Criminal procedure—failure to prosecute

R. v. METROPOLITAN POLICE COMMISSIONER, EX PARTE BLACKBURN[1]

The particular problem which is the subject of this case note is as follows. A and B are alleged to have committed a crime. A is charged with the crime, convicted and sentenced. B is not charged. At the trial of A there is evidence which suggests that B may have committed or been a participant to the crime. Can the prosecution be compelled to prosecute B?

The decision to prosecute must indisputably be a matter of discretion. The exercise of that discretion reposes in the prosecution and depends upon an assessment of the available evidence which the prosecution has assembled. But there are other factors which the prosecution may take into account. The nature and gravity of the offence, the reliability of the witnesses and the availability of other methods of dealing with the matter may all be considered relevant. There may be a question of *policy* which influences the exercise of the discretion. It is a stage in the criminal process which has received little attention, largely because the decision is taken in camera.[2] Unlike a trial it is not exposed to public scrutiny. Because it is not in issue in the ordinary criminal trial, it is an area of law in which the courts exercise little influence. Even where a decision is taken not to continue a criminal prosecution during the course of the trial, and a *nolle prosequi* is entered, the Court does not inquire into the reasons for that decision.[3] It is accepted as being a matter for the Crown to decide.

Considerable publicity was given to a case in the District Court of this State in October 1972 in which three women were convicted of performing sexual acts with men at a football club "bucks' night" and were sentenced to a year's imprisonment. All sorts of pertinent questions arose: whether such acts were truly ciminal in nature, the ap-

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1 The Times, October 31, 1972 (Divisional Court—Lord Widgery C.J., Melford Stevenson and Brabin JJ.); affirmed by the Court of Appeal, The Times, November 28, 1972.

2 Two notable exceptions to this remark are Miller, *Prosecution—The Decision to Charge a Suspect with a Crime* (Boston, 1969) and Wilcox, *The Decision to Prosecute* (London, 1972). See also *The Prosecution Process in England and Wales—Report by Justice* [1970] Crim. L. Rev. 668.

3 See Brown, *When the Prosecution Case is Weak* (1971) 4 A.N.Z.J. Criminology 144.

propriateness of the sentence, and why were the male participants and the football club not prosecuted.[4]

When the last point was raised in the Legislative Assembly in October 1972 the Minister representing the Minister for Police gave the following explanation—

> Charges were not laid against the men as in most cases, insufficient evidence of identification prevailed. The identity of only one male participant was known. He gave evidence for the prosecution and received a certificate from the court freeing him from any charges.[5]

On the following day in answer to a further question the Minister said—

> Police only viewed the acts through a small hole in a wall, a considerable distance from the acts performed. Police admittance to the premises was delayed as a large number of persons present were affected by liquor and difficult to handle. At no time was the view of the naked men sufficient to establish positive identification . . .[6]

He added—

> The male participant who gave evidence was a member of the club and there was no contact or prior arrangement with this person by the police.[7]

The particular question remains—assuming that at least one or more of those present could be identified, could the police be compelled to prosecute all those present as being accessories or conspirators? Do the police have to be satisfied in their own assessment of the evidence of the likelihood of a conviction? Or should they prosecute where they are not in a position to make a forecast of the likelihood of a conviction, but have some evidence which could, in their opinion, lead to a conviction, but is unlikely to do so? What questions of policy are to be considered?

In the case under review, a private prosecutor, Mr. Blackburn, sought an order of mandamus requiring the Metropolitan Police Commissioner to enforce the law against pornography. In essence his argument was that the flood of pornography in London was associated with a set policy of inaction by the police.

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4 See e.g. The National Times, November 6-11, 1972.
5 [1972] Parl. Deb. (W.A.) 4073.
6 Idem 4156.
7 Idem.

In an earlier case, *R. v. Commissioner of Police of the Metropolis, ex parte Blackburn,*[8] the same prosecutor had been concerned about the extent to which gaming clubs were operating in breach of the Betting, Gaming and Lotteries Act 1963 (U.K.) and had sought an order of mandamus to enforce the law against gaming clubs.

On the duty of the Commissioner of Police Lord Denning M.R. said in that case:

> The office of Commissioner of Police within the Metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their Report in 1962 (Cmnd. 1728). But I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.[9]

In this, the first of Mr. Blackburn's cases, the Commissioner had issued a confidential instruction to the police force to the effect that prosecutions for this offence would require his approval. He explained that due to the uncertainty of the law observations in clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become the haunt of criminals. Each member of the Court of Appeal held that if the instruction meant that the Commissioner had decided not to enforce the law as a matter of policy against clubs in breach of scandalous breach of the law, mandamus might lie compelling him to enforce it.

8 [1968] 2 Q.B. 118.
9 Idem 135.

