IN THE SUPREME COURT OF BELIZE, A.D. 2005

INFERIOR COURT APPEAL NO. 10 OF 2004

APPEAL FROM THE INFERIOR COURT - BELIZE DISTRICT

ACP BERNARD LINO **Appellant**

BETWEEN AND

EWART ITZA **Respondent**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Kirk Anderson, Director of Public Prosecutions, for the Appellant.
Mr. Hubert Elrington for the Respondent.

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JUDGMENT

Background

Mr. Ewart Itza, the respondent in this appeal was tried before the Dangriga Magistrate Court on 1st September 2003 for the offences of **wounding one Timotheo Cano** and causing **Harm to one Lincoln Cardinez**. On 13th November 2003, in the same Dangriga Magistrate Court, he was further charged with **false imprisonment** of the said **Timotheo Cano** and **Lincoln Cardinez**, using **Indecent words** against **Timotheo Cano**, use of **insulting words to Maria Gonzalez**, **aggravated assault against Timotheo Cano** and **Lincoln Cardinez**.

2. At the conclusion of the case for the prosecution on 29th July 2004, Mr. Itza's defence attorney made a no-case submission which was upheld by the trial Magistrate. He held that Mr. Itza had no case to answer on the charges of **false imprisonment** against **Timotheo Cano** and **Lincoln Cardinez**; **insulting words to Maria Gonzalez**; **threat of death to Timotheo Cano** and **Lincoln Cardinez**, and **indecent words to Timotheo Cano**.

3. The prosecution in fact conceded before the trial magistrate that there was no evidence to sustain the charges of use of indecent words to Timotheo Cano and those of threat of death by Mr. Itza in respect of Timotheo Cano and Lincoln Cardinez.

4. And on 3rd August 2004, the trial magistrate dismissed the charges of **wounding of Timotheo Cano**, **Harm to Lincoln Cardinez** and **aggravated assault** against Timotheo Cano.

5. From the records, the incidents that led to the prosecution of Mr. Itza happened on the morning of August 24, 2003 in the Dangriga Police Station. On that day both Lincoln Cardinez and Timotheo Cano were arrested and taken to Dangriga Police Station on the orders and or instructions of the respondent, Mr. Itza, who was then the most senior police officer commanding the Stann Creek formation. At the time he was of the rank of Superintendent of Police.

6. Following the arrest of Lincoln Cardinez at Club 2000 in Dangriga Town and of Timotheo Cano just outside of the Police Station and their detention in the station that day, certain incidents were alleged to have taken place which resulted in the charges brought against

Mr. Itza, the respondent in these proceedings. Timotheo Cano allegedly sustained personal injuries at the hands of Mr. Itza at the police station; Mr. Lincoln Cardinez was allegedly assaulted by Mr. Itza also inside the police station that same day and that Mr. Itza also used insulting words against Maria Gonzalez, the wife of Timotheo Cano.

7. Despite their arrest, no charges or proceedings were brought against either Mr. Cardinez or Mr. Cano and they were in fact released on the following Monday. But their arrest and the incidents in the Dangriga Police Station on that day led to the charges against Mr. Itza and his trial thereon.

8. The trial magistrate at the end of the prosecution's case against the respondent, upheld a submission of 'no case' by his attorney in respect of the charges of false imprisonment; the charges of threat of death, and the charges of using indecent words to Timotheo Cano and using insulting words to Maria Gonzalez, the common-law wife of Cano.

9. It would appear from the records that the respondent himself did not testify nor was any evidence or witnesses tendered or examined on his behalf, although he made an unsworn statement from the dock. Of course, the respondent was perfectly entitled to do so as it was a criminal prosecution, and the burden of proving his guilty always rested with the prosecution. The magistrate however, further ruled that the respondent be acquitted on the charges of harm to Lincoln Cardinez; wounding of Timotheo Cano and aggravated assault of Timotheo Cano.

DPP's Appeal against the "no case" on false imprisonment and using insulting words

10. Against these rulings on the no case submission and the acquittal of the respondent the learned DPP has brought the present appeal.

