

## **Magistrate Court Judgment – COP vs Ottley Laborde**

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### **IN THE MAGISTRATE'S COURT TERRITORY OF MONTSERRAT**

Criminal - jurisdiction

MC Files C3, 4 & 14 of 2012

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**BETWEEN:**

**THE COMMISSIONER OF POLICE  
“v”  
OTTLEY LABORDE**

**Before: - Senior Magistrate - Mr Robert A Shuster CRH**

**Counsel: - DPP Ms K A PYKE**

**Defence Mr L Daniels & Ms M Watts**

**Trial dates 31<sup>st</sup> October 2013, 16<sup>th</sup> & 17<sup>th</sup> Dec 2013**

**Written submissions by 12.00 on 24<sup>th</sup> Dec 2013**

**Judgment 02<sup>nd</sup> Jan 2014**

<b>JUDGMENT</b>
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The defendant Ottley Laborde was at all material times employed as a Police Sergeant in the Royal Montserrat Police Service, based at Brades PHQ.

The defendant appears before this court charged with three separate offences alleging [a] threatening language; [b] disorderly conduct and [c] assault.

The three summary only matters are alleged to have occurred during the morning of Saturday 17<sup>th</sup> December 2011 at approximately 11.00am, at Brades in the vicinity of Police HQ and the GOM compound. This is my judgment.

<b>The charges against the defendant</b>
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[a] **File C03/2012** –On 17<sup>th</sup> December 2011 at **Drummonds** in the Overseas Territory of Montserrat in a certain place to wit the compound of Brades Police Headquarters and the compound of Government Headquarters the defendant did conduct yourself in a disorderly manner which is an offence contrary to section 294 [1] of the Penal Code Cap 4.02

[b] **File C04/2012** – On 17<sup>th</sup> December 2011 at Brades in the Overseas Territory of Montserrat in a public place to wit the compound of Police Headquarters and Government Headquarters the defendant did make use of threatening language to Jasmine Leonard to wit” ***Me ah go buss ah you fucking head. Me ah go get two [2] stone now and buss up ah you fucking head*** which is an offence contrary to section 296 [1] [a] of the Penal Code Cap 4.02

[c] **File C14/2012** - On 17<sup>th</sup> December 2011 at Brades in the Overseas Territory of Montserrat the defendant did unlawfully assault Jasmine Leonard which is an offence contrary to section 184 of the Penal Code Cap 4.02

<b>The prosecution’s case:-</b>
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On Saturday 17<sup>th</sup> Dec 2011, the defendant was employed as a police sergeant with the Royal Montserrat Police Force; stationed at Police HQ. At approximately 11.00am, that same date, the defendant arrived at Police HQ by motor vehicle.

As the defendant walked towards the PHQ door, he was confronted by the complainant Ms Jasmine Leonard who was standing at the top of the steps, facing PHQ. When Ms Leonard saw the defendant she shouted certain words - which she directed towards the defendant.

The prosecution claim the defendant responded inappropriately towards Ms Leonard, responding in an aggressive and also in a threatening manner, by using inappropriate language and advancing up the grassy slope leading from PHQ, heading - directly towards where Ms Leonard was standing.

The prosecution claims the defendant intended to assault Ms Leonard, because of an incident, involving two members of the complainant’s immediate family.

That incident occurred earlier that morning, during a police operation in Drummonds. During the police operation, arrests were made, and the defendant and another person were injured.

The prosecution also claim when the defendant made his way up the grassy slope heading towards the complainant, he stooped and attempted to pick up a stone [or stones] from the ground - to use as a weapon to assault Ms Leonard.

At the same time the defendant is said to have uttered threats towards the complainant – threats were in these words- *Me ah go buss ah you fucking head. Me ah go get two [2] stone now and buss up ah you fucking head.*

On seeing the defendant approaching her in an aggressive manner; and seeing the defendant stoop down, the prosecution say the complainant fled the scene, running towards the sea, because the prosecution say the complainant feared for her own personal safety.

According to the prosecution when the defendant reached the top of the grassy slope, he was restrained by a civilian working in the vicinity of the Chief Ministers Office. That individual was Val Pollidore he helped restrain the defendant, with help from the defendant's colleague Insp. Semper, who had just arrived at PHQ.

The prosecution say whilst restrained, the defendant struggled to break away, and throughout the period of restraint, the prosecution say the defendant used threatening words again directed towards Ms Leonard.

The prosecution say by his behaviour on 17<sup>th</sup> Dec 2011 - when the defendant advanced in a threatening manner, using foul language towards the complainant, he is guilty of the offences charged and they ask the court to convict him accordingly.

### **The defence case**

The defendant denies any allegation of assault, disorderly conduct, or using threatening behaviour, as alleged by the prosecution, they put the prosecution to strict proof, as is their legal right.

The defence say the defendant had been injured that morning whilst participating in an official police operation at Drummonds, where officers arrested the complainant's brother, and her step-father.

As a result of the defendant receiving injuries in affecting an arrest the defendant was taken to the casualty department, by accompanying police officers.

According to the evidence the defendant travelled to the hospital with two prisoners arrested at Drummonds, in the same vehicle. During the journey, the defence claim the defendant was threatened by George Leonard, who repeatedly threatened the defendant and members of his immediate family.

At the casualty department the defendant was treated for his injuries. He lost one of his toe nails, he received an injury directly above his right eye, his wrist / arm was injured, his arm was partially paralysed, from a blow from a rock while attempting to ward off an attack with a rock, aimed at the defendant's head in an assault by George Leonard. The defendant lost a lot of blood.

Immediately prior to release from casualty, the defendant lost consciousness for a period of time. As a result of losing consciousness the defendant was placed under observation by medical staff. The defence claim the injuries the defendant sustained in the attack at Drummonds - were serious.

Evidence of an assault on the defendant was corroborated by the defendant's medical report and by Supt. Thompson's testimony.

The defence claim Ms Leonard, was the individual who provoked the defendant, who was walking peacefully towards PHQ. Upon hearing Ms Leonard shouting, the defence claim the defendant made up his mind to arrest Ms Leonard for breach of the peace; because of the words used towards him, those words were uttered in a public place.

The defendant was unable to arrest Ms Leonard because he was initially detained at the top of the grassy slope by a civilian worker Val Pollidor – and then he was restrained by other police officers.

### **Alleged irregularities in police procedures**

Three summary charges were laid against the defendant after the date of the incident in Brades 17<sup>th</sup> Dec 2011 – those charges appeared on 01<sup>st</sup> Feb 2012.

The defence claim the defendant was never cautioned by police; he was never told of the existence of the offences allegedly committed at Brades on 17<sup>th</sup> Dec 2011. Although these prosecutions were brought in the name of the Commissioner of Police, the defence say no investigative officer [IO] was ever appointed to investigate the defendant's case.

Further no police officer was appointed to interview the defendant, or take down the defendant's statement in writing. More importantly the defence claim, no IO was subpoenaed to formally give evidence before this court, or to answer any defence questions. The defence claim these blatant defects are a clear breach of acceptable established police practices and police procedures throughout the world in dealing with suspects in criminal matters.

The defence asks: - when where how and why, the defendant was arrested and charged; because the three offences before the court are NOT arrestable offences under our laws, they are summary matters only, with no attached powers of arrest.

In a nutshell, the defendant denies assaulting Ms Leonard; or committing public order offences. The defence aver the defendant was provoked by Ms Leonard. Further the defendant was attempting to arrest Ms Leonard for BOP for her conduct towards him. He was prevented from doing so; when he was restrained by Val Pollidore. BOP is and remains an arrestable offence at common law.

The defence further state the defendant slipped whilst making his way up the grassy slope, at the side of the steps to PHQ to arrest the complainant. He lost his footing because of the injury to his toe and the fact he was wearing slippers and walking on an uneven soft surface.

When the defendant slipped ascending the grass verge; and lost his footing, on his way up an uneven grassy surface - when he stumbled, the defendant put out his hand to save or steady himself and prevent himself from falling.

At no time did the defendant pick up any rock or rocks to use as a weapon as alleged by the prosecution. The defence asks all charges be dismissed in accordance with the evidence and the defence submissions.

<b>Disorderly conduct C3/12</b>
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An offence contrary to section 294[1] of the Penal Code - Laws of Montserrat: -

Which states: - any person who in any public place, conducts himself in a disorderly manner, or, conducts himself in such a noisy manner to disturb the neighbourhood - shall be guilty of an offence; and be liable on summary conviction to a fine of \$250 or, to imprisonment for three months or, to both fine and imprisonment.

