

## Misconduct by Lay Magistrates

### FRANCIS BENNION\*

In July 1999 one Timothy Price was found guilty at Witney Magistrates' Court in Oxfordshire of an offence of causing fear of violence. The incident arose out of a dispute over a parking space in the market town of Witney between Mr Price and a woman motorist, Mrs Sandy Strover. Mr Price was fined £500 and ordered to pay Mrs Strover £300 compensation. Tim Brown, for the defence, then pointed out to the court clerk that one of the three lay magistrates sitting, let us call him LM, had fallen asleep during the hearing, having to be woken up by the lady chairman. Mr Brown was reported as saying:

“She shook him slightly and he smiled. He obviously had been asleep. I don't think it was for long but it is only fair to have a retrial. They held their own investigation, found it was true and ordered a retrial.”

I shall return to the particular incidents of *R. v. Price*, but first I will describe the general position regarding misconduct by J.P.s.

### Dealing with misconduct

The lay magistracy, numbering some 30,000, dates back to the Justices of the Peace Act 1361 and is central to the administration of summary justice in England and Wales. Around 97 per cent. of criminal cases begin and end in magistrates' courts. The Lord Chancellor makes about 1,300 new appointments of J.P.s each year, which would be impracticable without the assistance of his Advisory Committees on Justices of the Peace and their Sub-Committees. At the latest reckoning there were 92 Advisory Committees and 123 Sub-Committees.<sup>1</sup>

The key qualities sought in those applying to become magistrates are officially described as: good character, understanding and communication, social awareness, maturity and sound temperament, sound judgment, and commitment and reliability. “The Lord Chancellor is confident that all magistrates will recognise the need to continue to display these qualities whilst they remain Justices of the Peace.” On appointment, a magistrate signs a declaration and undertaking which includes the following promises.

- I will administer justice according to law.
- I will not display political, racial, sexual or other bias.
- I will be circumspect in my conduct and maintain the dignity, standing and good reputation of the magistracy at all times in my private, working and public life.
- I will respect confidences.
- I will complete all prescribed training.

---

\*MA Oxon., Barrister. I am grateful to the Lord Chancellor's Department for factual assistance with this article, and also to Mr Adrian Turner for helpful comments. Responsibility for the views expressed remains entirely my own.

<sup>1</sup> This information, with much else in this article, is largely derived from an official publication entitled *Lord Chancellor's Directions for Advisory Committees on Justices of the Peace*, July 1998.

- I will resign if I become disqualified, or am unable, to sit.
- I will declare any impending criminal or civil proceedings, including divorce, against me and the outcome.
- I will say if I become bankrupt or involved in any other financial difficulties, or if a company of which I am a Director goes into liquidation.
- I will tell my Chairman and Clerk if I become a freemason.

The Lord Chancellor tells new magistrates he has a firm expectation that they will conduct themselves in such a way as to command the confidence of the community. He has sweeping powers to deal with misconduct, defined as “conduct which, in the eyes of the community as a whole, reasonably calls into question a person’s suitability to sit as a magistrate”. Apart from removal from office in grave cases, he may-

- counsel, caution or admonish a magistrate,
- suspend a magistrate from sitting,
- place a magistrate on the supplemental list, or
- direct that a magistrate shall not sit, or discharge any other magisterial duty, pending enquiry.

### **The Price case**

A minor complaint against a magistrate may be dealt with at bench level. Where a complaint raises the possibility of exercise of the Lord Chancellor’s disciplinary powers it must be referred to the Advisory Committee, who then appoint three or four persons to hold an enquiry. That is what happened in *R. v. Price*, mentioned above.

In that case the Crown Prosecution Service immediately said that in their view the conviction of Mr Price could not stand in view of the lapse by LM. The magisterial authorities immediately concurred in this view. Behind closed doors magistrates, purporting to exercise a power conferred by the Magistrates’ Courts Act 1980 s. 142(2), then ordered that a new trial be held on October 18. Mrs Strover, who as mentioned above had been awarded £300 compensation, generously said “If a magistrate fell asleep I can see that the man did not have a fair trial”. She added that the erring magistrate should be identified (which at first he was not) and said: “It was a public court. It’s public money that pays for the courts.”

