[1991–92 Gib LR 163]

R. v. ATTORNEY-GENERAL, Ex parte GLENSHAW

SUPREME COURT (Alcantara, A.J.): August 7th, 1991

Administrative Law—judicial review—amenability to review—no judicial review of decision by Attorney-General to continue prosecution after earlier decision to withdraw charges—whether or not to enter nolle presequi not subject to court's control

The applicant was charged with offences relating to the importation of cannabis.

The applicant was charged, together with an accomplice, with drugs offences. Following a hearing at which the Stipendiary Magistrate granted the accomplice bail, a newspaper carried a report about the case, and as a result, the Attorney-General decided to withdraw the charges against the two accused. The applicant was duly informed, but the Attorney-General made no application to withdraw the charges or enter a *nolle prosequi*. The following week, the Attorney-General notified the accused's solicitors that he had decided not to withdraw the charges after all.

At a further hearing before the Stipendiary Magistrate, the Attorney-General admitted he had made a mistake in deciding to withdraw charges. The Magistrate adjourned the proceedings to consider the accused's submissions, but later refused to discharge them. He ruled that he had power, if he wished, to dismiss the proceedings to prevent an abuse of process.

The applicant applied for judicial review of the Attorney-General's

decision to continue the prosecution. He sought an order prohibiting further proceedings; a declaration that the decision was arbitrary and capricious, unfair, likely to undermine public confidence in the administration of justice, and irrational and unlawful; and a stay of the proceedings pending the outcome of the judicial review. The accomplice breached his bail conditions and absconded.

The applicant submitted that the decision was reviewable, since he had *locus standi* to seek judicial review as a person aggrieved by the decision, and the Attorney-General had failed in his duty to act fairly.

The Crown submitted in reply that (a) no prerogative order could lie against the Crown or the Attorney-General acting in the name of the Crown, and therefore a declaration was the only remedy available from the court; (b) s.77(4) of the Constitution prohibited any interference with or control over the exercise of the Attorney-General's power to institute and discontinue criminal proceedings; (c) the position was the same as at common law, under which the courts had no power to review a decision by the Attorney-General whether to prosecute; and (d) the Attorney-General had not acted unfairly or capriciously, and the applicant had suffered no injustice.

The court also briefly considered whether the magistrates' court had power to dismiss the proceedings against the applicant to prevent an abuse of process.

Held, dismissing the application:

(1) Leave would be granted to the applicant to seek judicial review, since he had sufficient interest in the matter to establish that he had *locus standi* to apply and the application was not frivolous and without merit (para. 15).

(2) No prerogative order could lie against the Crown or against the Attorney-General as the Crown's representative, and if his decision was reviewable the only possible remedy was therefore a declaration (para. 18).

(3) Even if his decision were reviewable, the court was not satisfied that he had acted unfairly or unlawfully. There was nothing improper in the original prosecution or in the publication that caused the Attorney-General to decide to withdraw the charges. The charges were not in fact withdrawn, as he had not entered a *nolle prosequi* when he revised his decision. It was in the interests of justice that a simple mistake should be corrected if it did not prejudice the applicant. The decision to admit that mistake and continue the prosecution was not unreasoned or arbitrary. No injustice had been done to the applicant, and public confidence in the administration of justice was more likely to be undermined by a decision not to proceed against him (paras. 19–25).

(4) The decision of the Attorney-General was not, however, reviewable. Section 77 of the Constitution made it clear that his discretion

to prosecute was not subject to outside control. In particular, only he had the power to discontinue proceedings by entering a *nolle prosequi*. His position was similar to that of the English Attorney-General, and the English authorities indicated that there could be no judicial control or supervision of the Attorney-General's decisions as the principal law officer of the jurisdiction. The application would be dismissed (paras. 26–31).

(5) The court agreed with the Stipendiary Magistrate that the magistrates' court could dismiss summary proceedings to prevent an abuse of process, but it was less certain that that power extended to cases which were later to be tried on indictment (paras. 10–11).

