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PROSECUTING IN GUERNSEY

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With there being no specific legislation in Guernsey (unlike in Alderney and Sark) that spells out the position with regard to commencing and conducting criminal prosecutions, this article seeks to examine and explain the widely understood position that private prosecutions are not a feature of the Bailiwick's constitution.

1 That there is no such thing as a private prosecution in Guernsey is a proposition that is undoubtedly true—not just in Guernsey itself, but in the Bailiwick as a whole. It is also a proposition that is generally accepted without question. In his book *The Government and Law of Guernsey*, Dr Darryl Ogier stated (at 72) his understanding of the position quite clearly when he wrote—"All criminal proceedings are brought in the name of the Law Officers; indeed there is no right to bring a private prosecution." No authority for that bold (but undoubtedly correct) assertion is given. Perhaps it was felt by the author that as a universal truth none was needed. The question that this brief article therefore seeks to address is what support can be found for this accepted position, other than the fact that it is what everyone believes.

2 Before doing so, however, it may be worth spending a short time examining by way of comparison the position elsewhere. In England and Wales the position is different. There a prosecution may be started and undertaken by a private individual who is not acting on behalf of the police or any other prosecuting authority or body (of which there are many). That right is enshrined in legislation, namely the Prosecution of Offences Act 1985. Section 3 is a lengthy section that has developed over the years as the remit of the Crown Prosecution Service (CPS) has widened, but it states in broad terms that the Director of Public Prosecutions has a general duty, subject to certain exemptions, to take over the conduct of all criminal proceedings, other than specified proceedings (which predominantly tend to be very minor traffic infractions), instituted by a police force or by any other person.

3 Whilst it is therefore envisaged that the CPS will be the predominant prosecutor in England and Wales, s 6 of the 1985 Act nevertheless preserves the right to bring a private prosecution. Whilst

the section recognises the right of the private prosecutor to bring his own action, it also gives the DPP the power to take over the proceedings with the intention of running the case to conclusion or doing so with the sole purpose of stopping them.

4 That is an extremely powerful tool. It can be, and is, used to stop vexatious prosecutions. Equally, the DPP may intervene to bring an end to a private prosecution that, although brought with *bona fide* intention, is simply bound to fail or is clearly not in the public interest. Indeed, the DPP's right to do so was recently tested in the High Court in *R (Singh Gujra) v CPS*[1] when it was held that the policy of the CPS to take over the conduct of private prosecutions in order to discontinue them where there was no reasonable prospect of conviction against any of the accused was entirely lawful, and the court would only disturb the decision of an independent prosecutor in highly exceptional circumstances.

5 The position in Scotland is different from that south of the border. There, private prosecutions require Criminal Letters from the High Court of Judiciary and such applications are unlikely to be granted without the agreement of the Lord Advocate, the chief public prosecutor.

6 So it would seem that the position in Guernsey is quite different from that in some other parts of the British Isles. There is nothing necessarily wrong with that. Indeed in a small island community, where local rivalries and tensions can be greater, it might be argued there is every reason why the position should be different. However, there are general principles that apply uniformly across both jurisdictions. For example, no system of law wants to be troubled by prosecutions that are doomed to fail and court time is precious enough without unmeritorious cases eating into it. Further, bringing a criminal charge is a serious step and creates a number of possible adverse consequences for the proposed defendant, even if acquitted. There therefore needs to be a sensible appraisal of the evidence and the public interest before the decision to charge is taken. In Guernsey, that will be done in the first instance by a salaried police officer, sometimes with the benefit of advice from the Law Officers' Chambers. When doing so, those police officers are exercising a power that has the authority of the Law Officers, as it is in their name that all criminal proceedings are brought.

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[1] [2011] EWHC 472.

7 Has it always been thus? In seeking to answer that question it may be helpful to have some understanding of how policing in Guernsey has developed.