On October 1 the *Oxford Mail* reported that the Advisory Committee had reprimanded LM and reminded him of the onerous responsibilities which reposed on him and the need to give full attention to his duties at all times. He was warned, said the newspaper report, that he could face disciplinary action if he repeated the error. The report gave LM’s actual name.

The retrial fixed for October 18 never took place. Mrs Strover, the victim and main witness for the prosecution, said that giving evidence at the first hearing had been such a bad experience that she did not want to go through it all again. The C.P.S. told me that consideration was given to applying for a witness summons against Mrs Strover, but in the light of her views it was decided not to do this.

At the time of the case being reopened Mr Price had already paid Mrs Strover £100 of the compensation which had been ordered. He did not ask for repayment of this. Also, the Thames Valley Magistrates’ Courts Committee took the view that had it not been for LM’s misconduct, Mrs Strover would have received the full compensation and that she should not suffer financially as a result of it. Accordingly that Committee has paid Mrs Strover an ex gratia payment of £200, making up to £300 the full amount of compensation paid.

These events raise the following questions.

### Three questions

1. Was it right for the magistrates to order a retrial under s. 142(2) without a court hearing at which the point was investigated?
2. Was it right for the magistrates to decide in private to proceed under s. 142(2)?
3. In view of the miscarriage of justice caused by LM's lapse, was a reprimand from the Advisory Committee sufficient?

What s. 142(2) says is: "Where a person is convicted by a magistrates' court and it subsequently appears to that court that it would be in the interests of justice that the case should be heard again by different justices, the court may so direct". The sidenote is "Power of magistrates' court to reopen cases to rectify mistakes etc."

Section 142(2) is abbreviated and elliptical. It does not even say that the court can quash the conviction, though that seems to be the intent. So when applied it needs to be filled out by the numerous implications it contains. For example, the emphasis is on the word "court". The implication is that this drastic power is not intended to be given to an individual justice or justices but to magistrates sitting as a court, which is required to act on proper judicial grounds.<sup>2</sup> In *Price* a court was not convened.

The next implication in s. 142(2) concerns the essential nature of curial proceedings in English law. Normally they are adversarial, though exceptions are made for certain proceedings treated as inquisitorial such as coroners' inquests, family or wardship proceedings, probate actions and so on. In criminal matters such as *Price* the presumption is that any proceedings will be adversarial, so that interested parties, if that is their wish, will be heard before any decision is taken. If heard, they will be allowed to adduce relevant evidence and to cross-examine opposing witnesses. Advocates on either side will be permitted to advance legal and other argument to the court, which will then arrive at its decision by the usual judicial processes.

It follows that in *Price* an interested party such as Mrs Strover should have been given advance notice of the hearing at which the use of the s. 142(2) power was to be considered, so that she could take legal advice and if she thought fit make representations against the quashing of Mr Price's conviction and of the compensation order made in her favour. Again, the defendant Mr Price might have preferred to let the decision stand and then challenge it in the Divisional Court. (That court, if it quashes a conviction, is not bound to direct a rehearing.) These opportunities were not afforded.

The magistrates, with the prosecution concurring, seem to have proceeded as if it necessarily followed that there must be a retrial just because in a three-person court one of the "winger" magistrates had fallen asleep for a short while. Is this correct? There are two cases in point, both reported in the *Criminal Law Review*.

The first case is *R. v. Marylebone Magistrates' Court, ex parte Perry, Schott, Dunn, Wynter and Andreas*.<sup>3</sup> For ten or fifteen minutes, while one of the accused was giving evidence, the stipendiary magistrate, as part of his judicial duties unconnected with the case, went through and signed a number of warrants. Prosecution counsel said to him that if the evidence was not relevant or admissible it should not be given but that if it was he should listen to it. The stipendiary replied that he was listening to it. *Held* The convictions would be quashed, since it

---

<sup>2</sup> *R. v. Camberwell Green Magistrates' Court, ex p Ibrahim* (1984) 148 JP 400.