11. The first three grounds of appeal relate to the upholding of the no case submission by the learned attorney of the respondent concerning the charge of "false imprisonment" of Lincoln Cardinez and Timotheo Cano, and the use of insulting words by the respondent to Maria Gonzalez. On this score the trial magistrate upheld the submissions for the respondent that first, the information and complaint ran afoul of section 21(5) of the Summary Jurisdiction (Procedure) Act; and were therefore flawed in that the offence charged was **false imprisonment** under section 44 of the Criminal Code when in fact that section created the offence of **common assault**.

12. The learned DPP has complained that the trial magistrate erred in upholding the submission of no case in this respect, and that in so doing, he failed to appreciate properly or to take into consideration and apply section 127(2) of the Summary Jurisdiction (Procedure) Act – Chapter 99 of the Laws of Belize, Rev. Ed. 2000.

13. Having listened carefully to the DPP and after a close perusal of the relevant statutory provisions in play here, namely, section 21, in particular, subsection (5) thereof and section 127(2) of the Summary Jurisdiction (Procedure) Act, I am inclined to agree with the learned DPP for the following reasons.

14. First, section 21 of the Summary Jurisdiction (Procedure) Act addresses the form and requisites of complaint, which are, of course, dealt with summarily. Subsection (1) makes it clear that no complaint need be in writing unless it is required to be so by the statute on which it is founded. More importantly, subsection (5)

provides in terms:

> *"(5) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence."*

These provisions, in my view, imbue the summary prosecution of offences with an element of flexibility and informality devoid of technicality that did not warrant the upholding of the no case submission in favour of the respondent. Moreover, the complaint against the respondent did contain a reference to the section of the statute with which he was charged.

15. Secondly, if the trial magistrate had properly appreciated and applied section 127(2) of the Act, he could not have properly upheld the submission of no case. This subsection provides:

> *"(2) No objection shall be taken or allowed in any proceeding in the Court, to any complaint, summons, warrant, or other process for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof."*

The proviso to section 127 also empowers the Court if it appears to it that because of the variance or defect which might deceive or mislead a defendant, to make any necessary amendments and if necessary to do so, to adjourn further hearing of the case.

I am therefore left to wander why the trial magistrate did not at

least, amend the complaint and possibly grant an adjournment, instead of upholding the no case submission. It is no excuse that the prosecution had closed its case.

16. Thirdly, I am left in no doubt that even though the complaint preferred against the respondent spoke of **"false imprisonment"** contrary to section 44 of the Criminal Code, by the beneficent use of the provisions of section 127(2), the no case submission could have been refused.

17. Fourthly, in my view, the magistrate, I think, unduly fixed too much attention on **"false imprisonment"** in the complaint. False imprisonment is of course, a tort which is a civil matter. Its criminal analogue is the nominate offence of **unlawful imprisonment** provided for by section 69 of the Criminal Code. This section states among other things that detention of a person may be constituted by causing a person to believe that he is under legal arrest. In my view, the use of the expression "false imprisonment" in the complaint is a loose, non-technical rendition of the offence with which the respondent was charged that is within the contemplation of section 127(2) of the Summary Jurisdiction (Procedure) Act, and did not prejudice the respondent.

18. Finally, section 44 of the Criminal Code against which the respondent was alleged to have offended in respect of the detention of both Cardinez and Cano in Dangriga Police Station creates the offence of **"common assault"** and it is to be found under Title VII of the **Code** dealing with **Criminal Force to the Persons**. And under section 66(1)(c) of the Code dealing with modes of assault it is stated that **"Assault**

includes...imprisonment" (emphasis added).

It is clear from the particulars of the offence charged against the respondent as stated in the complaint, the reasons for the charge. I do not think that in all the circumstances of the case, he could have been said to have been misled or deceived by the description of the charge against him as **"false imprisonment"** – See **R v Sandwell Justice ex parte West Midlands Passenger Transport Board (1979) Crim. LR 56**.

19. I find therefore that the trial magistrate erred in upholding the submission of no case in respect of the charges relating to the detention of Lincoln Cardinez and Timotheo Cano by the respondent. The fact that they were detained in the police station does not, in my view, make their detention lawful, for otherwise, that would confer a charter on the police to detain unlawfully anyone. It is not the place of detention that makes it lawful or unlawful – it is the cause or reason or lack of reason, and the manner of the detention that makes it unlawful. By law, imprisonment or detention can amount to assault.

