

‘The Prosecution Circus Continued’

by Francis Bennion

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Any footnotes are shown at the bottom of each page
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Introductory Note by Francis Bennion

The article set out below is followed by the text of correspondence between the litigant in person Paula Lawton and myself which is reproduced with her permission. I feel she should have this opportunity to describe in her own words, without comment from me, the unhappy experience this encounter with the law has been for her.

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The Prosecution Circus Continued

FRANCIS BENNION*

Another Blow at Private Prosecutions

I showed in a recent article¹ how the police, aided and abetted by the Home Office, had by use of the cautions system deprived an individual of his constitutional right to bring a private prosecution, and how the Appellate Committee of the House of Lords appeared unperturbed by this blow at the constitutional rights of the citizen.² Now I have to report an instance where the Divisional Court has similarly transgressed in the case of *R v Fleming-Brown*³. A private prosecution was brought under the Town Gardens Protection Act 1863 by Paula Lawton against Christopher Fleming-Brown, a City of London banker. Both live in Elgin Crescent, Kensington, whose residents have use of the gardens in question, the Arundel and Elgin Ornamental Gardens.

The charge was that in October 2004 and March 2005 the accused, in play with his five-year old son, had contravened byelaws prohibiting the playing of football or a similar game in the gardens. The prosecutor appeared in person. The accused was represented by a silk, Mr Ian Glen QC. According to a newspaper report:

“The banker said he needed such high-powered representation because if convicted he might have been barred from visiting the US on business.”⁴

The West London Magistrates’ Court dismissed the charge, ruling that such play did not constitute a game of football, as defined by the Oxford English Dictionary⁵, namely “any number of forms of team game involving kicking a ball”. They held that, as Mr Fleming-Brown and his son were not “teams” of footballers, they were not guilty of breaching the byelaw when Ms Lawton saw them playing.

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¹ “*Jones v Whalley: Constitutional Errors by the Appellate Committee*”, p. 847 above.

² This action by the police was under non-statutory executive powers. The cautions system has also been applied by statute: see Crime and Disorder Act 1998 ss. 65, 66; Criminal Justice Act 2003, Pt 3.

³ A law report of the case is not available at the time of writing, so I have had to rely on press accounts of the judgments.

⁴ *The Guardian*, 23 November 2006.

⁵ This is the dictionary named in the report in the *Times* of 23 November 2006. In the *Daily Mail* of the same date the dictionary consulted by the magistrates is said to be the *Concise Oxford Dictionary*.

On appeal by Ms Lawton to the Divisional Court Waller LJ said:

“We think the justices took too narrow a definition of what constituted football or a similar game by paying too much attention to the dictionary definition, which referred to two teams seeking to put the ball into the opposition’s goal. By any commonsensical, natural interpretation, the respondent and his son were playing football or a similar game. The justices misdirected themselves and came to a conclusion to which no reasonable bench could have come.”⁶

This ruling is open to question, but it should have meant that the case was sent back to the magistrates’ court for a retrial. The Divisional Court declined to do this. Waller LJ is reported as saying that to do so “would not be in the public interest”⁷ – particularly since the byelaws have since been amended to allow parent and child ball games. The Court ordered that Mr Fleming-Brown’s acquittal should stand, and that costs should be met out of central funds.

The thwarted private prosecutor was understandably upset by this. She is reported as saying she was “horrified”, adding:

“I’m just protecting my garden. This is an ornamental garden and not a recreation ground, and football ruins the grass.”

Addressing the Court after judgment Ms Lawton said:

“You got the decision right, but still found against me. This has set a dangerous precedent.”⁸

Is it really in accordance with the constitutional principle of the rule of law for the Divisional Court to stifle a private prosecution in this way? I think not. The principle has recently been recognised by statute.⁹ It has been the subject of an important lecture, discussed below in this article, delivered by the Senior Law Lord, Lord Bingham of Cornhill. It does not permit the Court to deprive a citizen of a constitutional right.

Admittedly the Divisional Court had a discretion over whether or not to send this case for a retrial. But it should not, in my respectful submission, have used the discretion in this particular way. Constitutionally, if a private prosecution brought before a magistrates’ court is to be discontinued by the authorities the method laid down by Parliament should be followed.

In the present case this would be for the Director of Publications, acting under the superintendence of the

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Attorney General, to take over conduct of the prosecution under the Prosecution of Offences Act 1985 s 6(2) and then either discontinue it under s 15(3) of that Act or offer no evidence on the retrial.