8 The keeping of the Queen's Peace in Guernsey can be traced back to the middle ages when feudal officers known as "Bordiers" assisted the Prévôt (Sheriff) of the Royal Court in arresting tenants who had committed offences and taking them to prison. In keeping with Norman feudal systems this method of policing seems to have continued through the development of parish constables acting in an honorary capacity. Although attempts were made in 1870 and 1886 to change the honorary system generally, the first paid policemen were employed by the Parish of St Peter Port in 1853 when four officers were recruited. In later years the number was increased to twelve and some years later both the St Sampson and Vale parishes employed two policemen each and St Martin one.

9 On 30 October 1914, during the Great War, the States agreed to create an island-wide force for the duration of the war. After it was over a Projet de Loi, entitled *Loi ayant rapport à la Police Salariée pour l'île entière*, was registered in Guernsey on 10 January 1920, from which it can be said our present-day police force was born as it was this that declared that all duties in matters criminal and in relation to law keeping in general were transferred from the parish constables to an Island Police Force.

10 Against that backdrop it is also informative to look at how criminal offences have developed in Guernsey. Le Marchant in his critical commentary on the Order in Council of 1583, which gave legal force to the Approbation des Lois, which itself had sought to identify what part of the Grand Coutumier was effective in Guernsey, states the position[2]—

> "*Tort fait à une personne est l'origine et source de tous procès et actions criminelles. Or, comme on peut faire tort à un homme ou en sa personne ou en ses biens, ainsi y a-t-il deux sortes de causes criminelles, l'une est personnelle, pour tort fait à la personne, et l'autre de possession, pour tort fait à la possession de quelqu'un; et quant aux actions criminelles personnelles, comme on peut offenser une personne de fait ou de paroles, ainsi aussy il y a deux espèces d'action personnelle criminelle, l'une de fait et l'autre de dict. Sur tout quoy il faut observer qu'il y a deux sortes d'actions criminelles, tant à cause de la matière*

[2] Livre XII at 164 (see generally Dawes, *Laws of Guernsey*, Hart Publishing, Oxford, 2003, at 7–9).

> *d'icelles qu'à raison de la procédure qu'on y tient; l'une est ditte simple, qui procède de simple délict, ou crime plus léger, et tend à réparation simple et amende pécuniaire; l'autre est ditte criminelle, criminellement intentée, qui naist de délict énorme, comme de meurtre ou mehain, (c'est à dire, de blesseure à sang et playe, et dont pourroit ensuivre perte de membre,) et tend à punition corporelle contre la partie coulpable*".

11 This roughly translates as there being two types of criminal cause—wrongs against the person and wrongs against the possessions of persons and two types of criminal acts, by actions and by words. Similarly there are two types of criminal action—"simple" (ordinary) wrongs for lesser crimes with simple reparation (*ie* damages) and pecuniary fines and "criminal" wrongs, with criminal intent, which comprise great wrongs such as murder or mayhem, with bodily punishment. What seems clear is that included amongst the "simple" wrongs were what might be termed "quasi-criminal" offences that sought not only to punish the wrongdoer but also make him pay some form of compensation to his victim.

12 Moving forward in time by some 300 years or so, considerable evidence was taken from a number of distinguished witnesses before the Commissioners inquiring into the state of the Criminal Law in the Channel Islands who reported in 1848.[3]

13 In the course of his evidence, Charles De Jersey, HM Procureur, confirmed that the Royal Court alone exercised criminal jurisdiction in Guernsey. He stated quite categorically[4] that in Guernsey no private individual can prosecute criminally, except in cases in which he had a personal interest, such as in actions for "assault, battery, libel, defamation, cries of *Haro*, and *nouvelle dessaisine*, or (as informer) for penalties for the infringement of Acts of Parliament, or of ordinances of the Royal Court."

