[2007–09 Gib LR 1]

PARODY v. GIBRALTAR JUSTICES

SUPREME COURT (Schofield, C.J.): January 16th, 2007

Courts—magistrates' court—case stated—justices lack power to state case until hearing finished—Supreme Court may answer case stated ultra vires if necessary to avoid substantial delay to conclusion of case—answer not binding

Criminal Law—breach of the peace—causing breach—Criminal Offences Act, s.35 not designed to penalize breach but conduct intended to provoke breach or by which breach may be occasioned—amendment to bring charge within strict terms of section possible if adjournment and recalling witnesses for further cross-examination avoid injustice to accused

Criminal Procedure—appeals—case stated—if Stipendiary Magistrate refuses to remit case to justices for hearing on amended charge, judicial review, not appeal to Supreme Court, correct procedure

The appellant was charged in the magistrates' court with causing a breach of the peace, assaulting two police officers and obstructing them in the execution of their duty.

In November 2004, the appellant was arrested in Main Street. Before her arrest, she was abusive towards the officer arresting her; when he tried to arrest her, she was violent towards him. The Crown alleged, amongst other things, that, contrary to the Criminal Offences Act, s.35, she had made "a disturbance at Main Street, a public place, whereby a breach of the peace was occasioned" and she was charged accordingly. At the trial, the defence submitted that as there had been no breach of the peace before the appellant had been arrested, this charge had not been proved, and that as there had been no breach of the peace, the arrest had been unlawful, and so the other charges were also unsustainable. The Crown sought to amend the charge by substituting that a breach of the peace "may have been occasioned" for "was occasioned." The justices allowed the amendment and granted an adjournment for a new trial, which was held before the Stipendiary Magistrate. The defence appealed by way of case stated.

It submitted that (a) the justices had been wrong to allow the amendment to the charge, as it had been requested too late to produce other than an unfair result for the appellant; (b) the Supreme Court should adjudicate on the substantive issue, as it would save time and expense; and (c) as the

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justices had been wrong to grant the amendment, the arrest had been unlawful and therefore the rest of the charges could not be proved.

The Crown submitted in reply that (a) the justices had been correct to allow the amendment, as it served to bring the charge within the strict terms of the statute; (b) because the justices had not made a final determination of the case, they had no power to state a case, and the Supreme Court had no power to adjudicate on it; (c) the appropriate mechanism for determining whether the justices had been correct to allow the amendment to the charge was judicial review; (d) the matter should be remitted to the justices for hearing; and (e) the arrest had been lawful, for the reasons stated in the amended charge.

Held, dismissing the appeal:

(1) The case would be remitted to the justices for final determination. When the case came before the Stipendiary Magistrate, counsel should have asked that it be sent back to the justices. If the Stipendiary Magistrate had refused, or if the justices had refused to hear the case to a final determination, the correct mechanism for dealing with the matter would have been judicial review, and not an appeal to the Supreme Court (paras. 13–14).

(2) Although the justices lacked the power to state a case before the end of the trial, the court would, exceptionally, state its view on the matter to save further interruption to the trial process, which had already been substantially delayed (paras. 14–15).

(3) The justices' decision to allow the amendment to the charge had been correct, as the result of the amendment was to bring the charge within the strict terms of the Criminal Offences Act, s.35, which was designed to deal with potential breaches of the peace, rather than breaches of the peace that had already occurred; such an amendment could be made at any time until the justices were *functi officio*. Any potential injustice to the appellant had been avoided by the granting of an adjournment and the justices' willingness to allow the defence the option to recall witnesses for further cross-examination (para. 15; para. 18; para. 21).

(4) It was open to the justices to find that the arrest had been lawful even if a breach of the peace had not already occurred at the time of the arrest, as the Criminal Procedure Act, s.6(b) allowed police officers to arrest those whom they suspected of being likely to commit any offence punishable by imprisonment without warrant (para. 22).