20. I now turn to the ground of appeal against the trial magistrate upholding of the no case submission in favour of the respondent in respect of the charge of using insulting words to Maria Gonzalez, who from the records, is the common law wife of Timotheo Cano.

21. The complaint laid against the respondent charged the respondent with the offence of using "insulting words" contrary to section 4(1)(xi) and section 4(9) of the Summary Jurisdiction (Offences) Act – Chapter 98 of the Substantive Laws of Belize, Revised Edition 2000. And the particulars alleged that on 24th November 2003 at

Dangriga Town, he used certain insulting words to Maria Gonzalez, that is to say "Whore/Puta".

22. In his ruling upholding the submission of no case to answer in favour of the respondent, I must say that the trial magistrate was, from the records (see pp. 79 to 80) somewhat terse. He seemed to have based his ruling on the fact that Maria Gonzalez could not speak English. He said that he could not perceive how a complainant who testified that *"she could not understand what was said* (presumably by the respondent) *could lodge with the police a complaint that the accused* (now respondent) *used indecent words to her … It seems to me, that it was the police officers who felt insulted by what was said instead of the virtual complainant".*

23. I ineluctably agree with the learned DPP that the trial magistrate's ruling on this point was erroneous, more so in the light of the evidence before him as testified to by the witnesses for the prosecution who were all police officers and were present when the respondent was alleged to have used the words in relation to Maria Gonzalez.

24. On the evidence before the magistrate these witnesses testified that the respondent did use the word "whore", during an altercation between him and Timotheo Cano, whose detention he had just ordered, and this was in clear reference to Maria Gonzalez, the wife of Cano. According to Cpl. 283 Myers, at page 19 of the record: *"Mr. Itza* (the respondent) *was telling the person* (that is, Mr. Cano)*, he owns bars and whores … The person answered that he is a contractor and does mason work and does not own whores. … Mr. Itza then said to the person 'you da a fucking punk you the* (sic) *boast about the place with them*

whore and bitches. The person then reply to Mr. Itza that 'da no a whore that is my wife' ".

Also, PC 880 Salam testified at p. 37 of the records that: *"After an argument began with Mr. Itza and Mr. Timotheo Cano whereby Mr. Itza told Mr. Timotheo Cano that his wife is a cheap whore and a bitch, shortly after a struggle began between Mr. Cano and Mr. Itza over the counter in the Police Station…".*

WPC 222 Daly also testified at pages 49 – 50 of the records that after the respondent had ordered the detention of a group of Hispanics – about two females and five males, *"One of the male person* (sic) *who was later known to be Cano and Supt. Itza, Cano first name was Timotheo, an argument and Cpl. Myers got between Cano and Mr. Itza. Cano was saying that his wife was not a bitch, that she was not from a bar, that they were going home to Pine Street and that they were coming from some Club that was up the Street."*

25. There is therefore, in my view, from the evidence, ample ground that the respondent did use the words complained of on the day in question in relation to Maria Gonzalez. The trial magistrate accordingly erred, when he ruled, in effect, that because Maria Gonzalez could not understand English and that she did not testify that indecent words were used by the respondent and that according to him, it was the police officers who felt insulted by what was said instead of the virtual complainant (that is, Maria Gonzalez), he therefore upheld the no case submission in the respondent's favour (see pages 79 – 80 of the records).

26. This finding was, with respect, a misunderstanding of the offence

with which the respondent was charged in this respect. He was charged for the offence of using **insulting words** contrary to section 4(1)(xi) of the Summary Jurisdiction (Offences) Act which provides in terms, so far as is material:

> *"4(1) Any person who …*
>
> *(xi) uses to or at any other person or in the hearing of any person … insulting words … whether calculated to lead to a breach of the peace or not … in a street, or public place, or in a private enclosure or ground*
>
> *is guilty of a petty offence".* (emphasis added)

27. The learned DPP is correct when he submitted that the magistrate erred when he concluded that the offence of using insulting words could only have stuck if Maria Gonzalez had understood the words used by the respondent and had testified that such words were uttered in her presence.