Cases cited:

(1) *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680, *dicta* of Lord Greene, M.R. referred to.
(2) *Council of Civil Service Unions* v. *Minister for Civil Service*, [1985] A.C. 374; [1984] 3 All E.R. 935, referred to.
(3) *Gouriet* v. *Att. Gen.*, [1978] A.C. 435; *sub nom. Gouriet* v. *Union of Post Office Workers*, [1977] 3 All E.R. 70, *dicta* of Viscount Dilhorne applied.
(4) *R. (ex p. Tomlinson)* v. *Comptroller of Patents, Designs & Trade Marks*, [1899] 1 Q.B. 909, followed.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.77: The relevant terms of this section are set out at para. 26.

S.V. Catania for the applicant;
Mrs. K. Prescott, *Crown Counsel*, for the Crown.

1 **ALCANTARA, A.J.:** It was agreed by counsel that I should hear this application for leave to apply for judicial review and, on the assumption that leave would be granted, but without deciding it then and there, that I should proceed to hear the application for judicial review proper on its merits.

2 The applicant Daniel Glenshaw was charged jointly with another person, Brian Albert Price, with various offences under the Drugs (Misuse) Ordinance and the Imports and Exports Ordinance, involving a total (I am told) of 360 kg. of cannabis resin. They appeared before the magistrates' court for eventual committal for trial at the Supreme Court. They were separately represented: Mr. Finch for Brian Albert Price and Mr. Gomez for the applicant, Glenshaw.

3 Mr. Finch applied, in the words of the Stipendiary Magistrate, "in his usual forceful manner," for bail on behalf of his client. Mr. Gomez did not

apply for bail on behalf of the applicant. The Stipendiary Magistrate took time to consider, and on June 7th, 1991, he granted bail to Brian Albert Price in the sum of £15,000 with two sureties in the sum of £25,000 each and on certain conditions. The Stipendiary Magistrate, in granting bail, delivered a written ruling. In this ruling he dealt with the matters he would take into consideration in granting or refusing bail to any defendant, such as (a) the seriousness of charge; (b) the strength of the case; (c) previous convictions; and (d) the length of time before the actual trial.

4 The Stipendiary Magistrate did not say in his written ruling that the defendant Price had any previous convictions. What he did say was that it appeared that there was a very strong case in respect of 29 kg. of the drug; a strong case in respect of 111 kg., and a case of an indeterminate strength in respect of 121 kg. This all referred to the defendant Price. The applicant, Glenshaw, was not mentioned at all; he had not applied for bail.

5 The defendant Price complied with the conditions of bail and was released from custody, where he had been with the applicant. On July 9th, 1991, the defendant Price absconded or jumped bail, and has not been seen since.

6 But I must revert to the chronological sequence. When the Stipendiary Magistrate delivered his ruling on June 7th, 1991 there was a newspaper reporter in court. The ruling in full appeared on the following day, a Saturday, in the newspaper *Vox*. The Attorney-General read the newspaper, and on June 10th, 1991 informed the solicitors of both defendants that he would be withdrawing all the charges against both defendants because of the *Vox* publication. The defendants were due to appear before the magistrates' court on June 14th, 1991. The solicitors duly communicated the good tidings to their respective clients. I dare say that the two defendants must have felt as if they had just won the Treble Chance in the football pools without even playing!

7 On June 13th, 1991, the Attorney-General phoned the two solicitors and told them that he would not be withdrawing the charges but would proceed with the case. The reason he gave was that he had considered the circumstances drawn to his attention by Mrs. Prescott, Crown Counsel.

8 The two defendants duly appeared on June 14th, 1991 before the magistrates' court. Their respective counsel really had a field day against the Attorney-General, protesting vehemently about the prosecution's (the Attorney-General's) change of heart and saying that this was an abuse of the process of the court. They asked the Stipendiary Magistrate to discharge both defendants, submitting that he had the power to do so.

9 The Attorney-General admitted that he had made a mistake. This is what his explanation to the Stipendiary Magistrate amounted to.

10 The Stipendiary Magistrate adjourned until June 20th, 1991, when he gave another written ruling. He refused to discharge the defendants. In his ruling he directed his mind to whether he had the power to stop proceedings if there were an abuse of process or if a defendant could not be afforded a fair hearing. I will quote from his ruling:

> "In my view, if there is an abuse of process of the court, then I have jurisdiction to exercise such power. A trial judge has that power and no less do examining justices have that power, drawing their authority from the Constitution."