(5) Although the considerable delays in hearing the case were not so great as to amount to an abuse of process, and although they were not the fault of the prosecution, they would nonetheless constitute a relevant consideration to be taken account of by the justices when determining the correct sentence, in the event of the appellant being convicted (paras. 23–25).

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Cases cited:

(1) *Allan* v. *Wiseman*, [1975] RTR 217; [1975] Crim. L.R. 37, applied.
(2) *Atkinson* v. *US Govt.*, [1971] A.C. 197; [1969] 3 W.L.R. 1074; [1969] 3 All E.R. 1317; (1969), 113 Sol. Jo. 901, applied.
(3) *Garfield* v. *Maddocks*, [1974] Q.B. 7; [1973] 2 W.L.R. 888; [1973] 2 All E.R. 303; (1973), 57 Cr. App. R. 372, *dicta* of Lord Widgery, C.J. applied.
(4) *R.* v. *Greater Manchester JJ.*, *ex p. Aldi GmbH & Co.*, [1994] T.L.R. 678, *dicta* of Butler-Sloss, L.J. applied.
(5) *R.* v. *Howell*, [1982] Q.B. 416; [1981] 3 W.L.R. 501; [1981] 3 All E.R. 383; (1981), 73 Cr. App. R. 31; [1981] Crim. L.R. 697, *dicta* of Watkins, L.J. distinguished.
(6) *R. (UK Govt.)* v. *Stipendiary Magistrate*, 2003–04 Gib LR 343, applied.
(7) *Streames* v. *Copping*, [1985] Q.B. 920, [1985] 2 W.L.R. 993; [1985] 2 All E.R. 122; [1985] RTR 264; (1985), 81 Cr. App. R. 1, *dicta* of May, L.J. applied.

Legislation construed:

Criminal Offences Act, s.35: The relevant terms of this section are set out at para. 20.

Criminal Procedure Act, s.310(1):

> "Any person who was a party to any proceedings before the magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the Supreme Court on the question of law or jurisdiction involved:
>
> Provided that a person shall not make an application under this section in respect of a decision which by virtue of any law is final."

Magistrates' Court Act, s.67: The relevant terms of this section are set out at para. 17.

S.R. Bossino for the appellant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, and *D. Conroy* for the Crown.

1 **SCHOFIELD, C.J.:** This is an appeal by way of case stated by Keisha Parody in respect of a decision of the justices to amend one of six charges she was facing in respect of an incident in Main Street, Gibraltar, on November 4th, 2004. The six charges that she faced were that on November 4th, 2004, in Gibraltar, she did—

> "(a) make a disturbance at Main Street, a public place, whereby a breach of the peace was occasioned;
>
> (b) assault Gareth Cano, the said Gareth Cano being a Police Officer and acting in the execution of his duty as such a Police Officer;

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(c) assault Albert Rocca, the said Albert Rocca being a Police Officer and acting in the execution of his duty as such a Police Officer;

(d) intentionally obstruct Albert Rocca, a Police Officer and acting in the exercise of his powers under s.18 of the Drugs (Misuse) Act;

(e) behave in a disorderly manner at New Mole House Police Station; and

(f) resist Gareth Cano, the said Gareth Cano being a Police Officer and acting in the execution of his duty as such a Police Officer."

The subject of this appeal is the first of those charges.