<sup>3</sup> (1992) Crim. L.R. 514.

was a judicial duty to give, and appear to give, to the case before one undivided attention. This meant there had been an apparent unfairness in the conduct of the trial.

The other case is *R. v. Weston-super-Mare Justices, ex parte Taylor*.<sup>4</sup> During proceedings leading to a conviction the applicant's solicitor told the clerk of the court that he thought the chairman of a three-magistrate court had been asleep for some of the time and should withdraw from the rest of the hearing. The chairman refused to do this. *Held* The conviction would be quashed, even though it seemed to the Divisional Court that the chairman had not in fact been asleep. It was her well-known custom to close her eyes, and to look down rather than directly at a witness. Nevertheless once she was convinced that the application was genuinely made by a responsible solicitor she should have withdrawn from the bench. The applicant had indicated that he would have accepted the decision of the remaining two justices. A retrial was ordered, despite the matter being stale.

The first case might be distinguished on the ground that there was only one magistrate. The second case might be distinguished on the ground that the alleged sleeper was the chairman of the bench. Would the same principle be applied where the magistrate at fault was the "winger" in a three-person court and the court was unanimous in its conclusions? If the period of somnolence was brief, I would hope not. There should be room for the application of the *de minimis* principle here. But of course one cannot be sure what view the Divisional Court would take on the facts in *Price*. What is clear is that the magistrates acting under s. 142(2) should have analysed the arguments judicially rather than jumping to a conclusion, as it seems they did.

My second question was whether it was right for the magistrates to deal with the matter in private. I believe it was not right, and that it transgressed the basic principle of open justice. Here I cite the following from my own writings.

"The principle of the open court, requiring that court hearings should be conducted in public, is enshrined in what is known as the rule in *Scott v Scott* [1913] AC 417; see *Home Office v Harman* [1983] 1 AC 280 at 303 . . . It is intended to remedy the mischief that judges [here read magistrates] might otherwise misbehave . . . As Sir Christopher Staughton said, the court has to be most vigilant when both sides agree that information should be kept from the public (cited *R v Legal Aid Board, ex p Kaim Toder (a firm)* [1998] 3 All ER 541, *per* Lord Woolf MR at 549). In general, court proceedings are required to be subjected to the full glare of a public hearing 'because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available . . .': *R v Legal Aid Board, ex p Kaim Toder (a firm)* [1998] 3 All ER 541, *per* Lord Woolf MR at 549-550."<sup>5</sup>

---

<sup>4</sup> (1981) Crim. L.R. 179.

<sup>5</sup> Bennion, *Statutory Interpretation* (3rd edn 1997 as amended by 1999 Supplement), pp. 702-703.

In another case, where the proceedings before the magistrates were held in the absence of the public because of a risk of disorder, Lord Woolf MR cited the dictum by Lord Donaldson MR in *Leicester City Justices, ex p Barrow* [1991] 2 QB 260 at 284 that unless the interests of justice otherwise require it must be administered openly and its administration must not only be fair but be seen to be fair.<sup>6</sup>

On the final question, whether a reprimand from the Advisory Committee was sufficient, I would have thought that arguably it was not sufficient. Moreover the decision to settle for that punishment (if it can be so described) appears to have been taken by the Advisory Committee before the full consequences of LM's lapse had become apparent, that is before it was known what would happen on October 18 (in fact, as we have seen, nothing happened). The Advisory Committee's decision was it seems precipitate.

As a result of these unhappy events, public funds were deprived of a fine of £500, an additional £200 was paid to Mrs Strover out of public funds, and Mr Price escaped scot free apart from paying one-third of the compensation adjudged payable. One cannot feel that justice was best served by the events in *Price*.

2000-014 164 JP 196.

---

<sup>6</sup> *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751 at 755.