14 In response to being asked what steps were taken for the purpose of bringing a suspect to justice, he said that information was given to one of the constables or assistant constables of the parish who, according to the gravity of the charge, either took the accused into custody, or ordered him to appear before the court. In either case the constable was bound to report the matter to the Chief Magistrate and to the Crown lawyers. All petty offences could be disposed of summarily by the Ordinary Court, sitting as a Court of Correctional

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[3] See *Second Report of the Commissioners appointed to inquire into the criminal law of the Channel Islands—Guernsey*, HMSO, London, 1848.
[4] *Ibid*, at 82.

Police; otherwise the matter would be tried by the Criminal Court. When asked by whom the proceedings against the accused party were instituted he responded—

> "The constable produces the party and the witnesses before the Court in the first instance: the act of commitment for trial directs the Crown lawyers to prosecute; who then, as public prosecutors, indict the prisoner ..."[5]

15 The Commissioners also heard from John De Haviland Utermarck, HM Comptroller. He told them—

> "The original proceedings states the name of the Constable who produces the prisoner; the subsequent proceedings are brought in the name of the Law officers."[6]

Further into his evidence, apparently aware of the dislike the Commissioners had for Guernsey's criminal justice system, he embarked upon a defensive critique of what he regarded as the advantages of it, in which he placed first—"The prosecution of all offences being conducted by public prosecutors paid by the Crown and bound to take notice of all infractions of the public peace",[7] although it should be noted that the notion of there being a "public prosecutor" was questioned by others.

16 The Comptroller was asked to clarify matters further. After confirming that the Law Officers did not have authority to dismiss charges without first consulting the Bailiff, he was asked to state his understanding of the duties of the Law Officers with regard to matters which are in themselves purely criminal (as opposed to quasi-criminal). His response is worthy of exact recital—

> "With regard to ordinances, all ordinances of the Court inflict penalties for infringements of the clauses contained in them; and all actions entered for penalties must be patronised by one of the Crown Officers either in his own name or in the name of the informer; that is, *A.B. et les Officiers de la Reine joints*.[8]

He later explained that in this context "patronize" meant that a Crown Officer must grant summonses and then "must appear in Court to prosecute upon them." "There is also a particular form of action in what are called *causes mixtes*, which are subdivided into *Causes en adjunction*, cases for assault or slander, in which a party claims

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[5] *Ibid*, at 81.
[6] *Ibid*, at 42.
[7] *Ibid*, at 43.
[8] *Ibid*, at 100.

damages. Those cases must also be patronized by one of the Law officers for the plaintiff; and the first summons sent is in the name of the party alone. If the action is admitted, or if the defendant makes a default and does not appear upon the first proceedings, an *adjunction des Officiers de la Reine* is ordered, and the subsequent proceedings are in the name of the plaintiff and the *Officier de la Reine joints*."[9]

17 Crucially, he was then asked whether those proceedings, being patronized by a Crown Officer, implied they were being carried on in his name—"No. Summonses are sent by one of the Crown officers, either in his own name alone, or in his name and the name of the informer jointly."[10] However, as we will see later, *Causes en adjunction* fell into disuse and were finally abolished in 1950.

18 Further clarification was sought by the Commissioners with regard to purely criminal offences and again it is helpful to refer to the evidence of the same witness. The following exchange initially took place[11]—

> "Who decides whether a person shall be prosecuted or not?
>
> "That is the prosecution, if it is a summary case."

then

> "... who has the right of instituting criminal proceedings; is it the Law officers of the Crown or the Court?"
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> "The constables bring every case before the Court … [and the Comptroller confirmed elsewhere—] Supposing a complaint to be made to a constable by any party, it must come before the Court. When I say 'complaint,' supposing a person were to go to the constable with a civil charge, the constable would not undertake it; but, supposing he goes to the constable with any complaint bearing the nature of criminal proceeding, he would bring it before the court."[12]

19 This is, of course, consistent with his earlier testimony and that of the Procureur. The Comptroller also gave evidence that—

> "… the constable warns all the witnesses he thinks necessary for the support of the charge, and a list of any which the prisoner may have given him, to attend at the Court. He then gives a list of the whole on both sides to the Crown officers with the nature

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[9] *Ibid*, at 100, generally.
[10] *Ibid*, at 100.
[11] *Ibid*, at 101.
[12] *Ibid*, at 101.