<b>Threatening language C4/12</b>
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An offence - contrary to section 296 [1] of the Penal Code -Laws of Montserrat:

Which states - any person who uses any abusive, blasphemous, indecent, insulting, profane or threatening language:-

[a] in any public place

[b] .....

[c]..... Shall - be guilty of an offence; and be liable on summary conviction to a fine of \$250.00 or, to imprisonment for three months or, to both fine and imprisonment.

### **Common assault C14/12**

Is an offence contrary to section 184 of the Penal Code - Laws of Montserrat: -

Which states any person who unlawfully assaults another [person] is guilty of an offence; and if the assault is not committed in circumstances for which a greater punishment is provided by this or any other law shall be liable on summary conviction to imprisonment for one year

### **What constitutes disorderly conduct?**

What type of behaviour can properly be described as disorderly is a question of fact for the court. Disorderly behaviour does not require any element of violence, actual or threatened, and includes conduct that is not necessarily threatening, abusive or insulting. It is not necessary to prove any feeling of insecurity in an apprehensive sense on the part of a member of the public. *Charles Edward's v DPP 1995 CRLR 896*

Examples of types of conduct capable of amounting to disorderly conduct:-

- [1] Carrying out a disturbance in a residential area.
- [2] Persistently shouting abuse or obscenities at members of the public.
- [3] Pestering people waiting in a queue.
- [4] Rowdy behaviour in a street which may alarm people, more particularly women and elderly persons.
- [5] Carrying on a disturbance in a precinct or an area to which the public have access e.g. a hospital, bank

### **What constitutes threatening words / behaviour?**

Types of conduct which might be capable of amounting to threatening abusive words or behaviour:-

- [a] Threats made towards innocent bystanders, or individuals carrying out public service duties.
- [b] Throwing of missiles by a person taking part in a demonstration, or other

public gathering, where no injury is caused.

[c] Scuffles or incidents of violence or threats of violence committed in the context of a brawl in the vicinity of licensed premises, hospitals community centres and the like

[d] Incidents which do not justify a charge of assault where an individual is picked upon by a gang.

### What constitutes - assault?

The term **ASSAULT** is now frequently used to include both an assault, and also a battery - which is - the actual application of force. Strictly speaking an assault is an independent offence and should be treated as such. *Fagan v the Metropolitan Police Commissioner (1968)-1QB 439*

- *An assault is any act, not, a mere omission to act, by which the person intentionally or, recklessly, causes another person to apprehend immediate unlawful violence. An assault involves a hostile intent.*

Assault and battery are intentional torts, meaning the defendant actually intends to put the person in fear of being battered, or he intends to wrongfully touch the person. Wrongful touching of a person need not inflict physical injury, and may be indirect, such as contact through a thrown stone, or spitting at someone.

### The essential elements of assault

- An intentional, unlawful threat or "offer" to cause bodily injury to another by the use of force
- Under circumstances which create in the other person a well-founded fear of imminent peril;
- Where there exists the apparent / present ability to carry out the act – **if not prevented.**

An assault can be completed even if there is no actual contact with another person, and, even if a defendant had no actual ability to carry out an apparent threat.

e.g.:- a defendant, who points a realistic toy gun at another person, may be convicted for an assault, even though the defendant was fifty feet away from the person, and he had no actual ability to inflict harm from that distance.

## **Battery**

A battery is the wilful or intentional touching of a person against that person's will by another person, or by an object or substance put in motion by that other person it is the actual application of force.

An offensive touching can constitute a battery even if it does not cause injury, and could not reasonably be expected to cause injury. A defendant who emphatically pokes another person in the chest, with his index finger to emphasize a point may be culpable. Since the recognition of the existence of the HIV virus, a defendant, who spits on a plaintiff, even though there is little chance that the spitting will cause any injury other than to the other person's dignity, he or she commits a battery.

## **Police Conduct**

A police officer is privileged to be able to apply the threat of force, or if necessary to apply actual force, in order to affect a lawful arrest. A defendant, who suffers injury as the result of reasonable force exerted by the police to affect a lawful arrest, will not be able to sustain a suit against an arresting officer for assault or battery.

## **Provocation in relation to an assault**

- Words alone no matter how insulting or provocative **DO NOT** - justify an assault or battery, against the person who utters the words.

## **Self-defence**

Any person who is assaulted may use such reasonable force as may be necessary, or which at the time reasonably appears to be necessary, to protect him or herself from bodily harm. Any act of self-defence must ordinarily be proportionate to the threat. So if you believe a person is going to spit on you, depending upon the context, it *may* be reasonable to push that person away, but, it would *not* be reasonable to hit the person with a baseball or cricket bat.

## **The burden and standard of proof required in a criminal trial**

As this is a trial before a Magistrate sitting alone; I certify I have directed myself in accordance with the law relating to the burden and standard of proof in a criminal case. I have also directed myself on the need to consider the evidence in respect of

each of the charges, both for and against the defendant – separately as the elements of each offence are different.

The prosecution brings this case; they must prove beyond reasonable doubt, the defendant committed the offences or, any one or more offence[s]. The defendant does not have to prove anything; because / under the law and, under our system of justice, the defendant is innocent until he is proven guilty.

### **Good character directive**

Modern law says I must consider and apply to every criminal case wherever appropriate; a defendant's good character directive. That good character directive must apply in any case involving a serving police officer as he should have an unblemished record to join the police force. I certify I have reminded myself of the fact that good character, cannot of itself provide a defence to a criminal charge, but it is evidence which I should take into account when I come to consider my verdict. *R v Vye, Wise and Stephenson 97 Cr App R 134: and R v Aziz and others [1995 2 Cr App R 478.*

### **Discussion**

This is a simple case involving allegations brought by COP on behalf of the prosecution, alleging the defendant [a serving police officer] assaulted a member of the public Ms Jasmine Leonard during the morning of Saturday 17<sup>th</sup> Dec 2011.

The evidence consists entirely of direct evidence from eye witnesses who were present at the scene. There were no admissions made on behalf of the defendant in any formal police interview.

The court heard evidence from nine witnesses for both the prosecution and the defence. It is a fundamental principle of our system of justice that all witnesses are treated equally before the law.

This court fully recognises, the facts that these events are said to have occurred two-years ago, in 2011 and the court is cognisant of the fact that over a long period of time - memories fade, because we are all human and fallible.

### **The prosecution witnesses –**

In the courts view based on evidence before this court, the most significant independent witnesses were, [1] Simeone Leonard, [2] Inspector Semper, [3] Superintendent Thompson [4] Simon Riley and [5] WPC Allen. The court finds as a fact, these witnesses were credible witnesses and more importantly, the court finds they were truthful witnesses.

### **The defence witnesses – findings of fact**

The court finds as a fact, the defendant Ottley Laborde was also a credible and truthful witness when he gave evidence in his defence. The defendant spoke in a quiet manner, he showed emotion when he gave his version of events, on oath here in this court.

The defendant said in chief - that he was attempting to arrest Ms Laborde for the offence of breach of the peace, an arrestable offence, under common law. The defendant maintained that stance under cross examination.

The court accepts the evidence that the defendant was injured at the time he is said to have committed these offences, and the court also accepts the fact the defendant lost consciousness for a period of time at hospital.

The court also accepts the defendant's evidence, in chief, that whilst ascending the grassy slope at the side of the steps leading to PHQ, heading towards Ms Leonard the defendant slipped, because his foot was injured and he was wearing slippers the ground was unstable a building site, and the fact the defendant put out his arm to steady himself and save him from falling.

### **The oral evidence**

The trial commenced on 31<sup>st</sup> Oct 2013; continuing on 16<sup>th</sup> & 17<sup>th</sup> Dec 2013 on the availability of overseas defence counsel. At the close of the defence case, it was agreed written closing submissions would be submitted, due to both counsel's commitments, the following day, and, because of the late hour and the necessity for the court to provide a written judgment. The court confirms it received written submissions from both prosecution and defence it has taken these submissions into account. The court is in receipt of exhibits, including a medical report depicting injuries sustained on 17 Dec 2011.