If the Divisional Court were of the opinion that this should be done they ought in my opinion to have sent the papers to the DPP for him to consider the matter. Discontinuance of the prosecution fell within his constitutional province, not the Court’s.

The Prosecutorial Discretion

Why is it important that it should be the DPP’s discretion and not the Court’s that should be in play here? I have told part of the story in a previous article explaining how the 1924 *Campbell* Case led to the emergence of the constitutional doctrine that the Attorney General has independent charge of the prosecutive power of the state, or as it is known in Australia the

⁶ The *Daily Mail*, 23 November 2006.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Constitutional Reform Act 2005 s. 1.

prosecutorial discretion.¹⁰ Now I will continue the story by reference to the decision of the Judicial Committee of the Privy Council in *Mohit*.¹¹

In *Mohit* the question was whether exercise of the right of the local Director of Public Prosecutions under the Constitution of Mauritius to discontinue a private prosecution was subject to judicial review. Applying common law principles, a strong Judicial Committee including Lord Bingham of Cornhill and Lord Hoffmann held that it was, and examined the whole question of the prosecutive power under common law. What I go on to say about *Mohit* applies to the law of England as well as that of Mauritius.

The *Mohit* opinion said:

“Recognition of a right to challenge the DPP’s decision does not involve the Courts in substituting their own administrative decision for his: where grounds for challenging the DPP’s decision are made out, it involves the Courts in requiring the decision to be made . . . in (as the case may be) a lawful, proper or rational manner.”¹²

This reconciles the Court’s overriding jurisdiction to ensure that justice is done with the exclusive right of the DPP (acting under the Attorney General) to exercise the prosecutive power.

The *Mohit* opinion went on to cite approvingly a passage¹³ from the decision of the High Court of Australia in *Maxwell v R*.¹⁴ which refers to this power as “what is commonly referred to as ‘the prosecutorial discretion’”. This passage applies to English law and is so important that I must quote it in full.¹⁵

“The power of the Attorney General and of the Director of Public Prosecutions to enter a nolle prosequi and that of a prosecutor to decline to offer evidence are aspects of what is commonly referred to as ‘the prosecutorial discretion’¹⁶. In earlier times, the discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the Courts¹⁷.

That approach may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all states and territories and in the Commonwealth [of Australia]. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute¹⁸ . . .

It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute¹⁹, to enter a nolle prosequi²⁰, to proceed ex

¹⁰ For the Campbell Case see F A R Bennion, “*Jones v Whalley: Constitutional Errors by the Appellate Committee*”, p. 847 above at p. 849.

¹¹ *Jeewan Mohit v The Director of Public Prosecutions of Mauritius* [2006] UKPC 20.

¹² Paragraph 13.

¹³ See para. 15.

¹⁴ *Maxwell v R* [1996] 1 LRC 299.

¹⁵ In order to shorten the quotation I have converted the numerous citations into footnotes.

¹⁶ See *Barton v R* (1980) 147 CLR 75 at 91, 94 *per* Gibbs and Mason JJ, *R v McCready* (1985) 20 A Crim R 32, *R v von Einem* (1991) 55 SASR 199 and *Chow v DPP* (1992) 28 NSWLR 593 at 604-605 *per* Kirby P.

¹⁷ See Wheeler “Judicial Review of Prerogative Power in Australia: Issues & Prospects” (1992) 14 Sydney LR 432.

¹⁸ See *Newby v Moodie* (1988) 83 ALR 523; see also *R v Toohey, ex p Northern Land Council* (1981) 151 CLR 170 at 217, 220 *per* Mason J.

¹⁹ See *Connelly v DPP* [1963] 3 All ER 510 at 519, [1964] AC 1254 at 1277, *DPP v Humphrys* [1976] 2 All ER 497 at 527-528, [1977] AC 1 at 46 and *Barton v R* (1980) 147 CLR 75 at 94-95, 110.

²⁰ See *R v Allen* (1862) 1 B & S 850, 121 ER 929 and *Barton v R* (1980) 147 CLR 75 at 90-91.

officio²¹, whether or not to present evidence²², and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted.²³

The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the Courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what²⁴.”