28. A proper appreciation of the offence of using insulting words would have shown that the understanding of the subject or the person targeted for the insulting words is not an element or ingredient of the offence. The elements of this offence are: a) That the words charged as insulting were used to or at any other person or in the hearing of any person; b) that the words used were insulting words; and c) that the accused intended to use the insulting words. From the evidence before the trial magistrate, it was clear that the respondent did use the word "whore" at Maria Gonzalez and in the hearing of the witnesses who testified. And given the context in which he used the word, in the police station soon after the arrest of Ms. Gonzalez' husband and in his presence and hearing, it does

not take any leap of the imagination to find the word was insulting. The magistrate indeed, stated that in his view, it was the policemen in whose presence the word was used who felt insulted, rather than the virtual complainant. This, I find, was enough for the purposes of the section – **"use of insulting words in the hearing of any person"** – **Jordan v Burgoyne (1963) 2 A.ER. 225**.

29. I conclude on this score that the trial magistrate erred when he upheld the no case submission in favour of the respondent on the charge of using insulting words for the reasons he stated.

It is helpful to point out here, the grounds on which a no case submission may be made in a Magistrate's Court and indeed in any criminal proceedings. These were set out in the English **Practice Note [1962) 1 All E.R. 448** as follows:

> *"...a submission of no case may properly be made and upheld:*
>
> *(a) when there has been no evidence to prove an essential element in the alleged offence; or*
>
> *(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination is so manifestly unreliable that no reasonable tribunal could safely convict".*

These principles were elaborated in relation to indictable proceedings in **Galbraith (1981) 73 Cr. App. Rep. 124**, and they have been applied in this jurisdiction and were confirmed by the Privy Council in the Jamaican case of **Daley v R (1994) A.C. 117 P.C.** In the case before me, none of these grounds evidently was

in issue; instead, the trial magistrate upheld the no case in favour of the respondent for other reasons.

Dismissal of the charges of harm, wounding and aggravated assault

30. I now turn to the dismissal by the trial magistrate of the charges of harm, wounding and aggravated assault against the respondent at the conclusion of the prosecution's case. The charge of harm related to Lincoln Cardinez that the respondent intentionally and unlawfully caused him harm.

Again, I find that I have to agree with the learned DPP that the trial magistrate erred in his reasoning for his dismissal of the charge of causing harm to Lincoln Cardinez by the respondent.

31. First, the magistrate erred on the issue of causation. The evidence before him was that Mr. Cardinez, while he was detained in the police station in Dangriga, was punched in the face by one P.C. Dan and the respondent. This led the magistrate to conclude, in his own words: *"This leave* (sic) *some grey areas in the case against the accused"*. This is plainly wrong in the light of the provisions of section 11(3) of the Criminal Code – Chapter 101. This provides that if an event is caused by the acts of several persons acting jointly or independently, each of those persons who has intentionally or negligently contributed to cause the event shall be deemed to have caused the event. Therefore, the fact that Mr. Cardinez was punched in the jaw by both P.C. Dan and the respondent, this did not necessarily leave "some grey area" against the respondent warranting dismissal of the charge of harm against him. Of course, P.C. Dan could as well have been so charged. But that was a matter for the prosecution.

32. Secondly, the trial magistrate seriously erred when he dismissed the charge of harm against the respondent because in his words: *"The prosecution has failed to establish that consent was not given and that the harm was unlawful"*. From the charge and the evidence led, (see in particular pages 4 and 5, and page 18 of the records of testimony of Cardinez and Cpl. 283 Myers respectively of how the respondent punched Cardinez in the right jaw), it is difficult to see how the issue of consent could have been an issue for the prosecution to negative. It certainly would be most unusual for a person in detention in a police station to be said to have consented to a punch in the face if one of the police officers in the station were charged with causing him harm. Consent, from the records, was never in issue. Therefore the magistrate erred in reasoning that the prosecution failed to establish that consent was not given and that the harm was unlawful.

