ROYAL COURT
(Samedi Division)

19th December, 1996

244.

Before: Sir Philip Bailhache, Bailiff, and
Jurats Blampied and Vibert

Between:	HM Attorney General	Appellant
And:	Linda Marie Tracey	Respondent

Appeal, by case stated, by the Attorney General, against the refusal of the Relief Magistrate to adjourn the prosecution against the Respondent, and the subsequent dismissal of the case.

On 27th August, 1996, **the Respondent pleaded not guilty in the Magistrate's Court to 1 count of contravening Article 80 of the Licensing (Jersey) Law 1974, by supplying intoxicating liquor on licensed premises to persons under the influence of alcohol.**
The Relief Magistrate dismissed the charge with costs.

Advocate J. C. Gollop for the Attorney General.
The Respondent did not appear and was not represented.

JUDGMENT

THE BAILIFF:

Introduction

5 The Attorney General appeals by case stated against decisions by the Relief Magistrate to refuse a request for an adjournment of the prosecution of Linda Marie Tracey ("the Respondent") for an infraction of the Licensing (Jersey) Law, 1974, and subsequently to dismiss the case, no evidence having been offered by the Centenier. Counsel for the
10 Attorney General has contended that the Relief Magistrate was acting outside his jurisdiction and that the decisions were wrong in law. He accordingly applies for an order reversing those decisions. Counsel has, however, placed before us correspondence between the Attorney General and the legal advisers of the Respondent undertaking that, if
15 the appeal were successful, the Respondent would not be prosecuted for the alleged infractions. The Attorney General brings this appeal in order to establish a point of law which is said to be of some practical importance. In view of the Attorney General's undertaking we have not

felt it necessary to request the appointment of counsel to represent the Respondent.

The Facts

Mr. Gollop supplied the Court with a helpful summary of facts which, with minor omissions of no significance, we reproduce below.

"1. *On 1st March, 1996 a John William Boyle was arrested by PC. Bisson on licensed premises known as Scruffy Murphy's Bar, Peter Street, St. Helier for being drunk and disorderly. On 3rd April, 1996 Mr. Boyle was presented before the Magistrate's Court where he pleased guilty to the charge. During the course of the hearing of Mr. Boyle's case, the Magistrate Mr. T. C. Sowden, Q.C. expressed concerns that Mr. Boyle had been served alcohol at a time when he should not have been so served due to his intoxicated state. The Magistrate therefore directed Centenier Hayward that an investigation should be undertaken by the Police as to whether any offences had been committed by the Manageress of the licensed premises being Linda Marie Tracey ("the Respondent").*

2. *Following the Magistrate's direction PC. Parker of the Licensing Unit instigated a comprehensive investigation which involved several witnesses and the consequence of this investigation was that the Respondent who was the licensee of the licensed premises was warned for a Parish Hall Enquiry on 13th June, 1996. On that occasion, she was charged by Centenier S. Foulds with an offence of supplying alcohol to persons under the influence of alcohol pursuant to Article 12(1)(g)(i) of the Licensing (Jersey) Law, 1974. The Respondent was warned to attend at the Police Court in Seale Street on Tuesday, 23rd July, 1996 at 1430 hours.*

3. *On 14th June, 1996 Centenier Shingles who had taken over the conduct of the case received a letter from Advocate J. A. Clyde-Smith requesting that the Court date of 23rd July, 1996 be moved. Advocate Clyde-Smith stated that he was already committed to a case before the Royal Court on that day and that he would also be unable to appear on 15th, 16th, 17th and 18th July, 1996. Centenier Shingles in an effort to accommodate Advocate Clyde-Smith contacted the Police Court Greffier and established that the first available date was 27th August, 1996 at 1000 hours before the No.2 Court. A facsimile was sent to Messrs. Ogier & Le Masurier confirming this date. On 15th July, 1996 Centenier Shingles received a letter from Advocate Landick confirming the new Court date.*

4. *On 13th August, 1996 a list of witnesses required for the case was sent by facsimile to Rouge Bouillon Police Station. This was approximately four weeks after the new Court date had been finalised.*

5. *On either 14th or 15th August, 1996 PC. Parker acknowledged receipt of the warning and realising that he would be out of*

the Island on a pre-paid holiday with his family contacted Centenier Shingles by telephone to explain the problem. PC. Parker explained that whilst he was the Officer in charge of the case, he felt that he had no actual evidence to give as primarily his function had been to co-ordinate the paperwork. He thus suggested the names of two other Police Officers, PC's Bisson and Smith who had been involved in the arrest of Mr. Boyle on 1st March, 1996 and who would thus be able to give evidence of the level of Mr. Boyle's intoxication at a time shortly after he had allegedly been served by the Respondent and/or members of her staff.