2 When the justices finally heard the case (and I shall deal with the question of delays later), on June 2nd, 2006, they heard the evidence of four police witnesses. Police Const. Cano testified that at 8.10 a.m. on November 4th, 2004, he was with P.C. Hill in Main Street, when they received reports of a man and woman making a disturbance. They came upon the appellant who was arguing with a man. They were shouting at each other and waving their arms. When the man saw the officers, he ran off and P.C. Hill gave chase. P.C. Cano caught up with the appellant and noticed that she was agitated and had a laceration to her forehead. He wanted to ascertain what had happened but the appellant told him to leave her alone and was abusive to him. She was, according to P.C. Cano, angry and agitated. He tried to calm her down because members of the public were beginning to congregate. She continued to insult him and so he cautioned her and arrested her for making a disturbance. The appellant started to walk away, and P.C. Cano grabbed her by the arm to prevent her going, whereupon the appellant punched and kicked him. This is the subject of the second charge. Eventually, P.C. Cano restrained the appellant and, when P.C. Hill returned and with his assistance, handcuffed the appellant, who was taken to New Mole House Police Station. Police Const. Hill's evidence did not take the matter a great deal further, because he was not a witness to anything other than the final restraint of the appellant. Evidence was then heard from Police Sgt. Rocca and W.P.C. Benrimoj as to events at New Mole House Police Station, which gave rise to the last three charges on the charge sheet.

3 At the close of the prosecution case, the appellant chose not to give evidence. Defence counsel then submitted to the justices that, as there had been no actual breach of the peace by the appellant before P.C. Cano arrested her, there being no evidence that a breach of the peace had been occasioned at that stage, the first count had not been proved. She further submitted that, as there had been no breach of the peace, the appellant's arrest had been unlawful, and therefore the other four charges fell with the first charge.

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4 Prosecution counsel was granted a short adjournment and when the court resumed he sought to amend the first charge to read—"[that the defendant,] on November 4th, 2004, in Gibraltar, did make a disturbance at Main Street, a public place, whereby a breach of the peace *may have been* occasioned."

5 It will be seen from the amendment, which I have put into italics, that the prosecution acknowledged that it had not been proved at the time of the arrest that a breach of the peace had actually been occasioned, but they sought to satisfy the justices that P.C. Cano apprehended that a breach of the peace might be occasioned, which would satisfy the requirements of the Criminal Offences Act, s.35, and also make the appellant's arrest lawful. Defence counsel opposed the amendment.

6 The justices made the following finding:

> "We carefully considered the arguments put forward both by the prosecution and the defence, and we decided in this instance to grant the amendment sought by the prosecution. In arriving at this decision we considered that the defendant, in not having given evidence, would not be prejudiced by the amendment, and would still have the opportunity of a fair trial by either having witnesses recalled and cross-examined or being granted an adjournment for the defence to prepare for the new trial. We therefore granted the amendment, and, at the request of the defence, granted an adjournment for a new trial on September 29th, 2006."

7 During the period of adjournment, the appellant's counsel applied for the justices to state a case for the opinion of this court but, because he had doubts over the procedural regularity of such a step, he did not decide to pursue the appeal until after the hearing before the Stipendiary Magistrate. The question framed by the justices for the opinion of this court is "whether we were right to grant the amendment to the charge in this case."

8 The Crown has argued that because the justices had not reached a final determination of the case they had no power to state a case and this court has no power to give an opinion on it. In *Atkinson* v. *US Govt.* (2), the House of Lords decided that magistrates had no power to state a case in extradition proceedings because the relevant statutory provision for appeal by way of case stated limited matters in respect of which a case could be stated to final decisions. This court followed *Atkinson* in *R. (UK Govt.)* v. *Stipendiary Magistrate* (6).

9 In *Streames* v. *Copping* (7), justices rejected a submission made on the defendant's behalf that a charge was bad for duplicity. They acceded to a request that they should state a case for the opinion of the High Court on whether they were right to do so under the English statutory provision which, to all intents and purposes, was in the same terms as the Gibraltar

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Criminal Procedure Act, s.310(1). In following *Atkinson*, May, L.J. had this to say ([1985] Q.B. at 928–929):