33. Thirdly, on the issue of the identification of the respondent, which the trial magistrate stated as part of his reason for his dismissal of the charge of harm, he clearly erred; this again was not in issue. From the records, there was no doubt as to who brought Cardinez into `the police station that day and as to who punched him on the jaw, namely the respondent: See in particular the testimony of Cardinez and Cpl. Myers (already referred to above). There was no question as to who hit Cardinez and therefore the trial magistrate's reference to an identification parade was beside the point. The victim, Cardinez, knew who hit him and Cpl. Myers, who was present at the time, said clearly that the respondent punched Cardinez, in his words: *"Mr. Itza then walk up to him and punch him on the right side of his jaw"*.

34. I conclude therefore that the trial magistrate erred for the reasons he gave in dismissing the charge of harm against the respondent.

35. In so far as the offences of wounding and causing aggravated assault to Timotheo Cano are concerned, the trial magistrate, again, erred for the reasons he stated in dismissing these charges against the respondent. The background to these charges was that after Mr. Cano was brought into the police station and after some altercation with the respondent, he was invited or forced into the NCO's room in the station by the respondent. Only the two of them entered that room. Mr. Cano was later observed, when he left the room, to be bleeding from the head with blood on his shoulders – see page 32 of the records where P.C. 880 Marvin Salam testified to this and how he and the respondent took Cano to a stand pipe to wash off the blood stains on him when, he then he observed, a wound in the back of Cano's head which was bleeding; page 19 for the testimony of Cpl. 283 Myers; and page 50 for the testimony of WPC 222 Daly.

36. The trial magistrate dismissed these charges on two grounds, namely 1) that there was no proof that the respondent intended to cause the wound or aggravated assault against Cano. And 2) the prosecution did not prove that the respondent was not acting within the scope of his authority.

37. First, in so far as the intention of the respondent is concerned, section 6 of the Criminal Code, as the DPP correctly pointed out, provides for the standard test for establishing intention in any criminal prosecution, and this states:

> *"Did the person whose conduct is in issue intend to produce the result or have no substantial doubt that his conduct would produce it?"*

38. Only Cano and the respondent were in the NCO's room where the former is alleged to have sustained the wound and assault at the hand of the latter. And Mr. Cano testified as to what happened in the NCO's room and how he sustained his injuries (see page 10 of the records).

39. From the evidence before the trial magistrate, there was little room for conjecture as to how Cano came by his wounds, and who must have inflicted those wounds, whether intentionally or recklessly. The trial magistrate was therefore plainly wrong and was clearly speculating, even in the face of the evidence before him, when he said at page 86 of the records:

> *"The question of how the virtual complainant* (that is, Mr. Cano) *got into the NCO's office leaves some question marks, but it does not show any hostile intention, and obviously the prosecution failed to establish that the defendant was reckless in his action towards the complainant".*

40. I do not think there was, on the evidence, room to speculate as to how Cano came by his wounds or as to whether the respondent intended to hurt him. It is not reasonable to put a gun in someone's mouth and later hit that person at the back of his head and then say the wound that person sustained as a result was not intended by the actor or that he was not reckless. This, in my view, will fly in the face of commonsense. Cano in fact testified that he blacked out when the respondent hit him on the head in the NCO's room.

41. In so far as the respondent's scope of authority is concerned, in my view, the least said about it the better. It beggers belief as to how the trial magistrate could have raised this issue, given the charges

the respondent was facing on this score. The magistrate raised the issue in this way:

> *"Another question that needs to be address* (sic) *is whether the accused was acting in the scope of his duty. This is of vital importance in this matter as one needs to note that if the police officer conduct falls within the general scope of the duty to prevent crime and bring offenders to justice; then it would seem to be within the protection of the statute, if it was unlawful".*

It is not in doubt that it is within the general scope of the duty of police officers to prevent crime and bring offenders to justice. But it should equally not be in doubt that it is most certainly outwith that duty of police officers to inflict wounds on persons already in their custody.

42. The evidence in this case showed that only Mr. Cano and the respondent went into the NCO's room in Dangriga police station. Sometime later they emerged with Mr. Cano bleeding profusely with a gash on the back of his head. It would be a monstrous travesty of the scope of the authority of the police to hold that the respondent was acting within any scope of authority for what happened to Cano in that room. The wounds and aggravated assault of Mr. Cano were clearly outside of the respondent's scope of authority.