### **Prosecution witnesses**

#### **Serene Leonard**

On 17<sup>th</sup> Dec 2011 the witness arrived at GHQ; along with her sisters they stood talking amongst themselves when she noticed the defendant walking towards the PHQ entrance. Her sister recognized the defendant and said in a loud voice ***“You are wicked you are a wicked man for what you did to my brother”***. Serene said the witness **walked** towards a pile of rocks. She said, ***“My sister started to run. Me and my sister step out of the way”***. Serene said she was standing at the top of the steps and the defendant came towards her up the side of the steps

### **Inspector Semper**

The officer heard Jasmine Leonard say the word **wicked** that seemed to- **trigger** Sergeant LaBorde. Insp. Semper indicated before the defendant could “dip” she grabbed him she said ***“Sarge you better than this”*** he replied ***“ok”***. Insp. Semper put the girls on the GHQ compound; Jasmine was standing in the vicinity of the Health Department. Insp. Semper indicated when she saw the defendant advancing towards the GHQ - she held him before he dipped. During cross examination Insp. Semper said the defendant could not have done anything, because she had restrained him. She told the court the defendant was upset and crying he had an injury over his eye. She agreed the defendant had the power to arrest anyone. She admitted there was always a “distance” between the defendant and the complainant.

### **Zenique Leonard**

She arrived at the police station with her two sisters; they were standing at the top of the steps. Her sister saw Mr. LaBorde approaching the station, at the time she did not know who he was. JL shouted ***“You are wicked, you are wicked for what you did to my brother and LaBorde asked her if he was wicked?”*** He proceeded to leave from the front of the station up the side of the steps, ***“asking if my sister wanted him to burst her head with two big stones like what he did to my brother”***. My sister and I moved out of the way and we started to video record what went on”. She said there were four (4) persons holding him. He was pushing and tried to get away. Zenique admitted under cross examination that her sister started the incident. She admitted she did not see the defendant with any stones in his hands. She agreed both her sister and LaBorde were arguing and that argument lasted for about ten minutes.

### **Superintendent Thompson**

He testified he saw the defendant at hospital where he met and spoke with him as he had received a report the defendant had been injured on duty. Supt. Thompson said he saw the defendant with injuries to his forehead over his left eye and that the defendant fainted at the hospital. Supt. Thompson had to grab him and take him

back inside casualty. The defendant explained to him about an incident at Drummonds and in that operation, two persons were arrested. Under cross examination, Supt. Thompson said the defendant had the powers of arrest as a police officer and he could have arrested anyone who came to the station troubling the police. He described -telling the defendant to go home with his wife but the defendant refused insisting he travel in his own vehicle. Supt. Thompson made arrangements for Sgt Wade to drive the defendant home in his own vehicle.

### **Jasmine Leonard**

She gave evidence on the day in question she arrived at the station and saw her two sisters. As she walked down the stairs leading to the PHQ door, she saw Officer LaBorde approaching the station. She said ***“Officer LaBorde”*** he looked up and said ***“Yes”***. She said ***“You are a wicked man, you are a wicked man for what you did to my brother”*** he said ***“Me wicked?”*** ***“Let me show you wha de fuck wicked be me go kill you scunt”***. “She ran up the steps towards the parking lot. she stopped to see if he was still chasing me, he was....” “She then ran again towards the end of the parking lot near the Montserrat Stationery Centre. She turned and saw a crowd of people holding back Officer LaBorde. They were yelling and her sisters were yelling at the same time”. Under cross examination, the witness said when she arrived at PHQ she never went into the police station to enquire about her brother. She admitted under cross examination she received information Officer LaBorde was injured. She also agreed Officer LaBorde did not have any stones in his hands.

The witness agreed prior to 17<sup>th</sup> December, 2011 she did not have any disagreement or altercation with the defendant. There was no altercation between her and the defendant, and there was no reason for the defendant to assault her.

The witness agreed she first spoke to the defendant. It was suggested she first provoked him. She said ***“No”***. It was put to her she ran because she knew that she was going to be arrested she said, ***“I was scared”***. It was put to her Officer LaBorde never threatened her, she said ***“Yes”***. It was put to her she was shouting and was hostile towards Officer LaBorde she said ***“No”***.

It was put to her she attacked Officer LaBBorde by saying ***“You fucking wicked, you go get more, it no go done so”***. She said ***“No”***. She admitted she started the situation and she agreed that Sergeant LaBorde did not provoke her.

### **WPC Laurell Allen**

The witness said on 17<sup>th</sup> December, 2011 she was duty constable. Ms Allen stated she saw Sergeant LaBorde walking towards the station, she also saw Jasmine Leonard standing on the steps at PHQ in the area leading to GHQ. Jasmine said something to Sergeant LaBorde, and he responded. Sergeant LaBorde moved in the direction of Jasmine who ran away in the direction of the Chief Minister's Office. She saw Superintendent Thompson, Inspector Semper and other persons holding him. She saw him behaving in an aggressive or angry manner. He was fighting back and they hugged him".

Under cross examination the witness agreed Sergeant LaBorde was a hundred meters running champion. She said she saw him bending down - like he was looking for stones. She did not see him with any stones in his hands. Neither did she see him inflict any blows on people holding him.

The witness was asked if she saw Sergeant LaBorde try to run after Jasmine Leonard - twice she said "*No*". The witness agreed both parties were shouting at the top of their voices. She said their argument was conducted in a hostile manner. She said no report was made to PHQ while she was present. It was put to the witness a report was made against Mrs LaBorde, but no report was made against Mr. LaBorde. She said "**She did not know**". The witness was asked if she knew Sergeant LaBorde could have arrested Jasmine, she replied "***Your Honour he could have arrested- her if he had a reason to do so***". The witness was asked if making a loud noise in front of the police station was "an arrestable offence" She said indecent language "***is not arrestable.***" The witness was asked if Jasmine was there throughout the entire incident -she said, "***Not that I can recall***".

### **Simon Riley**

He was at work at GHQ, as Facilities Manager he noticed the defendant alight his vehicle with a band aid affixed over his eye. He saw three (3) ladies going down the steps of the MOH. "***He recognized them to be the children of George Farrell.***" He saw them go into the enquiries section and "***After they come and stand on the embankment and they were there standing. I heard a female voice saying "You burst me brother head and you go meet um"***".

He said the defendant got very worked up and angry and both of them had an exchange of words. "***He called out to the defendant and said that he was a sergeant of police and to ignore the girls them. I told him to go in the station and do his work. He did not take my advice***". Riley said in evidence that when the defendant noticed that the girls was running away from him, he bend down to pick up something.

Val grabbed the defendant he told Val to let him go. He made attempts to run after the girls. The Inspector and Val grabbed on to him and told him to behave himself. The witness said two of the girls ran to his side, hiding behind him for protection, although the witnesses Serene and Zenique both said they did not move. The witness said the defendant lost his voice and Jasmine was loud too. The distance between the parties when the exchange started was about 60 feet.

Under cross examination, the witness was asked what he understood by the words “*you go meet um*”. He responded, “*I can’t beat you, I can’t fight you but someone else or something.....*”. The witness was asked if it meant destruction that something terrible would happen to you. He said the argument lasted between 10 – 15 minutes. He admitted “*Yes the Defendant did slip and Val rushed up to him*” He said under cross examination he did not get the impression they were afraid of each other.

He said no police officer was around when the argument started. He could not recall seeing any police officer at the PHQ door. He did not see which direction Jasmine ran; when he looked up she was in the area near the generator house. (*near the Magistrate's Office*).

<b>The prosecution closed its case.</b>
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The defence made a no case submission, indicating this matter was never properly investigated by the police. They pointed out there was no evidence before the court that the defendant was ever interviewed, arrested or cautioned. More importantly, the defence argued there was no evidence of any officer being assigned to investigate this matter.

The defence argue no one told the defendant he was going to be reported, this was again due to the fact no investigation was carried out into this matter. The defence say it was for the prosecution to prove the defendant was either arrested or summoned as the case may be.

The defence say any doubt should be resolved in favour of the defendant. The defence relied on the authority of *Christie and Anor vs Leachinsky* The defence further argued; although complaints were filed in the name of the COP there was no representation from the Crown in this regard. There was also no evidence the defendant was cautioned, in accordance with the Judges’ Rule.

The court overruled the defence submission at this point in time. The court explained the defendant his rights under the law, and called on the defendant for

his election. The defendant chose to give evidence on oath and call a witness on his behalf.

<b>Defence case:-</b>
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### **Ottley Laborde**

On 17 January 1988, the defendant joined the Royal Montserrat Police Force. He worked in every department of RMPF. He had studied law and criminology in England. On his return to Montserrat in July 2011 he was assigned to work at PHQ, and on returning from England he told the court he was full of enthusiasm.