> of the charge. The Crown officers then lay before the Court their opinion as to whether the case is of a nature to be tried summarily, or to be sent for trial, and the Court decides whether it shall be taken summarily or not. Supposing it to be taken summarily, the charge is immediately gone in the Public Court. The Crown officers examine each witness ..."[13]

So it is clear that, whether the court decided the matter was to be dealt with summarily or on indictment, it was the Law Officers who presented the prosecution's case.

20 The Comptroller was asked if the constable had any discretion about bringing criminal matters to court and his response was—"He must bring every case before the Court which partakes of the nature of a criminal charge."[14]

21 The interchange developed by the Comptroller being quizzed as to what would happen, if having received a complaint, the constable refused to do bring the case to court—

> "The Court would then request the Crown Officers to write to the constable, stating that such a complaint had been made: and if they were of opinion there had been any gross violation of his duty on the part of the constable, they would order the constable to appear before them. If it were in the nature of carelessness, or matter of doubt, they would request the Crown Officers to write to the constable, stating that such and such a person had complained to the Court, and requiring them to bring the case forward."[15]

22 Thereafter there was another exchange—

> "Two questions arise in case of the default of the constable; one is his own criminality in not bringing the complaint forward, the other is the right of the party complaining. Supposing the constable is obstinate, has the party the right of getting his case before the Court in any other way?"
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> "Then the Court would order another constable to bring it forward."
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> "There is not known to your Law any criminal process not passing through the constable?"
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> "No."

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[13] *Ibid*, at 101.
[14] *Ibid*, at 101.
[15] *Ibid*, at 101–2.

> "There is no mode of setting a criminal case in motion, but through the constable?"
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> "No."[16]

23 It is also patently clear that overall the Commissioners did not like what they found. As the above passages perhaps allude to, they received evidence that the constables were not always disposed towards the proper exercise of their functions. Indeed in their Report reference was made to an instance where an advocate had stabbed an Englishman, thereby wounding him. The matter, although within the knowledge of the constables, was not brought before the court by them. Only once it became a matter of public concern did the court itself direct an enquiry which ultimately led to the trial and conviction of the offender but which was, of course, prosecuted by the Law Officers.

24 So, it is submitted, pulling together all the strands of the evidence that were put before the Commissioners it can be concluded that—

(1) in respect of all matters that related to crime the constable was required to bring the matter to court;

(2) thereafter the court would decide, after receiving representation from the Law Officers, whether the case should be dealt with summarily or on indictment;

(3) whichever venue was decided, it was a Law Officer who presented the case for the prosecution; and

(4) in a criminal matter there was nothing known during the 19th century that would permit a private citizen to bring a proposed defendant before the court in respect of what would today be recognised as a criminal offence.

25 With regard to the last of these points the Commissioners proposed that there should be such a right—

> "We are of the opinion that the method by which alone offences are brought within the cognizance of the Court is objectionable. We see no reason for entrusting the Police with so large a discretion; nor do we think that parties desiring to prosecute have, in the present system ample means of producing cases. We recommend that ... there should be three modes of prosecuting. We will for the present suppose that some tribunal for preliminary enquiry (either that now existing as the *Cour Du Quartier*, or any which it may be thought desirable to substitute)

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[16] *Ibid*, at 102.