It is clear that the effect of this passage in relation to *Fleming-Brown* is that the Divisional Court was wrong to take upon itself the decision to discontinue the prosecution of Mr Fleming-Brown. This is confirmed by the following passage from another judgment approved by the Judicial Committee in *Mohit*:

“It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the Courts to

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assess their merits. This approach subsumes concerns about separation of powers.”²⁵

Just as it is not for the Court to exercise what is truly the prosecutorial discretion in judicial review cases²⁶, so it was not for the Court in the present case to terminate a private prosecution in purported exercise of its general discretion on an appeal from the magistrates’ court. The giveaway is that Waller LJ is reported as stating as the ground for discontinuance that to go on with the prosecution “would not be in the public interest”. Constitutional doctrine says it is for the prosecuting authorities and not the Court to make this particular judgment. Usually Courts are astute not to blur this line.²⁷

Disturbing Observations by the Attorney and the DPP

My next task in this perambulation round the constitutional features of criminal prosecutions is to consider some recent observations by the Attorney General and the DPP. First the Attorney.

At the beginning of another recent article²⁸ I gave extracts from a letter by Lord Goldsmith on why he will not stand aside from involvement in the Cash (or loans) for Honours affair. The passage I found disturbing runs:

²¹ See *Barton v R* (1980) 147 CLR 75 at 92-93, 104, 107, 109.

²² See, for example, *R v Apostilides* (1984) 154 CLR 563 at 575.

²³ See *R v McCready* (1985) 20 A Crim R 32 at 39 and *Chow v DPP* (1992) 28 NSWLR 593 at 604-605.

²⁴ *Barton v R* (1980) 147 CLR 75 at 94-95, *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 54, 77-78 per Brennan J, Gaudron J, *Williams v Spautz* [1993] 2 LRC 659 at 690, (1992) 174 CLR 509 at 548 per Deane J and *Ridgeway v R* [1995] 3 LRC 273 at 320, (1995) 129 ALR 41 at 82 per Gaudron J.

²⁵ Paragraph 17. This is an extract from the judgment of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712 at 735-736.

²⁶ In *Mohit* the Judicial Committee allowed judicial review because the points at issue were outwith the prosecutorial discretion and within the court’s supervisory powers as exercised in judicial review proceedings.

²⁷ See, eg, *R (on the application of “C”) and Chief Constable of “A” Police v “A” Magistrates’ Court* [2006] EWHC 2352 (Admin), where Underhill J declined to make a declaration that a police investigation of the applicant was unlawful since this “would involve an unwelcome blurring of the separate roles of Court and prosecutor/investigator” (see para. [32]).

²⁸ “Déjà Vu, or the Judge Addresses the Society”, p. 888 above.

“ . . . the Attorney General has statutory responsibility for the superintendence of the CPS and is answerable to Parliament and to the public for its actions. It is therefore normal for the CPS to consult the Attorney General on any sensitive cases . . . Accordingly if the CPS consult me on a prosecution in this case, I propose that my office should appoint independent senior counsel to review all the relevant material and advise on any prosecutions.”

This indicates that the Attorney will take an interest in the matter *only if the CPS consults him*. This seems too supine a posture. He has a statutory duty to superintend the CPS. On an important matter like this he should not wait to be consulted.

The observations that worried me by the DPP, Mr Ken Macdonald QC, were also about the Cash (or loans) for Honours affair. They were made in the BBC Radio Four Today programme broadcast on November 13 2006. For ease of reference I will break them down into numbered paragraphs.

- (1) The Attorney General has a number functions. He is a government Minister and a senior member of the Government,
- (2) but he is also a Law Officer and in that role he exercises judgment in the public interest.
- (3) The decision about this prosecution, final decision, will be made by senior lawyers in the Special Crime Division of the CPS.
- (4) The Attorney General is entitled to be consulted, and they will consult with him and he will no doubt express views about the public interest.
- (5) That’s commonly done, there’s no difficulty with it, it’s not political,
- (6) but the final decision in this case will be made by the CPS.”

I wrote to the DPP about this statement but as yet have had no reply. I suggested it did not represent the true constitutional position, which is that the Attorney General has the power, if he wishes, to take the final decision in the case. I said that moreover in his statements about the case the Attorney had indicated that he proposes to exercise that power, after taking independent advice.

I added that at the time when the Prosecution of Offences Act 1985 was passed I wrote an article in the *Criminal Law Review*²⁹ which ended:

“The true constitutional position seems to be that the prosecutive power of the state is vested in the Attorney General, with the Director of Public Prosecutions and his staff acting as the Attorney’s executive arm.”