At 09.00 on 17<sup>th</sup> December, 2011 the defendant drove to PHQ where he parked his vehicle. He observed a police vehicle containing a number of junior police officers, he made enquiries what they were doing, and he was authorised to join them in a police operation.

The witness testified during an authorised police operation, ***“He affected an arrest; he was injured, almost killed. The person he arrested was the brother of the complainant. He knew he received injuries but he did not know the extent of his injuries until Monday 19 December 2011. On his way back, the father [George Farrell] of the brother he arrested, threatened to kill him and his entire family on numerous occasions.***

The defendant was treated at hospital where he received stitches to his forehead. His hand was partially paralyzed because George Leonard used a stone and he used his hand to block the attack to his head. At hospital, the defendant lost consciousness. When he came to, he was placed under direct observation until the doctor told him that it was OK for him to go.

Returning to PHQ after 11.00 am as a passenger in his wife’s vehicle, the defendant saw three ladies he knew to be Farrell’s daughters standing at the top of the steps leading to PHQ. He walked for about 15 feet, when Ms Leonard started jumping and pointing her hands in a Ghetto style, shouting ***“You LaBorde you get more fu wha you call me mother whore”***. “

The defendant took that to mean - more of what her brother dished out to him at Drummonds. She was the only person shouting the defendant looked around to see if there were any police officers around – but - there were none.

The defendant continued to walk, and the complainant continued to shout. She called the defendant by his name, ***“You LaBorde”*** He said he became

*overwhelmed with emotion and said, “You left from where you left and come here come interfere with me”.*

*He said, “My slipper was burst so I had to walk slowly. I decided that I had enough so I decided that I was going to arrest her. The two sisters were standing. I walked on the grass path; I slipped in the process, so I had to put my hand down.”*

*When I got to the top of the embankment I did not see where Jasmine Leonard went to. Val rushed and held me. We were face to face he was squeezing me. I eventually said “Val you are squeezing me”. I was shouting. Sgt Semper came and told me to take it easy.”*

The defendant was taken into the police station and later driven home by Sgt Wade. The defendant told the court, he continued to work in uniform and wore slippers - until 6 Jan 2012 when he went on leave to England.

Whilst in England the Commissioner of Police [COP] sent an e-mail captioned “*Urgent return to work*”. The e-mail was admitted in evidence “**OL1**” and “**1A**”. The defendant returned to Montserrat on 31<sup>st</sup> Jan 2012

On 01 Feb 2012 the defendant visited the COP at PHQ and they had a conversation. Inspector Kirwan met the defendant outside the COP’s office, and invited the defendant to his office where he was arrested and charged for an incident at Drummonds. A charge sheet, dated 01.02.2011 was admitted in evidence “**OL2**”

At this point there was never any mention made about any investigation into any report in relation to an incident at Brades. The defendant claims the persons involved in the Brades matters were different to those in Drummonds.

<b>Adverse publicity</b>
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The defendant said in evidence every month since the incident at Drummond’s, direct mention was made by HE the Governor in monthly press conferences; to the defendant by name and to the "Drummonds incident". Stories had also been printed in the local newspaper a copy of a newspaper article – is exhibited “**OL3**”.

The Defendant's Medical Records were exhibited as “**OL4**”. They indicate the injuries received by the defendant were to his forehead, toe, nose, and show other treatment and procedures were carried out locally, and overseas the medical evidence corroborates the defendant’s testimony as to his injuries.

The defendant said in evidence he was never informed, that he was arrested or, told he was to be reported for any incidents at Brades. No one cautioned him, interviewed him, or informed him he was under arrest. No one identified themselves or told him they were assigned to investigate an incident at Brades as an investigative officer [IO]

The defendant said he received a summons from a constable in March, 2012 at his home, three (3) months after the alleged incident alleging an assault. No one has ever indicated they were investigating any report or incident concerning a common assault. The defendant was granted bail for incidents at Drummonds, but never bailed for any incident[s] at Brades.

Under cross examination the defendant admitted he was upset about the incident at Drummonds, he stated Ms Leonard attacked him verbally, and thereby she assaulted him.

The defendant stated on oath - that he was afraid of the entire Leonard family. He said he felt threatened when Ms Leonard said to him, ***“He go get more for what he did to her brother and for calling her mother a whore.”*** Under cross examination he confirmed no one told him of any charges at GHQ.

### **Val Pollidore**

He gave evidence for the defence- indicating on 17 Dec 2011 he worked at GOVHQ installing ducts and cables. He said, ***“While working some rudeness was drawn to my attention where a young lady said, you LaBorde, if you think that you get enough- it ain’t done yet”. “He saw Ottley going across the car park; he had a bandage on his head. Coming up he slipped, he almost fell. He grumbled, I did not understand what he said.***

The witness held the defendant and asked him what happened; he did not catch what the defendant said. He told him to go to his wife’s vehicle. Sergeant Wade took him away. He continued with his work”. Under cross examination the witness said GHQ was a construction site there was clay and sand on the ground. When he held the defendant - his feet were on the ground. He was the only person holding the defendant at that time.

### **Defence submissions**

The defendant was ordered to report for duty at PHQ on 19<sup>th</sup> Jan 2012; via an e-mail from COP, while the defendant was on leave in England. On his return to Montserrat, he reported for duty and spoke to the COP on 01 Feb 2012.

The defendant was interviewed by officers from the Cayman Islands and Bermuda Force in relation to an incident at Drummonds. The defendant claims he was never informed by any police officer or anyone at all that he was under investigation for incidents occurring at Brades on 17<sup>th</sup> Dec 2011 concerning Jasmine Leonard [or anyone]

The defence stress the defendant was never interviewed, cautioned or told he was under arrest, for incidents at Brades and that is in direct contravention to s7 Montserrat Constitution Order 2010 - which states”

***If any person is charged with a criminal offence, then unless the charge is withdrawn.....". Section 7(2) (b) states that "Every person who is charged with a criminal offence shall be informed in a language that he understands and in detail of the nature and cause of the accusation against him or her”***

Further, the offences associated with the alleged incident at Brades were not arrestable offences. The defence say on or about 01 Feb 2012, the defendant was served with two (2) indictable charges for offences at Drummonds. Those charges were subsequently dismissed in the High Court - in a judge directed acquittal.

To the defendant’s surprise, the RMPS charge sheet dated 01 Feb 2012 shows two charges alleging disorderly conduct contrary to Section 294 (1) of the Penal Code; and threatening language contrary to Section 296 (1) of the Penal Code Cap 04.02 alleging offence in Brades.

At that time the defendant had received no charge sheet in respect of any assault charge against Jasmine Leonard.

On or about 28<sup>th</sup> Mar 2012, the defendant was served with three summons, one for common assault contrary to **Section 184** of the Penal Code; **and** the defence claim two summonses were **withdrawn** by the prosecution, three days later.

The matter was originally heard in the Magistrate's Court. Although he expressed on numerous occasions the fact he had retained a lawyer, the matter was conducted without a lawyer and a conviction rendered in the absence of defendant's attorney. The defence appealed that conviction a retrial was ordered before a different Magistrate, by the CA.

### **Re-hearing 14 Oct 2013**

This matter subsequently came before this court on 14<sup>th</sup> Oct 2013 for re-hearing. On that date the DPP was absent from the jurisdiction and, a junior DPP Officer

attended court on her behalf. On 14<sup>th</sup> October 2013 - the defence attacked the summons for disorderly conduct and threatening language - issued to the defendant dated 25 July 2013 on three grounds namely:-

1. That the summons offended **Section 74 of Magistrate Code Act 2.02** in that it was issued in excess of the six (6) months limitation after the commission of the offence. **NB Should be 74 Criminal Procedure Code and this is a retrial**
2. That the words used in the summons for the offence of threatening language constituted an entirely new charge, and as such, it should not be put to the defendant, since any amendment constituted a new charge and was prejudicial to the defendant. **See section 70 of Criminal Procedure Code**
3. That the defendant was not served with any charge / summons for disorderly conduct. **No summons on file**

On 14<sup>th</sup> October 2013 the court overruled the defence submissions [at that time] because the DPP who had conduct of the case was out of the jurisdiction and the junior lawyer had no knowledge of the facts.

The charges were read, the defendant was asked if he understood the charges he agreed he did - he was asked to plead to each charge - and the defendant pleaded NG to each charge.