> "It follows that magistrates' courts on the one hand have no jurisdiction to state a case under section 111(1) of the Act of 1980 unless and until they have reached a final determination on the matter before them, and that this court has no jurisdiction on the other to consider or determine such a case if justices should nevertheless purport to state one.
>
> To summarise, I think that the legal position in this field is as follows. Where either party contends that justices have no jurisdiction to hear and determine an information or complaint, and the justices uphold that contention, then the remedy available to the party aggrieved is to ask for leave to apply for judicial review seeking a finding from the Divisional Court that the justices were wrong to decline jurisdiction and an order for mandamus directing them to hear the information or complaint. Where, upon such a contention, justices decide that they do have jurisdiction to hear and dispose of the matter, they should not accede to an application there and then by the party against whom they have decided to adjourn any further hearing and state a case on the jurisdiction point. They should in general proceed to hear and determine the matter before them on whatever evidence is adduced and then, if either party is dissatisfied, he can apply to the justices to state a case under section 111(1). The party against whom the justices decided that they did have jurisdiction at the outset of course always has the concurrent right to apply to the Divisional Court for leave to seek judicial review in the nature of prohibition. In some cases, if the party aggrieved did take that course, it might be desirable for the justices to adjourn their further hearing of the substantive matter until after the determination of the judicial review proceedings; in most cases, however, nothing will be lost if the justices do complete their hearing. It may be that on the facts they will decide the substantive issue in favour of the party contending that they had had no jurisdiction. If they do not, then all the issues can be determined by the Divisional Court on a case stated, at a substantial saving of time and money."

The Crown submits that I should follow *Streames* v. *Copping*, as I followed *Atkinson* in *R. (UK Govt.)* v. *Stipendiary Magistrate*, and remit the matter for the justices to hear the case to final determination.

10 Mr. Bossino, for the appellant, concedes that he had held back pursuit of this appeal for the reasons put forward by the Crown. However, when he appeared before the learned Stipendiary Magistrate it was considered prudent for the issues to be considered by this court. He submits that the justices had recused themselves from hearing the case further before they

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had reached a final determination when they granted an adjournment "for a new trial" and put the matter over to the Stipendiary Magistrate. Had the matter gone before a new bench it would have done so with an amended first charge and, in that event, there would have been no way for the appellant to challenge the amendment to the charge in this court.

11 Mr. Bossino has directed me to the unreported decision of the English Divisional Court of *R.* v. *Greater Manchester JJ.*, *ex p. Aldi GmbH & Co.* (4). In that case, informations were laid against a wholesaler under the Consumer Protection Act 1987, by a trading standards officer. When the matter came before the justices, it became clear that the wholesaler was the incorrect company against whom to lay the informations. An amendment was granted to the informations to substitute the name of the retailer. This decision, and other matters, came before the Divisional Court on an appeal by way of case stated and by way of judicial review. The court decided that the justices were wrong to allow the amendment. Butler-Sloss, L.J. then went to the issue:

> ". . . [W]hich is the correct way for the applicants or appellants to come to the Divisional Court when this is an interlocutory matter and the summonses as amended had not yet been adjudicated upon[?] Since an adjournment was in any event granted for the retailing company to be served with the summonses and brought to court, it was in the event of this case sensible that the matter should come to this court together with the other summonses. But the issue is which is the better, or which is the correct, method of coming to the court?"

Mr. Bossino directed me to the following passage in the judgment:

> "It is right and proper that the court should deal with it at this stage. I would myself feel that the undesirability of the use of a case stated in interlocutory matters would in general apply to the use of judicial review in interlocutory matters, because again we do not want to use that valuable weapon of moving for judicial review on various points that might come up during the hearing before magistrates. But in this case it appears to be the only avenue by which this court can deal with the question as to whether the magistrates were wrong to amend the summonses."

12 As I understand his submission, Mr. Bossino asks this court to take a pragmatic view and deal with an issue which is rightly before it because the justices divested themselves of the case and there is no other way for this court to review the propriety of the justices' decision to allow the amendment to the charge.

13 However, this argument ignores the availability of judicial review. In *ex p. Aldi GmbH* (4), the Divisional Court felt itself bound by *Streames* v. *Copping* (7) and whilst expressing reservations about the general use of

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judicial review of interlocutory decisions of justices in the passage above, found that judicial review was the appropriate method of dealing with the matter in the circumstances of that case.