11 This aspect of the matter has not been argued before me, so I am not prepared to express any firm opinion on the matter. However, that is no reason why I should not express a tentative view. I think I would be prepared to agree with the Stipendiary Magistrate when he is dealing with cases which are, or are going to be, dealt with summarily. I think I part company with him when it concerns cases which are going to be tried on indictment. I will say no more.

12 On July 5th, 1991, the applicant Glenshaw applied for leave to apply for judicial review. The defendant Price did not. To me, this is not surprising; he jumped bail four days later. The judicial review sought is not against the Stipendiary Magistrate who refused to discharge the defendants and will continue with the committal proceedings, but against the Attorney-General. The decision in respect of which relief is sought is:

> "The decision of Her Majesty's Attorney-General on June 14th, 1991 to prosecute criminal charges (more particularly described in the grounds in which relief is sought) against the applicant, which decision reversed the said Attorney-General's decision of June 10th not to prosecute the said charges by reason of the fact that, as a result of the contents of a press report of the applicant's appearance before the examining magistrate on June 7th, 1991, the applicant could not expect to be afforded a fair hearing before an impartial court."

13 The relief which the applicant is seeking is:

> "(a) An order prohibiting the said Attorney-General from further undertaking and prosecuting the aforementioned criminal proceedings against the applicant. Further or in the alternative:
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> (b) A declaration that the decision is arbitrary and capricious, unfair, likely to undermine public confidence in the administration of justice, and irrational and unlawful.
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> (c) A direction that the aforementioned criminal proceedings be stayed until the determination of the application for judicial review, or until the court otherwise orders."

14 I think I should say that I am grateful to counsel, who have dealt with this case in the best traditions of the English Bar. They have not tried to argue the unarguable and have not stone-walled the obvious. This is how it should always be, but only occasionally is. This has enabled this case to be expeditiously heard and concluded.

15 The first hurdle which the applicant has to surmount when seeking leave to apply is to satisfy the court that he has sufficient interest in the matter to which the application relates. In other words, that he has a *locus standi* and that his application is not doomed to failure from the start. Mrs. Prescott has conceded, quite rightly, that the applicant has a *locus standi*. She argued, however, that the application was doomed to failure, and leave should not be granted because the Attorney-General is not subject to judicial review. When confronted with the proposition that Ministers' decisions, and even the Governor's decision, can, in appropriate cases, be the subject of judicial review, she agreed that there might be room for argument and that the application was not *prima facie* frivolous or without any merits whatsoever.

16 This enabled the court to embark on the application for judicial review proper. Counsel for the applicant immediately accepted that the third form of relief sought (a temporary stay of proceedings in the magistrates' court) was no longer a live issue, taking into account that there was going to be no delay between the leave to apply and the judicial review proper. The court needed to concentrate only on (a) and (b). Relief (a) was for an order of prohibition. Relief (b) was for a declaration. Counsel for the applicant accepted that prohibition might not be the most appropriate remedy and sought leave to apply for mandamus instead.

17 I am going to proceed on the assumption, first, that the decision of the Attorney-General is reviewable, and decide whether it should be reviewed in this case. Then I will consider whether a decision of the Attorney-General is reviewable at all.

18 A prerogative order does not lie against the Crown. As *Aldous & Alder on Applications for Judicial Review*, at 59 (1985), states: "In particular . . . the declaration is the only remedy which is available against the Crown." Counsel for the applicant has sought to argue that the Attorney-General is not the Crown because of the Gibraltar Constitution. This submission has no merit and I reject the same. The Attorney-General *is* the Crown. In the circumstances, the only issue now before me, apart from the question of whether the Attorney-General's decision is reviewable, is whether this is a proper case to make a declaration.

19 What is, in reality, the complaint of the applicant? The applicant does not say that the initial prosecution was in any way improper. Neither does he complain that anything prejudicial to him appeared in the

publication of *Vox*. His real complaint is that the Attorney-General resiled from his position not to continue with the prosecution three days after he had informed the applicant that he would be withdrawing the charges against them because he thought that a fair trial might not be possible.