I said that my subsequent writings had been based on this reading, which was not challenged, and added:

“Paragraph (2) of your broadcast statement seems an inadequate description of the Attorney’s function. Historically it is as the Attorney General rather than just as a Law Officer that he holds prosecutive functions, and these go far beyond ‘exercising judgment in the public interest’. He has overriding power both to begin and terminate a prosecution on indictment.

Paragraphs (3) and (6) suggest, surely incorrectly, that the senior lawyers mentioned will possess a power of decision overriding those of yourself and the Attorney.

Paragraph (4) inadequately describes the Attorney’s powers. No doubt these are not brandished in his everyday dealings with the CPS, but they are there just the same.

²⁹ [1986] Crim LR 3.

The statement in paragraph (5) that ‘it’s not political’ overlooks the fact that this case is inevitably political. What matters is that the prosecution question should not be decided by political considerations. It is important to stress that our constitution requires an Attorney in such circumstances to act with strict impartiality. There is no doubt he will do so, even though wearing other hats he is a member of a Labour Cabinet. Modern cynicism tends to suppose this degree of mental separation (often required in law) is not possible; and that must be combated.”

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Lord Bingham again

At the beginning of an article referred to earlier in this piece³⁰ I criticised the Senior Law Lord, Lord Bingham of Cornhill, for saying that the Crown Prosecution Service is an “arm of the executive”, whereas in fact it is a constitutionally separate and independent body acting quasi-judicially under the superintendence of the Attorney General. I also criticised certain statements Lord Bingham made in his speech in *Jones v Whalley*³¹ criticising the right of private prosecution.

It was suggested by Professor J. R. Spencer³² that in these statements Lord Bingham was not himself criticising the right of private prosecution, but was doing two other things, namely (i) summarizing the argument of counsel on what in the judgments was called the wider ground³³, and (ii) indicating that the House should not accept that argument because it had not been properly ventilated. In an earlier reply³⁴ I pointed out that not only was Lord Bingham doing those two things but he was also quite clearly indicating opposition to the right of prosecution on his own behalf in the following passage:

*“It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest.”*³⁵

I will now examine this passage more closely than I did in the previous article. The first italicised passage is objectionable in muddling together the investigation of alleged crimes (which is a function of the executive in the shape of the police) and the decision whether an offender should be prosecuted (which is a function of the entirely separate CPS). It is also objectionable in failing to recognise the longstanding right of the private citizen to investigate offences and take the decision that he himself should prosecute.³⁶ This is all the more remarkable since the case he was dealing with concerned that very right. Moreover it was a right which had been affirmed by Parliament in modern times.³⁷

The second italicised passage is objectionable because it disregards material contained earlier in his own speech, and in Lord Mance’s speech, which shows that private prosecutions are a common feature of the current scene and that the right of citizens to prosecute is supported by senior members of the judiciary and by the Law Commission.³⁸

A further objectionable feature appears when we look at the question of the wider ground referred to above. In *Jones v Whalley* the appeal against the decision of the Divisional Court

³⁰ “*Jones v Whalley: Constitutional Errors by the Appellate Committee*”, p. 847 above.

³¹ [2006] UKHL 41, [2006] 4 All ER 113, at [10].

³² See p. 916 above.

³³ I return to this below.

³⁴ Also given at p. 916 above.

³⁵ Para. [16] (emphasis added).

³⁶ In the case of certain offences this right is for special reasons curtailed by statute.

³⁷ See Prosecution of Offences Act 1985 s. 6.

³⁸ See para. [9], and in Lord Mance’s speech para. [43].

favouring the private prosecutor was based on a narrower and a wider ground. The narrower ground, which I support, was that it was an abuse of process to secure a conviction when the person convicted had been told by the police officer administering the caution that he would not be prosecuted unless he reoffended. The wider ground was that “irrespective of what may be said to, or stated in a form given to, a person who is cautioned, conditionally cautioned, reprimanded or warned, it can [never] be other than an abuse of process for a Court thereafter to entertain a private prosecution against him”³⁹.