6. *Correspondence between the Magistrate and Assistant Chief Officer P. R. Marks and Centenier Shingles makes it clear that both Centenier Shingles and PC. Parker had expected the case against the Respondent to proceed on 27th August as there were a total of eight Prosecution witnesses who would have to give evidence.*

7. *Centenier Shingles later on either 14th or 15th August, 1996 then spoke with Centenier Foulds who originally had conduct of the case and because Centenier Shingles was due to be out of the Island between 16th August and 2nd September requested that Centenier Foulds present the case on 27th August, 1996. Centenier Foulds kindly agreed to undertake this task and Centenier Shingles informed him that he had asked for the witnesses to be warned and explained that whilst PC. Parker would be absent two other Police Officers would be called as witnesses.*

8. *During Centenier Shingles' absence from the Island Centenier Foulds passed the case onto Centenier Patton to present. Regrettably the information regarding PC. Parker's absence, the presence of the two additional witnesses and the fact that it had been proposed the case proceed irrespective of the absence of PC. Parker on 27th August, 1996 was not forwarded to Centenier Patton.*

9. *On or about 23rd August, 1996 it was brought to Centenier Patton's attention that PC. Parker was on leave. Thus Centenier Patton not knowing that it had already been agreed that PC. Parker was not due to attend but believing PC. Parker to be a vital witness for the Prosecution had Messrs. Ogier & Le Masurier advised by facsimile that the case would not proceed on 27th August, 1996 and that a remand would be sought. However, it has to be noted that even by 23rd August, 1996 none of the other Prosecution witnesses appear to have been warned and Centenier Patton having ascertained that PC. Parker was not available then issued the instruction that none of the other witnesses should be warned. He was not as already noted aware of the discussion and agreement reached previously between PC. Parker and Centenier Shingles.*

10. *It is to be noted that no explanation has been offered as to why despite the discussion and agreement between Centenier*

Shingles and PC. Parker none of the other Prosecution witnesses were warned by 23rd August, 1996."

Proceedings before the Relief Magistrate

On 27th August Centenier Patton called the case before the Relief Magistrate and applied for an adjournment. As is clear from the summary recited above, Centenier Patton was unaware of the conversation between Centenier Shingles and PC Parker. The Relief Magistrate was therefore, quite innocently but very unfortunately, given a misleading version of the background to the request for the adjournment, PC Parker being cast quite wrongly as the villain of the piece, and as the officer in charge who had left the Island on holiday without making alternative arrangements. The reality of the situation was that PC Parker had acted perfectly properly but that other mistakes had occurred. Firstly the arrangement made between PC Parker and Centenier Shingles had not been relayed to Centenier Patton. Secondly, there had been a failure to make proper arrangements to warn the witnesses for the 27th August, no action at all having been taken by the 23rd August, notwithstanding that the list had been received at Rouge Bouillon Police Station on the 13th August.

Advocate Clyde-Smith, who appeared for the Respondent in the Magistrate's Court, was of course equally unaware of the extent of the disarray in the prosecution camp. He opposed the application on the basis that the Respondent had been notified on or about the 27th June that trial would take place on the 27th August, and that the defence had spent the previous week interviewing witnesses and preparing for the hearing. The Respondent, who was then three months' pregnant, was in a very nervous state about the trial; if convicted she was at risk of losing both her employment and her accommodation which was tied to that employment. Advocate Clyde-Smith contended that a defendant was entitled to expect the case to proceed on the day for which she had been summoned. He submitted that the prosecution had been "casual" in its approach and that there was no good reason for the request for an adjournment other than, of course, the incompetence of the prosecution. He added, and we regard this as significant, that the interests of justice would be better served by dismissing the case because this would *"bring some discipline to the way these matters are dealt with in the future"*.

Judge Boxall accepted the submissions of Advocate Clyde-Smith, and dismissed the case stating:

"... there are occasions such as the present where a prosecution has been fixed for some considerable time, the person whose, perhaps not liberty, but certainly livelihood is exposed to risk, is entitled to know both the case he or she faces and the moment at which the confrontation is going to occur, so as to prepare properly and adequately for that. This seems to me to be a balancing exercise between the interest of the public on the one hand in the due administration of justice, which includes the bringing to book of offenders in proper cases, but also the requirement that a fairness be done to defendants. The prosecution might say that the prejudice to the defendant is one of delay rather than unfairness in the

sense that a defendant is not able to, or is some way prejudiced in the presentation of the defence case, and that may or may not be true although the longer delays go on the more difficult it is to ensure that the case is fairly presented because of the fading recollection of witnesses and so on. But I am inclined to accept the submission ... of Mr. Clyde-Smith that one of the most important factors here is one of general, if not, overriding principle, that the public besides having an interest in offenders being duly prosecuted also has an interest in the due and expeditious administration of justice."

In the course of delivering his judgment Judge Boxall did not expressly refuse to order an adjournment but we think that that is the necessary implication from the decision to dismiss the case.

The legal submissions of the Attorney General

Mr. Gollop drew our attention to the <u>Loi (1853) établissant la Cour pour la répression des moindres délits</u>, and in particular to the second paragraph of Article 3 which provides:

"Si par une cause quelconque un témoin nécessaire n'a pas été averti, le Juge pourra remettre l'affaire à un autre jour, et ordonner l'ajournement des témoins par un des Officiers."