43. I therefore find that the trial magistrate erred in dismissing the charges of wounding and aggravated assault against the respondent, for the reasons he stated.

The Respondent's position in this appeal

44. Mr. Hubert Elrington, who did not appear for nor represented the

respondent during his trial before the Magistrate Court, appeared for him in this appeal before me. At the conclusion of the arguments and submissions by the learned DPP, there were a number of adjournments at Mr. Elrington's request. He was then requested to file written submissions in reply to the DPP. He promised to do so. But on the resumption of the hearing on 4th October 2005, Mr. Elrington stated that he would take only one point in answer to the DPP.

The point he said was a constitutional one and it related to the prosecution of the respondent before the trial magistrate. Mr. Elrington submitted that the respondent's prosecution and trial was a nullity as the prosecution was in the name of A.C.P. Bernard Lino and not in the name of the Crown as specified in section 42(5) of the Belize Constitution. Mr. Elrington however cited no authority for his proposition or submission, but stated instead, that it was a constitutional issue.

45. I must observe that Mr. Elrington's approach and presentation were not helpful, either to the Court itself or the appellant, the DPP, in this case and I will say nothing about the respondent, his client. If he had intended to take this line of action, that is, to rely solely on the constitutional issue, he should have at least taken it up at the trial of the respondent. When pressed on this, he replied that he was not the attorney who represented the respondent at his trial. Even so, I think, it would have been more reasonable and proper to expect that on appeal by the DPP against the discharge of the respondent, Mr. Elrington, his new attorney, if he felt so strongly about the constitutional point and was convinced of its merits, should have taken it at the very first opportunity. But instead, he waited after the DPP's arguments and submissions and promises by him to hand in

his own submissions in reply in writing. In the event, none was forthcoming.

46. In due deference to the Constitution which he prayed in aid, I listened to Mr. Elrington. Section 42 subsection (5) of the Constitution provides in terms:

> *"(5) Legal proceedings for or against the State shall be taken in the case of civil proceedings, in the name of the Attorney General and, in the case of criminal proceedings, in the name of the Crown".*

Did the fact that the Information and Complaints on which the Respondent was prosecuted were laid by ACP Bernard Lino vitiate his trial and make it a nullity?

47. Having listened to Mr. Elrington on this point, the only one he pressed on the Court on behalf of the respondent, and the DPP in reply, I was not persuaded that because the prosecution of the respondent was not in the name of the Crown, the proceedings were therefore flawed. As the DPP properly pointed out, even if Mr. Elrington was right in his contention, then only a retrial of the respondent would be ordered with the correction substituting the "Crown". The DPP also submitted that this point now being taken by Mr. Elrington was a matter of form and by the application of section 127(2) of the Summary Jurisdiction (Procedure) Act relating to the avoidance of objection to any complaint or summons or other process for alleged defect either in form or substance, it could have been dealt with at the respondent's trial. The DPP therefore submitted that this section is applicable to meet Mr. Elrington's point on behalf of the respondent.

48. On reflection, I think the learned DPP is correct. But I feel unable to

accede to Mr. Elrington's point as well for other reasons.

49. In the first place, though the Constitution in section 42(5) talks of the "Crown" this term is defined in it as the "Crown in right of Belize". This I take to mean that as an independent member of the Commonwealth, executive authority in Belize is vested in Her Majesty, the Queen or "the Crown". This is reflected in section 36 of the Belize Constitution. This provides that executive authority may be exercised on behalf of Her Majesty by the Governor General either directly or through officers subordinate to him – see also **Volume 6 Halsbury's Laws of England 4th ed. para. 818**.

