury and *sequellae*, *inter alia*, in determining the quantum of compensation for the complainant's pain and suffering.

[71] For the reasons outlined, there is merit in this Ground of Appeal.

DISPOSAL

[72] In view of the premises, the appeal is allowed in part: the conviction is affirmed but the sentence of 160 community hours and compensation of \$5000.00 is quashed.

[73] In accordance with this Court's powers under **section 260(2) of Cap. 116A**, this matter is referred to the magistrate of District 'E' for a rehearing of the sentencing order of that court.

[74] We wish to thank counsel for their submissions in this matter.

Chief Justice

Justice of Appeal

Justice of Appeal