> is to exist, distinct from the Court which is to try the case. We suggest that every individual should have the power of bringing a charge before this Court, and of obtaining a warrant for compelling the appearance of the accused party, where such Court, on an *ex parte* application, decides that the case ought to go on. We think, also, that the Law Officers should have the power, *ex officio* to demand a warrant."[17]

26 However, the context of the recommendations has to be appreciated. The Commissioners were clearly very troubled by many things, including aspects of the role of the parish constables and the performance by them of their duties. Parish constables were, after all, parochial and not Crown appointments and may have found themselves in situations or positions of conflict on more than a few occasions. What the Commissioners therefore saw was an unsatisfactory system of policing that was open to abuse for personal reasons and/or a failure generally to carry out duties properly. There would have been no Code for Crown Prosecutors the general principles of which, although an English document, are followed in Guernsey today and which demands objectivity and fairness in making charging and prosecution decisions. The Commissioners also felt uneasy about the implicit (and in some cases explicit) duality of role that was played by certain officers within the criminal justice system and the lack of transparency and disclosure that restricted the ability of a defendant to answer the case against him properly. In short, what they found was a system that could not be tolerated today. In addition, it should be noted that their recommendation that a private person should be able to complain directly to the court was only made in the context of getting the accused to court. The whole tenor of their other recommendations was clearly in favour of the Law Officers continuing to be "the prosecutor" and indeed went further by suggesting they be given greater power to dismiss prosecutions if they felt they were unwarranted rather than that power remaining solely within the gift of the court in circumstances where it might be perceived or directly accused of a lack of partiality.

27 It must also be noted than many of the Commissioners' recommendations were never carried out (and they themselves recognised how controversial many of them were) and that some were only carried out many, many years later and perhaps for other reasons—for example, they recommended the abolition of *causes en adjonction* but that did not occur until 1950, one hundred years later. However, what did change, albeit nearly half a century later, was the

[17] *Ibid*, at xxviii.

introduction in 1920 of a salaried police force so that what the Island then had was a professional statutory body that could meet many of the concerns expressed by the Commissioners. It should be remembered, however, that some changes to the parish system were made much earlier, in the late 19th century, by the introduction of salaried, rather than honorary, officers in certain parishes, including St Peter Port, where the majority of the little crime that there was in Guernsey would have been committed.

28 Further help in establishing that no right to private criminal prosecution existed in Guernsey may be gained from two other sources. The first is the Guernsey Court of Appeal case of *Bach v Law Officers*.[18] After referring to the historical development of the criminal law in Guernsey, the Court made reference to the case of *Smith v Harvey*[19] which, although an action for damages for personal injury based on negligence, involved consideration of the notion of criminal prescription which it addressed thus—

> "Another area in which a prescription of a year and a day was recognised by Terrien is that of minor crimes. In certain such cases an award of damages could be made to the injured individuals, but the grounds of action were plainly limited to positive intentional acts either of physical violence or of language, sometimes identified as assaults, batteries, libel and slander. This limitation can be traced in Denisart's *Collections des Decisions Nouvelles* (II p 557) and in the Commissioners' Report (p 48 para 33). The prosecution of such wrongs was of a double character, both civil and criminal, prosecuted at the same time by the injured party and by the Procureur and leading, if successful, to an award of reparation for the victim and of a penalty paid to the King (*Terrien* Bk XII p. 507; Le Marchant vol II p 165). The procedure came to be known as a *cause en adjonction*. It was noted and discussed in the Commissioners' Report and plainly existed in 1848 as a recognised form of remedy. By the *Loi Relativeaux aux Causes présentement poursuivies aux Petit Criminel, 1861* the procedure, subject to certain exceptions, became a purely civil matter without the adjunction of the Crown Officers. Eventually it was entirely abolished by the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950."[20]

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[18] .2007–08 GLR 354.
[19] [1981] Court of Appeal, Civil Appeal No. 9.
[20] *Ibid*, at 364.

29 The second source is the 1861 Loi referred to immediately above, in which art 1 specifically stated—

> "*Les causes présentment poursuivies au Petit Criminel (à l'exception de celles qui sont intentées pour les penalités et amendes imposées par les Lois et Ordonnances) seront pour l'avenir censées causes civiles, et elles seront poursuivies comme telles sans l'adjonction des Officiers de la Reine …*"

which broadly translates as—

> "The causes presently prosecuted as minor criminal matters except those instituted for penalties by way of fines imposed by laws and ordinances shall in the future be deemed to be civil causes and they shall be pursued as such without the adjunction of the Law Officers."