50. Also, by section 1 of the Police Act – Chapter 138 of the Laws of Belize R.E. 2000, the Governor General appoints the Commissioner of Police and who subject to the Governor General's Orders, has the command and superintendency of the Police Department and superior officers and non-commissioned officers and constables. And section 17 of the Police Act confers the right on superior officers to prosecute police cases as follows:

> *"17. Where any information has been laid, or complaint or arrest made, by any police officer, it shall be lawful for the Commissioner or any superior officer, sergeant or corporal of the Department, if of opinion that such information was laid, or that such complaint or arrest was made, by such police officer in the performance of his duty as a police officer, to appear on behalf of such police officer before any magistrate at any proceedings consequent upon such information, complaint or arrest, and, on behalf of such police officer, to*

conduct the information, complaint or charge, and examine and cross-examine witnesses in the same manner as if such information had been laid, or such complaint or arrest had been made, by such Commissioner, superior officer, sergeant or corporal".

51. In the present proceedings, the information and complaint were in the name of the Assistant Commissioner of Police named therein.

52. Moreover, sections 18 and 19 of the Summary Jurisdiction (Procedure) Act provide for the mode of instituting proceedings. They provide as follows:

> *"18. Every proceedings in a court for the obtaining of an order against any person in respect of a summary conviction offence shall be instituted by a complaint made before the magistrate of the court.*
>
> *19. Any person may make a complaint against any other person committing a summary conviction offence unless it appears from the statute on which the complaint is founded that a complaint for that offence shall be made only by a particular person or class of persons".*

53. These provisions, in my view, affirm the historic common law prosecutorial right vested not only in the police but private citizens as well, which I find, is not abolished by section 42(5) of the Constitution.

54. Also, unlike proceedings on indictment, which by section 68(2) of the Indictable Procedure Act – Chapter 96, provides that every

indictment shall be presented to the Court by and in the name of the Director of Public Prosecutions, there is no such requirement for summary proceedings other than what is stated in sections 18 and 19 of the Summary Jurisdiction (Procedure) Act. In the case of indictments, the First Schedule to Chapter 96, gives in Rule 3, the commencement of an indictment in the following form -

"The Queen v AB

In the Belize Supreme Court

(Criminal Jurisdiction)"

There is no comparable provision for complaints or information for summary proceedings.

55. I therefore do not think that section 42(5) of the Constitution is intended to operate to abolish or vitiate summary criminal proceedings not taken in the name of "the Crown". In any event the Assistant Commissioner of Police in whose name the proceedings against the respondent were taken is an agent, servant or emanation of the Crown.

56. Moreover, section 42(5) of the Constitution is not a procedural code whether for civil or criminal proceedings – see the decision of this Court of 12th February 2002 in Supreme Court Act No. 47 in **The Queen and the Minister of Budget Management, Investment and Public Utilities – ex parte Belize Telecommunications Ltd**. In my view though in criminal proceedings section 42(5) provides that they shall be in the name of the Crown, this I think is only declaratory and does not vitiate criminal proceedings commenced in a name other than the Crown.

In any event, I am persuaded by the reasoning of erstwhile Meerabux J in the case of **The DPP v Vernon Harrison Courtenay and W.H. Courtenay & Co.** where objection was taken to proceedings taken in the name of the Director of Public Prosecutions instead of "the Crown". After an examination of some of the relevant authorities, he concluded that they *"would seem to indicate that 'the Crown' embraces the entire machinery of the Central Government and would cover not only the Ministers but also the civil servants such as the Director of Public Prosecutions and even the lowest of the Police Officer.*

… A Fortiori, any criminal proceedings instituted by the Director of Public Prosecutions or by a police officer acting in his public capacity (both being 'aspects or members of the Crown') are, to all intents and purpose instituted in the name of the Crown".

57. It is for all these reasons that although Mr. Elrington has invoked the authority of the Constitution, I am unable to agree with him on this point. In any event, even if he were correct, the practical result for his client, the respondent, would be the same – a retrial would be ordered.

58. However, for the reasons I have stated earlier, I find that the trial magistrate erred in upholding the no case submission on behalf of the respondent on the charges of "false imprisonment" of Lincoln Cardinez and Timotheo Cano; and the use of insulting words at Maria Gonzalez.

I uphold as well, the learned DPP's appeal against the trial magistrate's dismissal of the charges of aggravated assault on

Timotheo Cano; and harm against Lincoln Cardinez, by the respondent.

59. Accordingly, I order the re-trial of the respondent on the aforesaid charges.

A. O. CONTEH
Chief Justice

DATED: 25th November, 2005.