The court had sight of the CA ruling filed on 30 April 2013. In the absence of the DPP the cases was adjourned for trial to 31<sup>st</sup> October 2013 the defendant was released on bail.

#### **Defence submissions – on the law**

On 1<sup>st</sup> February 2012 the defendant was served with three charges namely:

Disorderly Conduct: contrary to Section 294 (1) of the Penal Code and

Threatening Language: contrary to Section 296 (1) of the Penal Code.

Common Assault: contrary to Section 184 of the Penal Code:

**None of these offences charged are arrestable offences**

**Section 319(1)** of the Penal Code states:-

**319(1)** *“The power of summary arrest conferred by the following sub-section shall apply to offences for which the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of five years or longer, and to attempt to commit any such offence; and in this Code in any other law “arrestable offence” means any such offence or attempt.*

*(2) Any person may arrest without a Warrant anyone who is, or whom he, with reasonable cause suspects to be, in the act of committing an arrestable offence”.*

*(3) When an arrestable offence has been committed any person may arrest without Warrant anyone who is, or whom, he with reasonable cause suspects to be guilty of the offence.*

*(4) Where a police officer, with reasonable cause suspects that an arrestable offence has been committed, he may arrest without a Warrant anyone whom he, with reasonable cause, suspect to be guilty of that offence.*

*(5) A police officer may arrest without a Warrant any person who is, or whom he, with reasonable cause, suspect to be, about to commit an arrestable offence.*

*(6) For the purpose of arresting a person under any power conferred by this section a police officer may enter, if need be by force, and search any place where that person is or where the police officer, with reasonable cause, suspect him to be.*

*(7) This section shall not affect the operation of any enactment restricting the institution of proceedings of an offence, nor prejudice any power of arrest conferred by law apart from this section.*

**Section 320 (1) of the Penal Code** states: - 320 (1) *“For the avoidance of doubt, when an offence is triable either summary or on indictment and is punishable by imprisonment for five years or longer if tried on indictment, it shall be deemed to be an arrestable offence notwithstanding that it would be punishable by a lesser term if tried summarily”.*

Arrestable offences under the Code are shown in the fourth column of the Table of Offences and Penalties in the Schedule. None of the offences which the defendant was charged with in the lower court, are arrestable offences, they do not carry a term of imprisonment of five (5) years or longer and are not triable on indictment.

These offences are not covered by **Section 319 or 320** of the Penal Code. They are not shown in the fourth column of the Table of Offences and are not considered as arrestable offences under the Penal Code; rather they are shown in the fifth column as Summary Offences. The three offences alleged to have occurred on 17<sup>th</sup> Dec 2011 were all Summary Offences.

Therefore any arrest of the defendant for these two offences ALONE on 1<sup>st</sup> February 2012- to have occurred without a Warrant is unlawful and unjustifiable. The defence relies on the authority of **Rex vs Curvan 1826 1 Mood. C. C. 132 15 Digest 786, 8473.**

Curvan had been arrested by a constable, without a Warrant for “insulting a man on a road”. The constable was acting on a complaint that had been made to him, but the alleged offence did not, of course justify Curvan’s arrest without a Warrant.

He escaped and later a private person upon whom the constable called for assistance stopped him... Holroyd J., who tried the case reserved it for the opinion of the Judge, he held the original arrest was illegal and consequently the prisoner was entitled to an acquittal.

The importance of this decision for the instant case is to emphasise the illegality of an arrest without a Warrant on a specific set of charges, which do not justify such an arrest.

The defence claim the defendant Laborde was arrested by the police for two non-arrestable offences, the question is by whom and for what purpose. The defence argue the complaints before the court were filed in the name of the COP, yet the prosecution failed to adduce any evidence of an investigator or of an investigation.

The defendant said in evidence, that he was not cautioned and this fact had not been disputed by the prosecution. The defence submit, that is fatal and any conviction where an unlawful arrest occurred, and there was a failure to inform the defendant of the reasons for an arrest - renders a conviction unsafe.

More importantly the defence say in, *Woolmington vs Director of Public Prosecutions 1935 A C 462* the burden is on the prosecution to prove its case beyond any reasonable doubt. The defence argue there is significant doubt as to whether this matter was properly investigated; the prosecution has led no evidence to that effect. A court cannot be engaged in mental gymnastics

There was no evidence before the Court that any person had been assigned to conduct investigation into the matter and, who in fact recommended charges to be

preferred against the defendant concerning the Brades incident? The Court is devoid of any such evidence it is just guessing.

The defence argue what is alarming is the fact the offences which the defendant was arrested for were summary offences and the police had no right to arrest him as the offences were not arrestable offences? The defence say before anyone can be arrested for an offence, the alleged offence must be investigated.

***In Hoffman La Roche and Co AG and other vs Secretary of State for Trade and Industry [1975] AC 295 at page 365 Lord Diplock said:.....***

***“It is the duty of the Commissioner to observe the rules of Natural Justice in the course of their investigation – which means no more than they must act fairly by giving to the - person a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely.”***

The Judges’ Rules make provisions for every defendant to be cautioned. There is no evidence before this Court that any investigator identified himself to the defendant and cautioned him in keeping with the Judges’ Rules for alleged offences at Brades.

The Defence again rely on - ***Christie and another vs Leachinsky [1947] 1 ALL ER at page 564 where. Lord Du Parcq at page 578 paragraph H said.***

- ***The right of arrest and the duty to submit are correlative.***
- ***This principle is applicable both to arrests in execution of civil process and to arrests on a criminal charge.***

It was stated in this House by **Lord Cransworth LC. In Hooper v Land** who said:

-

***A Sheriff... is bound, when he executed the Writ, to make known the grounds of the arrest, in order, among other reasons that the person arrested may know whether he is or is not bound to submit to the arrest”.***

**Lord Du Parcq on page 577 paragraph F said:-**

***Indeed I find it difficult to believe that the appellants would have sought to defend their conduct if the fact had been that Leachinsky had been arrested and taken to prison without even being given and taken to prison***

*without even being given a reason for his arrest until he came before the Magistrate.*

*It is a curious feature of this case that the arrest and the subsequent proceeding were carried out with what must have seemed to any man unskilled in the law to be a careful attention to all the requisite formalities.*

*The appellants did not omit to charging the Respondent at the time of his arrest. They charged him, in due form, with an offence which, as the appellant, Christie admittedly knew, did not justify the arrest.*

*They cautioned him when he was arrested, and I must assume, in the absence of evidence as to the words used, that the form prescribed by the Judges' Rules was followed, and that he was asked the question: "Do you wish to say anything in answer to the charge?"*

*The caution was twice repeated – when the police arrived with the prisoner at the police station, and again when he was taken before Sergeant Tindall, the Bridewell Sergeant...*

*The repetition of a deceptive formula does not disguise the fact that the appellants wholly failed in their duty to tell him what that charge was.*

The defence argue any omission to tell a person who is arrested at, or within a reasonable time of the arrest, with what offence he is charged - cannot be regarded as a mere irregularity.

Arrest and imprisonment without a Warrant, on a charge which does not justify an arrest, are unlawful and, therefore constitute false imprisonment, whether the person making the arrest is a policeman, or he is a private individual.

The defence say the comment by Lord Du Parcq puts the issue beyond doubt in that Sergeant LaBorde was unlawfully arrested for offences that were not arrestable offences. The defendant was not told of the arrest and this was not disputed by the DPP acting on behalf of the prosecution.

This was not an irregularity of a date, time or the name of a person; it is a fundamental defect that is fatal. The defence rely on the constitutional provisions of Section 7 (2) and 13(2) of the Montserrat Constitution Order 2010.

The defence say the court has heard no evidence who affected the arrest of the defendant. The defendant said in his evidence in chief that he was never told he was arrested or informed of his arrest in this matter. He was never cautioned and there was no evidence led by the prosecution to dispute this.

The defence say all the charges must be dismissed since there is no evidence of the defendant ever being informed of the reason for his arrest. In any event, the offences charged are non-arrestable offences - they do not carry a term of imprisonment of five (5) years or more and any arrest was unjustified.

## **Conclusions**

The court heard all the evidence in this case, over a period of three days commencing 31<sup>st</sup> Oct 2013, 16<sup>th</sup> and 17<sup>th</sup> Dec 2013. The court has had the benefit of observing all the witnesses, both for the prosecution and the defence during the course of trial. The court has received and considered the helpful written submissions on behalf of the prosecution and defence, and has considered case law referred to by the parties.