30 An exception to this rule was retained in the case of libel where it remained possible *obtenir l'adjonction d'un des Officiers de la Reine* and one can perhaps understand the sound policy reasons why a court would value the view and assistance of a "public prosecutor" in such a case. What this legislation certainly shows, however, is Guernsey's continued move away from the notion of mixed liability offences to there being a clear division between civil wrongs and matters that were considered as "pure" criminal offences instituted and prosecuted by the Law Officers.

31 It is perhaps difficult to explain why in the *Loi ayant rapport a l'institution d'un magistrat en police correctionnelle et pour le recouvrement de menues dettes 1925*, which created the position of a Stipendiary Magistrate to deal with summary matters, it was stated in art 1—

> "*Le Magistrat pourra exercer sa juridiction dans les causes soit criminelles soit civiles sans la présence des Officiers du Roi. Pourvu toutefois que rien dans cette loi ne déroge aux droits des Officiers du Roi d'assister aux enquêtes en cas de cause de mort et d'intenter et de poursuivre ou d'intervenir dans toute cause criminelle ou quasi-criminelle comme par le passé devant la Cour de Police Correctionnelle*."

32 Quite why, or in what circumstances, given the obvious development of criminal offences away from "quasi-criminal" matters, it was thought in 1925 that the Law Officers could intervene in a case apparently not already in their name or that was not being brought by the police on their behalf is not clear and the policy letters behind the law do not assist but perhaps, despite the apparent clarity of the Loi of 1861, it was simply the retention of the exception in libel cases in 1925 that caused it to be felt necessary to include a specific provision in the Law of 1950 to abolish without any doubt *causes en adjonction* in totality.

33 Moving to the present day, certainly to the author's personal knowledge of practising law in Guernsey since the late 1990s *all* criminal prosecutions have been prosecuted in the name of, and by or on behalf of, the Law Officers of the Crown, as was broadly considered to be the position in 1848. I think it would also be fair to say also that no present advocate, whether practising or not, has any knowledge of the position being any different at any other time in living memory and that is something of which judicial note can be taken. Indeed, as was said by the then Deputy Bailiff in *Re Clemens*[21] in the context of a case concerning prescription—

> "I have practised and been concerned with the law since 1960 as an Advocate in private practice, as a Law Officer of the Crown and as Deputy Bailiff. In none of these capacities have I ever heard it said that crime is prescribed by any period at all and it was never a consideration raised by other members of the Bar, by defendants, by the police as the source of prosecution activity, nor by any member of the public at large.
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> If year and a day prescription were part of our law there would be doubtless much learning on breaking prescription, deferring prescription by absence from the Island or incapacity, there would be an active consideration of the issue in the many cases which come before the Courts. I have no knowledge of any such learning."

34 Similarly, there would appear to be no such learning concerning the right to bring a private prosecution (indeed all the learning that there is points away from it) and certainly no statute has introduced it.

35 What about the rest of the Bailiwick? The position in Alderney and Sark is different in that the governments of those Islands have legislated on the issue. Thus in the former Island, s 16 of the Government of Alderney Law 2004 states that criminal proceedings before the Court of Alderney may be instituted only by or under the authority of Her Majesty's Procureur. A similar provision applies in respect of the Court of the Seneschal by virtue of s 14 of the Reform (Sark) Law 2008. It can be assumed that the parliaments of those two Islands, for the avoidance of doubt, only sought to replicate in their legislation what is understood to be the position in Guernsey.

36 Whether a right should exist to prosecute privately is not the subject of this short article but whatever one thinks it would appear that, as the law stands, none does.

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[21] [1985] 2 GLJ 20.

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