The case was decided by the Appellate Committee on the narrower ground. Lord Bingham said of the wider ground:

“I [do not] think the House should in this appeal accept it, for reasons which I find, cumulatively, to be compelling. It was not advanced in the Divisional Court, so we lack the benefit of its judgment on it. It was scarcely foreshadowed in Mr Whalley’s written case, and there was no hint that the correctness of Hayter was to be challenged⁴⁰. Thus Mr Swift had little opportunity to prepare an argument in reply. The question is one of some importance, and should not be resolved in the absence of representation of the Crown or any police force, both of whom might be expected to have views on how the issue should be decided. The question is one which might well benefit from legislative attention. It is not necessary to resolve this question to decide the present appeal.”⁴¹

My contention is that not only should the Appellate Committee not have accepted the argument for the wider ground but it should not even have entertained it, since it clearly required legislation and so was beyond their powers. Lord Mance virtually admitted this when he said “It requires some consideration of the general value of any right of private prosecution in modern conditions”.⁴² Lord Brown of Eaton-under-Heywood said “Plainly . . . such a rule, were it to be established, would substantially diminish what many understand to be the present scope for private prosecutions”.⁴³ When Parliament had declared as recently as 1985 that the right of private prosecution is to remain, it was for Parliament and not the judiciary to abolish or truncate that right.

Ironically Lord Bingham acknowledged this in a recent lecture he gave on the rule of law.⁴⁴ He said:

“The core of the existing principle [of the rule of law] is, I suggest, that all persons and authorities within

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the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the Courts.”⁴⁵

Stripped of wording unnecessary in the present context, this reads:

“The core of the existing principle is that all authorities within the state should be bound by laws publicly and prospectively promulgated and publicly administered in the Courts.”

This clearly includes the Appellate Committee of the House of Lords. They are bound by the law that establishes and continues the right of private prosecution, and their function is obediently to implement it.

³⁹ Paragraph [14]. For the argument advanced for this see para. [15].

⁴⁰ Accepting the wider ground involved reversing the decision in *Hayter v L* [1998] 1 WLR 854.

⁴¹ Paragraph [16].

⁴² Paragraph [38].

⁴³ Paragraph [34].

⁴⁴ Sixth Sir David Williams Lecture, delivered by Lord Bingham of Cornhill on 16 November 2006.

⁴⁵ Page 5.

Lord Bingham rams the lessons of the present article home by saying later in his lecture: “. . . one can agree with Justice Heydon of the High Court of Australia that judicial activism, taken to extremes, can spell the death of the rule of law”⁴⁶.

Correspondence

From Paula Lawton to Francis Bennion, 19 March 2003

Dear Francis Bennion

It was only yesterday that a friend researching a topic on the internet drew to my attention your article in *Justice of the Peace* 9 December 2006 on my court case *R v Fleming-Brown*. I had ceased reading newspaper articles after those in *The Daily Telegraph* and *The Times* because so many others were slanted towards the angle of ‘single/childless-woman-attacks-father-kicking-football-with-little-boy’. I feel so supported by your interest and by your scholarly and well-informed observations.

When I was born people were suffering and many were out there dying in a war fought to protect democracy, so that my own and future generations could continue to live under the democratic principle so hard-won, that laws applicable to all citizens should be passed by a democratically-elected parliament and enforced by all courts. I lived for 67 years believing that this war had been won and the suffering justified and this principle secured. And I believed that if I should need to affirm the protection the law gave me then the courts would provide this in a context of civilised conduct.

Only in the last ten years have I tested the situation by bringing three legal actions. In all of them, including the one you wrote on, I have been stupefied by the rank contrivance by the courts of the legal situation and by the personal abuse which I was shown by judges when my well-presented and legally-backed case has been presented to them.

I now know that I have no more rights than a slave. My parents’ generation fought for a victory which the ‘justice’ services of this country have laid waste. The ideological horror of the situation does not leave me, nor does my awareness of my material vulnerability and risk of financial ruin from unlawful claims of others on my resources and from the power of the courts to impose legal costs through finding against me in verdicts which are rankly unjust through hearings which are abusive in both the personal and procedural sense.

It is so difficult to mobilise opposition when so many people continue in the same delusion which I held for so long that this was a country governed by the law. It is in fact a country ruled by the capricious dictatorship of courts.

We live in terrifying times. Thank you again for your article which gave me great strength.

Yours sincerely

Paula Lawton

From Francis Bennion to Paula Lawton, 19 March 2003

Dear Mrs Lawton,

Thank you for your email. I am grateful for your kind remarks about my article. I was very sorry for your distress over the case.

⁴⁶ See J D Heydon, “Judicial Activism and the Death of the Rule of Law”, *Quadrant*, January-February 2003.

The article will be used in a book I am writing about the rule of law. May I please have permission to put your letter on my website alongside the article and quote it in the forthcoming book.

Forty years ago I myself brought a private prosecution, at great personal expense and with unsatisfactory results. Since then I have been fighting to preserve and improve this important right of the citizen. I am grateful to have your support.

Yours sincerely,

Francis Bennion