14 To my mind, the matter should have been dealt with in this way. When the case came before the Stipendiary Magistrate on September 29th, 2006, counsel should have sought that the matter be remitted to the justices for them to continue hearing the case to final determination. If either the Stipendiary Magistrate had refused to do so, or, on a remission, the justices had refused to continue with the hearing, then either of those decisions would have been subject to judicial review. In the event, following *Streames* v. *Copping*, I shall decline to answer the case stated by the justices and I remit the matter for their final determination.

15 However, it seems to me that I should give my view on the propriety of the justices' decision to allow the amendment to the charge, in case I am wrong in my above finding and to avoid any further delays in bringing this case to a final conclusion. The Attorney-General has counselled against me doing so, but Mr. Bossino asks that I should. In the peculiar circumstances of this case I intend to do so. There have already been substantial delays in the case, and if the case is finally determined against the appellant I can imagine an appeal being heard on this very point one year from now. Because I have taken a view on the propriety of the amendment, I think that counsel should have the benefit of it, although I accept that it is not binding. This is an exceptional decision and one which would not normally be taken.

16 The defence submission in relation to the first charge was based on the English Court of Appeal decision in *R.* v. *Howell* (5), in which the appellant had been convicted of assaulting a police constable with intent to do him grievous bodily harm. The prosecution evidence was that the appellant was being moved away from a scene where a number of people had been noisy and offensive and, indeed, there had been some arrests made. The incident occurred in a residential area in the early hours of the morning. The appellant continued to be noisy and insulting to the police officers and eventually one officer told him that if he continued to swear he would be arrested for "disturbing public order." When the appellant continued with his behaviour, the police officer caught hold of his right arm and said "I am arresting . . ." and got no further because the appellant punched him very hard in the face. The defence argued that as no breach of the peace had been proved the appellant's arrest was unlawful, and in punching the police officer the appellant was acting lawfully in escaping from an unlawful arrest. In rejecting the defence argument, Watkins, L.J. had this to say ([1982] Q.B. at 426):

"We hold that there is power of arrest for breach of the peace where:
(1) a breach of the peace is committed in the presence of the person

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making the arrest or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach or (3) where a breach has been committed and it is reasonably believed that a renewal of it is threatened.

The public expects a police officer not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace, in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognising that a wrongful arrest is a serious invasion of a person's liberty, provides the police with this power in the public interest.

In those instances of the exercise of this power which depend upon a belief that a breach of the peace is imminent it must, we think we should emphasise, be established that it is not only an honest albeit mistaken belief but a belief which is founded on reasonable grounds."

17 When faced by this authority in the Magistrates' Court, Mr. Conroy, for the prosecution, considered that there had in fact been no actual breach of the peace proved and applied to have the charge amended in the manner already described. In doing so he relied on s.67 of the Magistrates' Court Act, which reads:

"(1) 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.

(2) If it appears to the court that any variance between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance, the court shall, on the application of the defendant, adjourn the hearing."

18 Lord Widgery, C.J., in *Garfield* v. *Maddocks* (3) ([1974] Q.B. at 11) had this to say about s.100 of the English Magistrates' Courts Act 1952, which was in the same terms as s.67 of the Magistrates' Court Act:

"Those extremely wide words, which on their face seem to legalise almost any discrepancy between the evidence and the information, have in fact always been given a more restricted meaning, and in modern times the section is construed in this way, that if the variance

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> between the evidence and the information is slight and does no injustice to the defence, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practice is for the court to require the prosecution to amend in order to bring their information into line. Once they do that, of course, there is provision in section 100 (2) whereby an adjournment can be ordered in the interests of the defence if the amendment requires him to seek an adjournment."

Furthermore, an amendment may be made at any time until the justices are *functi officio* (see, for example, *Allan* v. *Wiseman* (1)).