## **I will deal first with the assault charge – file C14-2012**

This charge is obviously the more serious offence; I will first give my findings on the assault charge. My findings are based solely on the evidence presented in this court by witnesses for both the prosecution and defence. They are not based on any previous findings, reports or gossip, from anywhere else. I will then address other issues raised in counsel's submissions covering the other charges.

To secure a conviction for a charge under s184 of the Penal Code Cap 4.02 alleging an offence of assault, the prosecution must prove each and every element of the offence of assault, as required under the law - for a conviction to succeed.

## **Essential elements**

[1] An intentional, unlawful threat or "offer" to cause bodily injury to another by the use of force.

[2] Under circumstances which create in the other person a well-founded fear of imminent peril;

[3] Where there exists the apparent / present ability to carry out the act – **if not prevented.** **My emphasis**

The evidence reveals at a point in time, during the morning of 17<sup>th</sup> Dec 2011 the defendant moved from the area in front of PHQ heading up a grassy slope towards the complainant Ms Leonard – to where she was standing. The prosecution say the defendant ascended the grassy slope in an aggressive manner, in response to words

shouted at him by Ms Leonard. In fear of the approaching man, Ms Leonard ran towards the sea, fearing an assault.

The defendant said in his evidence in chief, and he maintained in cross examination, that he was going to arrest Ms Leonard for BOP committed outside PHQ; within his view. The area is clearly a public place. This portion of the defendant's testimony was corroborated by Inspector Semper.

However, at the top of the grassy slope the defendant was stopped / restrained by Val Pollidore a civilian who was working near a drainage ditch in the area near GHQ. The fact the defendant was restrained by Val Pollidore and police officers, on or near the roadway near GHQ - was uncontroverted throughout this trial.

Although evidence was adduced and accepted by the court, that the defendant was struggling, the fact is whilst detained by a civilian Val Pollidore and police officers, the defendant did not assault either the civilian Val Pollidore or any police officer. No charges of obstructing resisting the police; are before this court today.

The court accepts sworn evidence from a number of sources, the fact that all of the witnesses say the defendant was restrained - and thus he was prevented from carrying out an assault & battery on Ms Leonard - as alleged by the prosecution.

The court also finds as a fact on the evidence, that the defendant was prevented from going any further than the road outside GHQ by police officers. That evidence was again uncontroverted. The defendant was never standing directly in front of Ms Leonard - or colloquially put - to offend or occupy her immediate air-space - further the defendant never threw any rock or dirt towards Ms Leonard- thus there was no indirect assault committed on her.

<b>Was there an intention to arrest Ms Leonard?</b>
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The court heard sworn evidence from the defendant, that it was the defendant's intention to arrest Ms Leonard for an offence of breach of the peace.

Various points in the body of my judgment made by the defence - are indeed valid and relevant when assessing the body of evidence. Had the defendant been officially interviewed by the police and given an opportunity to make a statement under caution concerning the incident at Brades prior to any charges being laid for alleged offences at Brades – then the truth of the defendants intention or not to

arrest Ms Leonard - might have been easier to ascertain. Unfortunately and in breach of the rules of natural justice - the defendant was not afforded an opportunity by his superiors to make any such statement.

It is very unfortunate the defendant has been prevented from putting his side of the story in December 2011 - this does not reflect well in the way this case was prosecuted by the police. In the absence of any evidence to the contrary I have to conclude the decision to prosecute came directly from the office of the Commissioner of Police - without giving an opportunity for the defendant to justify or explain his actions on the 17 Dec 2011 when the defendant sustained apparently serious injuries in affecting an arrest.

It is a fact that – that No evidence of any police investigation into what happened at Brades on 17<sup>th</sup> Dec 2011 has been revealed to this court, during the course of this trial and this is a trial which has serious ramifications for the defendant. Every criminal trial must be a fair trial and;

***As Lord Diplock said:- In Hoffman La Roche and Co AG and other vs Secretary of State for Trade and Industry [1975] AC 295 at page 365***

***“It is the duty of the Commissioner to observe the rules of Natural Justice in the course of their investigation – which means no more than they must act fairly by giving to the - person a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely.”***

Inspector Semper’s evidence supports the defendant’s assertion that he was going to affect the arrest of Ms Leonard. The court believes both the defendant and Insp. Semper when they said and inferred the defendant did in fact intend to arrest the complainant Ms Leonard - for her conduct that day.

The court is however confronted with uncontroverted evidence that the defendant did not succeed in [a] either arresting Ms Leonard for the offence of breach of the peace or [b] in assaulting Ms Leonard as alleged by the DPP acting on behalf of the COP.

***Tuberville v Savage - 1 MOD Rep 3 86 Eng Rep 684 (1669)***

- Savage had made some insulting comments to Tuberville. In response, Tuberville grabbed the handle of his sword and stated, "If it were not [assize-time](#), I would not take such language from you." Savage responded with

force, causing Tuberville to lose his eye. Tuberville brought an action for assault; battery and wounding. Savage pleaded provocation,

### *Courts Judgment*

- The Court considered the language used in the statement and found that Tuberville did not express any intention to do any harm to Savage in the given circumstances. Tuberville's express words were precisely that he was *not* going to harm Savage because the justices of assize were in town. Therefore, there could be no action for [assault](#) putting someone in apprehension of immediate violence, as there is neither intent nor an act, at least one of which was required to establish an assault. Tuberville succeeded in his action.

A defendant cannot be convicted of an assault on a person “*Where there exists the apparent / present ability to carry out the act – if he is prevented from doing so.*” The facts reveal the defendant was held onto, and he was restrained by Val Pollidore and police officers at the top of steps, in the vicinity of GHQ and Ms Leonard ran away. Those facts are uncontroverted. The defendant never came within easy reach of Ms Leonard, no weapon was used, no missile thrown mere words were used by both parties and that evidence also came directly from Inspector Semper and others.

The prosecution made it part of their case, in averring the defendant attempted to pick up a stone [or stones] to use as a weapon; perhaps to throw as a missile towards the complainant or to threaten her. However the evidence is also crystal clear that - not one witness saw the defendant pick up a stone[s] a piece of clay or earth, that day. The complainant agreed she did not see the defendant with any stones.

Val Pollimore testified the defendant slipped on the slope and when he slipped he put his hand down to steady himself. The medical evidence is also conclusive the defendant had an injured foot at that time and the defendant was wearing slippers at the time he claims he slipped and this court believes him.

### **Recap-**

The evidence concerning the alleged assault upon Ms Leonard is crystal clear. The defendant was prevented from carrying out any assault on Ms Leonard when

restrained by police officers, and as such the defendant cannot in law be convicted of an assault on Ms Leonard for reasons already stated.

The prosecution has failed to prove an essential element of the offence required to secure a conviction for assault they have failed to prove the completion of the third element. I believe the defendant when he said he wanted to arrest Ms Leonard as he would be entitled to do, for an offence of breach of the peace, that part of his evidence was corroborated by Insp. Semper.

The court finds as a fact - the prosecution has failed to prove the defendant assaulted Ms Leonard as alleged. The court finds as a fact the defendant was prevented from assaulting Ms Leonard by police officers on 17<sup>th</sup> December 2011, and on that basis the defendant must be found not guilty of assault.

- **The defendant is acquitted of the charge of assault in file - C14/2012.**

#### **Files C3 and 4 OF 2012**

The court also considers the defence submissions concerning:-

[a] The means by which the defendant appeared before the court relating to summary only matters.

[b] The allegation the defendant appears not to have been cautioned or offered any opportunity to be interviewed and give his version concerning the three charges

[c] The defence allegation the defendant was arrested by the police for three non arrestable offences.

#### **Defence points**

The means by which the defendant appeared before this Magistrate's court is well settled. It is a settled and well established principle, established by case law, and by reading and applying s70 of the Criminal Procedure Code CAP 4.01 of the Laws of Montserrat.

***“No objection shall be allowed to any information or complaint or to any summons or warrant, to procure the presence of the defendant, for any defect in it, in substance or in form, or, for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the***

*hearing of the information or complaint.” .” Any discretion appears to arise from the court’s inherent power to do justice (see Thornby v Clegg)*

Without going into too much detail concerning the history of this case the result of an appeal against a previous decision involving these matters, was filed in the High Court Registry - on 30<sup>th</sup> April 2013, in a decision of the Montserrat Court of Appeal – the CA’s decision was as follows.