He also cited Article 16 of the <u>Loi (1864) réglant la procédure criminelle</u>, the material part of which provides:

"Le Juge pourra ordonner la remise ou plusieurs remises de l'affaire quand le cas le requiert, soit pour contraindre un témoin absent à comparaître, soit pour faire entendre de nouveaux témoins, soit pour obtenir de plus amples informations, pourvu que nulle des remises n'excède trente jours."

The law quite clearly confers a wide discretion upon the magistrate as to the ordering of an adjournment.

The question for us, however, is whether and to what extent that discretion may be exercised in such a way as to bring about the premature dismissal of the charge brought against an accused person without any evidence having been heard.

Mr. Gollop drew our attention to the limited powers of magistrates in England to discharge an accused without hearing the prosecution evidence. The learned authors of <u>Blackstone's Criminal Practice</u> (1996 Ed'n) state at p.1083:

"Abuse of Process: the Discretion to Discharge Accused

Examining justices have a discretion to discharge the accused without hearing the prosecution evidence if there has been delay in bringing the proceedings of such magnitude as to render them vexatious and an abuse of the court's process (Grays Justices, ex parte Graham [1982] QB 1239). Usually it

will be necessary for the defence either to demonstrate mala fides on the prosecution's part or to show genuine prejudice and unfairness to the accused."

At p. 1394 they continue:

"According to Bingham LJ in Willesden Justices, ex parte Clemmings (1987) 87 Cr App R 280, the decided cases show that the power of magistrates to stop a prosecution arises only when it is an abuse of the process of the court in that either:

(a) the prosecution have manipulated or misused the process of the court so as to deprive the accused of a protection provided by law or take unfair advantage of a technicality, or

(b) on a balance of probability, the accused has been or would be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which was unjustifiable.

Thus, the cases divide into those concerning deliberate delay for improper reasons and those concerning delay through inefficiency."

Counsel reminded us of the chronology of events. On the 13th June there was a parish hall inquiry at which the Respondent was charged and warned to appear in court on 23rd July. Subsequently, at the request of the Respondent's legal advisers, that date was changed to the 27th August. There was no question, counsel submitted, of any undue delay on the part of the prosecution. Mr. Gollop accepted that there had been inefficiency on the part of the police, both honorary and States. He also accepted that there had been prejudice to the Respondent. He submitted however that it was only where there had been delays amounting to an abuse of process that the magistrate could properly refuse an adjournment and dismiss the charge.

Conclusion

We wish first of all to repeat that which this Court has said on more than one occasion about the difficult, if not impossible, position in which the magistrate is often placed when considering applications of the kind made in the context of the case under appeal. Judge Boxall was faced with an application persuasively made by experienced counsel for the Respondent. Who was there to put the other side of the argument and to place the relevant law before him? The answer is no-one. The reason of course is that the magistrate in Jersey is a *juge d'instruction*. He is not a *juge d'instruction* in the sense that that term is understood in France. But equally he is not a magistrate as that term is understood in England. He has a hybrid function which, although no doubt apt for the nineteenth century, has become for several reasons quite inappropriate for the process of criminal justice which has developed in recent years. The deficiencies were laid bare by the report of the Judicial and Legal Services Review Committee under the Chairmanship of Sir Godfray Le Quesne QC as long ago as 1990. The system cries out for legislative reform.

Judge Boxall was invited to weigh up the conflicting public interests of avoiding prejudice to the Respondent on the one hand and of enforcing the criminal law and ensuring that offenders receive their just deserts on the other. That was not an invitation which should have been accepted. There is no doubt that there had been inefficiency on the part of the police and that that inefficiency had been the cause of distress to the Respondent. It is not however the function of the magistrate to punish inefficiency on the part of the police by discharging a defendant without hearing the evidence against her. If an adjournment is requested by the centenier for reasons which are inadequate, the magistrate may properly order the payment of the wasted costs of the defence to be paid out of public funds. In addition he may, if he thinks fit, publicly admonish those responsible for their mistakes or inefficiency. What he may not properly do in such circumstances is to stifle the criminal process. There will no doubt be cases in which there has been an abuse of process which would justify the magistrate in dismissing a charge without hearing any evidence. But such cases will in our judgment be rare. It must not be overlooked that the criminal process in the Magistrate's Court is inquisitorial and not accusatorial. In a sense the magistrate is the prosecution. If the police have been dilatory or inefficient it is the magistrate's duty to call them to order. The magistrate in Jersey has wider and different functions from those of magistrates in England. The circumstances in which it will be proper to dismiss a charge without hearing any evidence will certainly be no more extensive than the circumstances described by Bingham LJ in R v. Willesden Justices, ex parte Clemmings to which we have referred above.

Our conclusion therefore is that this appeal must be allowed and the decisions of the Relief Magistrate quashed. In view of the Attorney General's undertaking not to pursue the prosecution of the Respondent we make no further order.

Authorities

Loi (1853) établissant la Cour pour la répression des moindres délits: Article 3(2).

Loi (1864) réglant la procédure criminelle: Article 16.

Blackstone's Criminal Practice (1996 Ed'n): pp.1083; 1394.

R -v- Willesden Justices, *ex parte* Clemmings (1987) 87 Cr.App.R. 280.