19 Mr. Bossino submits that the amendment to the charge came too late in the day, and that the result of the amendment was unfair and unjust to the appellant. He argues that P.C. Cano demonstrated by his evidence that he did not know the basic requirements of s.35 of the Criminal Offences Act. Furthermore, prosecuting counsel was likewise unaware of these requirements, in that he knew in advance the evidence which was available to him to support the charge.

20 We must not lose sight of the fact that in *R.* v. *Howell* (5) the court was dealing with the common law right to arrest for breach of the peace, whereas in this case we are dealing with a statutory charge brought under s.35 of the Criminal Offences Act. This states that—

> "a person who, in or near to any public place or in any patio, yard, way, staircase or other means of access to any occupied premises or in the port of Gibraltar, makes or causes to be made any disturbance or who uses any threatening, abusive or insulting words or riotous, violent or indecent behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, or the annoyance of any person, is guilty of an offence and is liable an [*sic*] summary conviction to imprisonment for three months and to a fine at level 4 on the standard scale."

21 This offence deals with conduct intending to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. It does not deal with a case where a breach of the peace has occurred: it is designed to deal with a contemplated breach of the peace. Therefore by amending the charge the justices did no more than bring it within the strict terms of s.35. The appellant cannot have been prejudiced by the amendment, particularly as she was granted an adjournment to consider her position, and the justices contemplated the recall of the relevant witnesses to enable defence counsel to cross-examine them further, if that is what defence counsel should choose to do.

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22 Was the arrest unlawful, so as to cause the charges to fall? The court was not dealing with a common law arrest as in *Howell* (5). Section 6 of the Criminal Procedure Act provides that—

> "any police officer may, without prejudice to any other powers of arrest conferred by this Act or any other law, without a warrant, arrest—
>
> (a) any person who commits in his presence any offence punishable by imprisonment, whether on indictment or on summary conviction;
>
> (b) any person whom he suspects on reasonable grounds of having committed or of being likely to commit any offence punishable by imprisonment, whether on indictment or summary conviction;
>
> (c) any person who assaults, obstructs or resists a police officer while in the execution of his duty or who has escaped from or attempts to escape from lawful custody . . ."

It is therefore open to the justices to find that the arrest fell under either para. (a) or (b) of s.6. My view is that the justices were right to allow the amendment to the first charge and that they may, depending on their view of the evidence, find that the appellant's arrest was lawful.

23 Why are the courts still dealing with matters relating to a summary trial more than two years after the alleged offences were committed? The appellant first appeared in the magistrates' court on November 5th, 2004, the day following the alleged offences. The prosecution docket was produced before the appellant's second appearance in court on November 25th, 2004. The defence request for production of some CCTV footage took until late February 2005 to resolve. Obviously the appellant had a drug problem, because arrangements were then made for her to attend a rehabilitation centre in Seville, but funding had first to be obtained. Thus she did not undertake the rehabilitation programme until mid-2005, and it was not completed until November 2005. Following rehabilitation, there were a number of adjournments, and the appellant's counsel accepts that these delays were not at the behest of the prosecutor. The matter was finally listed for hearing before the justices on June 2nd, 2006. Following the grant of the amendment to the charge, the justices adjourned the hearing at the behest of the defence, and the matter came before the learned Stipendiary Magistrate on September 29th, 2006. It has taken from September to now for the matter to reach me.

24 These delays do not, of course, amount to abuse such as to cause this court to interfere with the continued prosecution of the matter. However, given that the appellant was a juvenile at the time of the alleged offences and is now only 18 years old, and given the other circumstances of the

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appellant, the Attorney-General has indicated that he intends to look at the matter and take a view on whether it should continue. If the case does continue and there is ultimately a conviction, no doubt the justices will take the delays, along with the other circumstances of the offences and offender, into consideration when determining the correct sentence.

25 The upshot is that the appeal is dismissed and the matter is remitted to the justices for them to continue hearing the case. In the circumstances, I urge the justices to give the matter an early hearing.

Appeal dismissed; case remitted to justices.