**Stating:-**

- **Appeal Allowed**
- **Retrial ordered before a different Magistrate**

<b>Magistrate’s court’s records</b>
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Perusing court’s records from 30<sup>th</sup> April 2013 the defendant was first summoned to appear in the Magistrates court, by issuance of two complaints [without oath] filed on 01.02.2012 - for

[1] File C3-2012 conduct yourself in a disorderly manner and

[2] File C4-2012 use threatening language towards Jasmine Leonard.

Summonses were first issued for these complaints on 22<sup>nd</sup> Mar 2012. A similar complaint was filed on 23<sup>rd</sup> Mar 2012 for [3] file C14-2012 involving the allegation of assault for which the defendant is today acquitted. The first summons for these 3 offences were issued on 23<sup>rd</sup> Mar 2012.

Three letters of request from the DPP were addressed to the Chief Magistrate dated 7<sup>th</sup> May 2013, 19<sup>th</sup> June 2013 and 10<sup>th</sup> Jul 2013 asking the court to relist these matters - following the Court of Appeal’s decision of 30<sup>th</sup> Apr 2013.

Summonses were issued by the Magistrate’s court on 25<sup>th</sup> Jul 2013 in respect of the assault charge C14-2012 and also on 25<sup>th</sup> Jul 2013 in respect of the threatening language matter **ONLY**

Further searching of our court records reveal - **NO** court summons appears to have been issued for the offence of disorderly behaviour in file C3 -2012, though the defendant pleaded NG on 14<sup>th</sup> Oct 2013, to that charge when that complaint was read to him by the court

From the date the Court of Appeal ordered a retrial of these matters, on 30<sup>th</sup> Apr 2013, before a different Magistrate to the date of the issuance of summonses on 25<sup>th</sup> Jul 2013 the time period is “86 days.”

The entire purpose of a summons is to direct a named person to appear at a given time and place in accordance with the law, to answer a charge / complaint – so in essence a summons directs a person to do some specific act - specified therein in that summons.

The two summonses, directed the defendant to appear in the Magistrate’s Court at Brades on 14<sup>th</sup> October 2013 –or “167 days” after the Court of Appeals decision to relist the matter, that is a period well within the six-month time frame for starting proceedings afresh, before a different Magistrate, after a CA ruling.

For the record that different Magistrate commenced duties in Montserrat upon being sworn into office on 06<sup>th</sup> Oct 2013.

Court records show the defendant has been released on court bail since 01<sup>st</sup> Feb 2012, in the sum of \$15,000.00 in his own recognisance. Those bail conditions continue to-date.

This court concludes the defendant has voluntarily attended court on each date, bar one, in answer to summonses and complaints filed in this court.

This court finds as a fact - the defendant was first summoned to appear before this court on 22<sup>nd</sup> March 2012 and in relation to the successful Appeal Court hearing two summonses were reissued on 25<sup>th</sup> July 2013 for [1] threatening language and [2] the offence of common assault – when the defendant was directed by the summons to appear in court on 14<sup>th</sup> Oct 2013 - before me.

That said the defendant is deemed to have accepted this court’s jurisdiction, by attending and answering the summons on 14<sup>th</sup> Oct 2013; the provisions of s70 of the CPC Cap 4.01 – kicked in.

On 14<sup>th</sup> Oct 2013 the defendant was granted bail in the sum previously indicated to the trial date, and beyond on these matters.

***Case law - Thornby v Clegg [1982] RTR 405***

*“Notwithstanding the fact that the section has appeared in Act after Act, we still get technical objections taken. They have a certain fascination for*

*advocates, but they are quite plainly contrary to the purpose of the Act and successive Acts, in Magistrates' court" Per Ormrod J in Thornby v Clegg [1982] RTR 405*

*"In every successive statute dealing with summary jurisdiction since the original Summary Jurisdiction Act of 1848 there has been a section which provides, in effect, that technical objections to information's are not to prevail. The object is obviously to avoid purely technical objections being taken to process in Magistrates' court.*

*"Justices should be encouraged to dispose of technical errors in the proceedings, which are technical in the sense that no injustice is done to the defendant, "Per Lord Widgery CJ in Allan v Wiseman [1975] RTR 217*

*"It is clear ...that the effect - is to give a court a wide discretion to amend an information; secondly, that the discretion will ordinarily be exercised in favour of an amendment unless that would result in an injustice to the defendant" Per Owen, J in the case of R on application of DPP v Martin Short [2001] EWHC Admin 885 (unreported)*

### **The issue of - arrest**

No evidence was adduced by the prosecution, that the defendant was ever arrested for these offences before this court. No records of interview were tendered in court.

In this case the prosecution relied on - direct evidence to prove their case from eye witnesses present at the scene.

The Crown acted on behalf of the COP with the DPP prosecuting on the Commissioners behalf - as is the DPP's right to take over all prosecutions within the jurisdiction of the court.

The defence produced a charge sheet - Exhibit 2; dated 01/02/2012 signed by a senior police officer [SPO] – That charge sheet clearly shows the defendant was charged on 01-02-2012 –via an RMPF - INFORMATION showing four offences

[1] ABH at Drummonds –an Arrestable Offence

[2] Wounding at Drummonds an Arrestable Offence

[3] Disorderly conduct at GHQ a Summary only matter

[4] Threatening language PHQ - files C3/4 of 2012 a Summary only matter

This court concludes that charge sheet Exhibit 2 -relates to the indictable offences only for which the defendant has been acquitted - on a judge directed acquittal.

### **An Arrest - The Law**

An arrest means the taking or restraining of a person from his or her liberty, in order that he or she shall be forthcoming to answer a charge or charges, in a court of law.

The key question academics ask - is when it is fair to arrest someone. Individuals have a right to liberty; it has been held that if the police do not adequately respect a person's right to liberty by ensuring that:-

- (i) The police have some evidence to justify the arrest before the arrest takes place,
- (ii) That the police tell the person why they are being arrested - and
- (iii) That they release the person arrested as soon as possible,

When does arrest becomes unlawful? - this was the position stated in the leading case of *Christie v. Leachinsky* [1947] A.C. 573.

Where it was said "*A citizen...is prima facie entitled to personal freedom...But, the right to liberty is not absolute, and its balance with other societal interests which are reflective of other rights –*

Can be demonstrated by Article 5 of the European Convention on Human Rights and Fundamental Freedoms which became part of UK law under the Human Rights Act 1998):

### **European Convention on Human Rights (Cmd. 8969, 1950)**

Article 5.1 "*Everyone; has the right to liberty and to security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...*

### **Arrest under warrant**

The most regulated powers of arrest are those which are allowed under a warrant. A warrant is the formal legal document which authorises someone to take action. Warrants can be issued by an individual Magistrate to a police officer to carry out the arrest of a named individual. This is the common method of proceeding

against people who have failed to pay fines after a conviction, or have failed to answer bail when they have been told to do so. These powers are set out in the relevant acts.

### **The exercise of arrest powers**

The powers of summary arrest conferred by the following subsections apply in this case –

- To offences for which the sentence is fixed by law;
- To offences for which a person of 21 years of age or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced)

Common law powers of arrest and detention still exist- in relation to breach of the peace- the leading case is *R. v Howell* [1981] 3 W.L.R.501. It should be emphasised the common law allows action by the police to preserve the peace which falls short of arrest e.g. pulling a person who has jumped a queue away from hostile bystanders: *Lavin v. Albert* [1982] A.C. 546.

### **Detention other than by arrest**

The police have powers at common law to detain a person without making a formal arrest. These exist in order to prevent or quell breaches of the peace. However, the normal rule is that police do not have powers to detain for questioning, or, to make people "help with their inquiries". Individuals can generally choose whether or not to help the police. Good citizens will generally wish to assist, but the principle of policing by the consent of the public means that they should not be forced to assist unless formally arrested

### **Voluntary attendance at police station**

Where for the purpose of assisting with an investigation a person attends voluntarily at a police station or at any other place where a constable is present or accompanies a constable to a police station or any such other place without having been arrested--

- (a) He shall be entitled to leave at will unless he is placed under arrest;
- (b) He shall be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will.

- (c) He shall be cautioned in certain and accepted judicial terms that he does not need to say anything but anything he says may be taken down in writing and given in evidence etc.etc.

### **Information to be given on arrest**

(1) Where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable - after his arrest.

(2) Where a person is arrested by a constable, subsection (1) above applies regardless of whether the fact of the arrest is obvious.