In Mr. Blackburn's second case the Divisional Court held that if it could be shown in the present case, as it was in the gaming case, that the Commissioner had declined to enforce the law with public or scandalous consequences, the court would issue an order for mandamus. But the court would not interfere with the legitimate exercise of police powers. In this case Mr. Blackburn failed to establish on the facts that there had been a neglect of duty to prosecute. Melford Stevenson J. said that he had not come within measurable distance of establishing the charge of inaction. The Commissioner explained to the court that when the police thought a case was suitable for prosecution, the matter was submitted to the Director of Public Prosecutions for advice and that he was *guided* by the Director's decision. He did not say that he was *bound* by that advice, and Lord Widgery C.J. said that if the Commissioner had, however, said that he had felt himself bound to follow the Director's advice, he would be wrong. Whether this dictum is applicable to the relationship between the Attorney-General and the police in this State is another question.

When the case went on appeal, the Court of Appeal re-iterated that in carrying out their duty of enforcing the law, the police have a discretion with which the courts would not interfere.[10] Lord Denning M.R. said that this was not a case for mandamus; he attributed the cause of the ineffectiveness to the system and the framework in which the police had to operate. He thought that the Obscene Publications Act 1969 did not provide a sound foundation. Phillimore L.J. said that he had come to the conclusion that it would be premature and unfair to say that the Commissioner had turned his back on his duties. Roskill L.J. also thought the legislation was defective.

The answer sometimes given to the situation where the police will not prosecute is, 'If the police will not prosecute it is open to a private person to act as prosecutor'. As a general rule a private person may institute any criminal proceedings (unless it is a statutory offence which requires leave to prosecute). Private prosecutions are sometimes regarded as being hazardous. In *R. v. Harrison*[11] there were a series of hitches which were in part attributable to inexperience.

Section 720 of the Criminal Code permits a private prosecution but leave of the Court is required. The Full Court examined the section in *Gouldham v. Sharrett*.[12] Giving the judgment of the Court Wolff C.J. observed—

10 The Times, November 28, 1972 (Court of Appeal—Lord Denning M.R., Phillimore and Roskil L.JJ.).

11 [1954] Crim. L. Rev. 39.

12 [1966] W.A.R. 129.

> In close on 50 years of association with the law I have known no case of a private prosecution and have been unable to find any in the records.[13]

Four possible situations may arise: either (i) the Crown will have examined the evidence and made a decision not to commence prosecution proceedings; or (ii) it will have made a decision not to continue with the prosecution proceedings; or (iii) in the light of a decision not to commence or continue proceedings under (i) or (ii) a private prosecutor will institute proceedings or (iv) the Crown will be unaware of the factual situation and a private prosecutor will institute proceedings without reference to the Crown. In *Gouldham* the Court was concerned with the situation in (ii) where the Crown had instituted proceedings but had decided not to proceed further. Wolff C.J. said—

> I feel that once the law officers have had an opportunity to consider the facts of the case, as they have here, this Court would be loath to give authority except in a most glaring incident.[14]

In *Gouldham* Wolff C.J. thought the following considerations should guide the Court in the exercise of its discretion whether to give leave to a private prosecutor—

> (1) Is the type of offence of such grave character that the determination whether to prosecute should be left to the Attorney-General: e.g. prosecutions for such offences as non-capital homicide, perjury, and so on?
> (2) Is the admissible evidence in support of the prosecution inherently credible and sufficient to found a prima facie case?
> (3) If there have been no proceedings for committal, is there any good reason why the usual proceedings for committal before justices should not be resorted to?
> (4) Has the accused already been committed for trial by a petty sessional court?
> (5) Has the Attorney-General entered a *nolle prosequi* or intimated that he will not file a bill?
> (6) Is the administration of justice likely to be impaired by reason of some discreditable motive on the part of the prosecutor?
> (7) Is the situation such that if leave is refused a grave injustice will be done to the applicant or somebody standing in close relationship to him?[15]

It has been said in other jurisdictions that it is a fundamental principle of criminal law that the right of private individuals to institute

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13 Idem 137.
14 Idem.
15 Idem.

a prosecution should not be restricted unless there exists some very good reason to the contrary. There are however restrictions on this so called right. First, there are a number of offences in which the consent of the Attorney-General or of a government department is needed before a prosecution can be started. It is difficult to discern any broad principle or reason which determines which type of offence requires consent. Secondly, the private person seldom has the financial resources, the time or the ability to launch a prosecution in a serious matter. Thirdly, the Attorney-General by s. 579 of the Code has a complete discretion in regard to the conduct of all indictable offences. Fourthly, by s. 581 he has complete discretion to enter a *nolle prosequi* in any case triable by indictment. He can do so without offering any explanation over the head of the private prosecutor.

The right to institute a private prosecution would appear to be more restricted than in common law jurisdictions.[16]

The position seems to be that where the police do not prosecute an alleged offender in exceptional circumstances either (i) mandamus may be sought, or (ii) a private prosecution may be instituted. Neither course of action is ideal, but no better solution seems to offer itself.

16 See Brebner v. Bruce [1950] A.L.R. 811, 818 per Fullagar J. Section 41, Interpretation Act 1918 (W.A.) provides: ". . . any person may sue for, or take proceedings to recover, and may recover any fine, penalty, or forfeiture imposed by, or which is authorized to be imposed or awarded under, any Act, unless by such Act the right to so sue or take proceedings is vested in an officer or person thereby indicated." The meaning of the Section was considered in Bateman v. Hatton [1960] W.A.R. 202 by Jackson S.P.J.