20 The Attorney-General gave his explanation for his change of mind to the Stipendiary Magistrate on June 14th, 1991. As I have said before, he made a mistake. All mistakes can be corrected if they do not give rise to a gross injustice. A world in which mistakes are not capable of correction would be a terrifying world, and a person who never makes a mistake would not be human.

21 Counsel for the applicant has relied quite heavily on *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.* (1), particularly to part of Lord Greene, M.R.'s judgment, where he said ([1947] 2 All E.R. at 682–683):

> ". . . [A] person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."

22 Counsel has also cited *Council of Civil Service Unions* v. *Minister for Civil Service* (2), for the proposition that judicial review lies where the decision-making authority has failed in its duty to act fairly.

23 I think I should at this juncture make clear that although the Attorney-General on June 10th, 1991, indicated that he would be withdrawing the charges against the two defendants, he never reached the stage of actually seeking the leave of the court to do so (which is necessary) or entering a *nolle prosequi*.

24 The applicant in his application for judicial review states that he has been caused distress and suffering by the Attorney-General's change of mind. I daresay that he has suffered a disillusion, but not an injustice. I do not agree that the decision to continue with the prosecution had the effect of undermining public confidence in the administration of justice. Probably not to proceed would have that effect.

25 I am not satisfied that the applicant has succeeded in his application for judicial review. I am not prepared to review the Attorney-General's decision to proceed. It cannot be said that he has acted unfairly or unlawfully. All he has done is to correct a mistake and swallow the bitter pill of admitting it. It has not been an arbitrary decision or one which I am prepared to review. I dismiss the application for judicial review on the grounds that this is not a proper case for me to review.

26 I will now consider the question of whether the decision of the Attorney-General to proceed in this case is in law reviewable. I will first set out the relevant part of s.77 of the Gibraltar Constitution Order 1969:

> "(1) The Attorney-General shall have the power in any case in which he considers it desirable so to do—
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> (*a*) to institute and undertake criminal proceedings before any court of law . . . ;
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> (*b*) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
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> (*c*) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
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> (2) The powers of the Attorney-General under the preceding subsection may be exercised by him in person or through other persons acting in accordance with his general or special instructions.
>
> (3) The powers conferred upon the Attorney-General by paragraphs (*b*) and (*c*) of subsection (1) of this section shall be vested in him to the exclusion of any other person or authority. . .
>
> (4) In the exercise of the powers conferred upon him by this section the Attorney-General shall not be subject to the direction or control of any other person or authority."

27 The position of the Attorney-General in so far as prosecutions are concerned is similar to the position of the Attorney-General in England. In the absence of any local decision I shall apply and rely on the law in England.

28 Counsel have informed me that they have been unable to discover any English decision where the Attorney-General's exercise of his power to *nolle* or not to *nolle* has been the subject of a judicial review. In fact, the authorities there are lead one to the conclusion that his decision is not reviewable. I shall start by quoting two passages in Edwards, *The Law Officers of the Crown*, 1st ed., at 7 (1964): "The courts have repeatedly recognised their impotence to control the Attorney-General in the performance of his discretionary powers." He stated (*op. cit.*, at 226): "The significant absence of any judicial control by the Courts over decisions made by the principal Law Officer of the Crown within this general area was thoroughly canvassed by the Court of Appeal in *ex p. Tomlinson* in 1899."

29 The above case is reported under the name of *R. (ex p. Tomlinson)* v. *Comptroller of Patents, Designs & Trade Marks* (4). A.L. Smith, L.J. had this to say ([1899] 1 Q.B. at 914):

> "Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control.
>
> It follows that his decisions, when exercising such functions, were not subject to review by the Court of Queens' Bench, and are not now subject to review by the Queens' Bench Division or this Court."

30 In a more recent case, *Gouriet* v. *Union of Post Office Workers* (3), a House of Lords decision dealing with a relator action, Viscount Dilhorne expressed the following opinion ([1977] 3 All E.R. at 88):

> "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues *or to the control or supervision of the courts*." [Emphasis supplied.]

It is pretentious to say that I agree with Viscount Dilhorne, but I have to say it to crystallize that the above reflects the law in Gibraltar.

31 I am firmly of the opinion that the decision of the Attorney-General to prosecute or not to prosecute; to *nolle* or not to *nolle*, is not subject to judicial review.

Application dismissed.