(3) No arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.

(4) Where a person is arrested by a constable, subsection (3) above applies regardless of whether the ground for the arrest is obvious.

(5) Nothing in this section is to be taken to require a person to be informed – [a] that he is under arrest; or [b] of the ground for the arrest, if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given.

### **It is trite law – reasons for an arrest**

Persons under arrest must be told of the reasons for their arrest. This ensures the police think about the reasons, and it also allows for an early explanation of innocence to be offered by the defendant. This idea was set out in the leading case of *Christie v Leachinsky*. [1947 1 All ER 567

The court heard no evidence from the prosecution that the defendant was arrested for these three offences, which are summary only. The court has on file two valid summonses which were signed and dated by a Magistrate, of this jurisdiction.

The court finds as a fact the defendant voluntarily surrendered to the jurisdiction of this court and the defendant has done so throughout the course of these proceedings in answer to a summons for two offences.

The court is satisfied by the defendant's knowledge and through his previous working experience that he knew ALL his rights under the laws of Montserrat and

that his rights were not abused by this court. No formal or written admissions were made or tendered on the defendant's behalf that were or could be used against him during the course of this trial.

This prosecution relied entirely upon oral evidence, of what the witnesses saw and heard concerning the events on the 17<sup>th</sup> December 2013 at Brades.

***However in Hoffman La Roche and Co AG and other vs Secretary of State for Trade and Industry [1975] AC 295 at page 365 Lord Diplock said:-***

*“It is the duty of the Commissioner to observe the rules of Natural Justice in the course of their investigation – which means no more than they must act fairly by giving to the - person a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely.”*

### **FILE C3- 2012 DISORDERLY BEHAVIOUR - FINDINGS**

The court has considered the totality of the evidence adduced in respect of the first charge of Disorderly conduct - file C3-2012,

The court heard ample evidence from witnesses to conclude that on the first charges of disorderly conduct **IF** the prosecution had alleged the offence to have been committed in Brades, then the defendant would have been found guilty of that charge. However the charge of disorderly conduct in file C3-2012 reads as follows:

**COP v Ottlet Laborde -File C03/2012** –On 17<sup>th</sup> December 2011 at **Drummonds** in the Overseas Territory of Montserrat in a certain place to wit the compound of Brades Police Headquarters and the compound of Government Headquarters the defendant did conduct yourself in a disorderly manner which is an offence contrary to section 294 [1] of the Penal Code Cap 4.02

The court heard no evidence from any witness during the course of this trial that this offence of disorderly conduct occurred in Drummonds. Although there is a reference in the complaint that the offence occurred in a place: - to wit the compound of Brades PHQ and the compound of GHQ. The compound at Brades PHQ is not in Drummonds, as alleged in the complaint – the compound is in Brades.

There was no application made by the prosecutor, the learned DPP to amend the place of the offence - from Drummonds to Brades - at any time during the three days of trial. The defence put the prosecution to strict proof as is their legal right.

Drummonds is a ten minute drive from Brades. There is no Police HQ or GOM compound at Drummonds,

Further as I stated earlier in the body of this judgment, perusing the court file there is no summons on the MC court file directing the defendant to attend court on this particular charge - having been issued on 25<sup>th</sup> July, 2013 as was the case in files C4-2012 and C14-2012

As a result - I find as a fact that the complaint in file C3-2012 is defective. No application was made to amend the complaint prior to closing the prosecution case, as required by section 70 of the CPA;

That defect is and was, throughout the course of this trial a glaring omission, which was capable of rectification on the part of the prosecution - prior to the close of the prosecution case [section 70 of CPA Ch 70.] No application was made by the prosecution to that effect and the defendant is entitled to be acquitted and discharged on file C3-2012.

- ***In the courts respectful view in file C3-2012 the prosecution failed to prove the charge of acting in a disorderly manner - beyond all reasonable doubt and the defendant is acquitted.***

#### **File C04/2012 THREATENING LANGUAGE - FINDINGS**

I turn to the last offence **File C04/2012** – that of using threatening language towards Ms Jasmine Leonard

***The charge reads on 17<sup>th</sup> December 2011 at Brades in the Overseas Territory of Montserrat in a public place to wit the compound of Police Headquarters and Government Headquarters the defendant did make use of threatening language to Jasmine Leonard to wit” Me ah go buss ah you fucking head. Me ah go get two [2] stone now and buss up ah you fucking head - an offence contrary to section 296 [1] [a] of the Penal Code Cap 4.02***

In my view, the defendant was properly summoned for this offence and he also attended court - whenever directed to do so, so there is no defect to this charge though he was not given the opportunity to explain his actions some two years ago.

Upon hearing all the evidence in this case I am satisfied - threatening language was used towards Ms Leonard, by the defendant because I accept the evidence of Ms **Zenique Leonard** - who said:-

*She arrived at the police station with her two sisters; they were standing at the top of the steps. Her sister saw the defendant approaching the station, at the time she did not know who he was. Jasmine Leonard shouted “You are wicked; you are wicked for what you did to my brother. LaBorde asked her if he was wicked. He proceeded to leave from the front of the station up the side of the steps,*

*“Asking if my sister wanted him to burst her head with two big stones like what he did to my brother”. My sister and I moved out of the way and we started to video record the incident.*

**Accordingly**

- **I find the defendant “guilty “of using threatening language directed towards the complainant in file C4-2012**

**That said - I make the following comment and wish to point out to everyone we all live and work in Montserrat - under the Queens Peace.**

A court is entitled to bind over any person - to keep the peace who appears before the court - either as a witness or as a defendant in a criminal trial - to be of good behaviour towards everyone, for their future behaviour to keep the Queen’s Peace - in such sum, and for such period of time as the court considers necessary – [but the bind over should be for no longer than three-years }

I have listened carefully to all the evidence in this case and I find as a fact that the prosecution witness Ms Jasmine Leonard was the person responsible for starting this incident in Brades on 17<sup>th</sup> Dec 2011, with the words she used uttered and directed - towards the defendant Ottley Laborde - who at that time was employed as a public servant.

I find as a fact Ms Leonard went to PHQ on the date in question and she deliberately confronted the defendant - who was a serving police officer reporting for duty.

Ms Leonard told the court she went to PHQ to find out about her brother and her step father – [her family as she called them in the witness box] then why did she not simply go inside PHQ and ask about them?

Ms Leonard provoked the defendant by her words, her conduct, and her behaviour by - using her arms and fingers to gesticulate her views. The evidence clearly reveals Ms Leonard shouted at the defendant, and she also used threatening words and behaviour towards the defendant in a public place

The defendant would have been perfectly entitled to affect her arrest. *R. v Howell* [1981] 3 W.L.R.501. Inspector Semper confirmed in court that the defendant said he wanted to arrest Ms Leonard and the defendant attempted to do so.

However the defendant's actions in attempting to arrest Ms Leonard might have been misread by a member of the public Val Pollidore and any attempt by the defendant to arrest Ms Leonard may have been frustrated by Mr Pollidore.

Ms Leonard should have made any complaint she had about the defendant, through appropriate official police channels, to a senior commissioned police officer. She should have gone into PHQ; instead she chose to take the law into her own hands deliberately provoking the defendant.

Ms Leonard should not have provoked the officer or caused a breach of the peace. On 17<sup>th</sup> Dec 2011 her actions were to say the least - inappropriate and improper in all the circumstances.

That said this court intends to use its powers to bind Ms Leonard over to keep the Queens Peace and be of good behaviour to all persons for her **FUTURE** conduct especially towards the Laborde family.

<b>ORDER</b>
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Ms Jasmine Leonard - Having agreed to be Bound over to keep the peace in **OPEN COURT** in respect of her threatening behaviour on 17<sup>th</sup> Dec 2011 – then Jasmine Leonard is Bound over to keep the peace, in the sum of \$500.00 for a period of two years from today's date, she is specifically bound over to keep the peace and be of good behaviour to all manner of persons – and especially towards members of the Laborde family

<b>ORDER</b>
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In respect of the defendant Ottley Laborde- he has been found guilty after trial of threatening behaviour on 17<sup>th</sup> Dec 2011 and in view of all the circumstances pertaining to this case - the defendant is sentenced as follows.

- On file C4-2012 the defendant is granted an absolute –**DISCHARGE without conviction** - under the provisions of section 35(1) of the Penal Code Cap 4.02

**2<sup>nd</sup> January 2014**

**Robert A Shuster**

**Senior Magistrate**