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"That being so, it is difficult to see how we can properly interfere with the exercise of the Court's discretion in inflicting punishment upon one of its own officers." We adhere to that opinion.

"In such cases the nature of the punishment is a matter entirely within the discretion of the Supreme Court itself."

Holding that opinion also, it seems to us that this is a case within the lines which the Court there laid down, and therefore that we ought not to grant special leave to interfere with the decision of the Supreme Court in any matter of such a character.

Appl Lovering v Brough (1985) 36 NTR 59

Special leave refused.

Solicitors, for applicant, *Sullivan Bros.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MARGARET WALSH . . . . . APPELLANT;
DEFENDANT,

AND

THOMAS DOHERTY . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Oct.* 8.

Griffith C.J., Barton and Isaacs JJ.

Notice of prosecution—"Institution of proceedings"—Notice given after lodging of complaint—Licensing Act 1885 (*Qd.*), (49 *Vict. No.* 18), *sec.* 75 (2)—*Liquor Act* 1886 (*Qd.*), (50 *Vict. No.* 30), *sec.* 25—*Justices Act* 1886 (*Qd.*), (50 *Vict. No.* 17), *secs.* 42, 52.

In a prosecution under the Queensland *Liquor Act* 1886 for any of the offences named in sec. 25 of that Act, the provisions of that section—that notice in writing of the intended prosecution shall be given to the person intended to be prosecuted, specifying the section of the Act for breach of which the prosecution is intended to be instituted—are not satisfied by the

service of a notice of prosecution after the information for the offence in question had already been laid. A prosecution has been "instituted" as soon as the complaint is lodged and the summons issued.

Decision of the Full Court: (*Doherty* v. *Walsh*; *Ex parte Walsh*, 1907 St. R. Qd., 180), reversed.

APPEAL by special leave from a decision of the Supreme Court of Queensland.

The appellant, licensee of an hotel at Roma, was prosecuted by the respondent, the licensing inspector, for an offence against sec. 75 (2) of the *Licensing Act* (Qd.), (49 Vict. No. 18), in keeping her licensed premises open for the sale of liquor on a Sunday, and was convicted and fined. She appealed from the conviction to the Supreme Court on the ground that by sec. 25 of the *Liquor Act* 1886 (Qd.), (50 Vict. No. 30), no licensee should be convicted of any offence against sec. 75 of the *Licensing Act*, "unless within fourteen days after the day on which the offence is alleged to have been committed notice in writing of the intended prosecution is given to the person intended to be prosecuted, specifying the section of the Act for breach of which the prosecution is intended to be instituted;" whereas in fact the constable who lodged the complaint had not served such notice upon the appellant until after he had taken out a summons on the complaint, which he served upon her immediately after delivery of the notice. An order *nisi* was granted by *Real* J. to quash the conviction, but the Full Court (*Cooper* C.J. and *Power* J., *diss. Real* J.) discharged the rule, considering that the word "prosecution" was used in sec. 25 in its popular meaning, so as to denote merely the proceedings in the Police Court on the day of hearing before the magistrate, and not in the legal sense of the initiation of proceedings in the prosecution by the formal lodging of a complaint. From this decision (1) an appeal was brought to the High Court by special leave.

Power, for the appellant. The meaning of sec. 25 is that the notice of the intended institution of proceedings must be served on the defendant before the institution of the proceedings, which are instituted as soon as the complaint is lodged and a summons

(1) 1907 St. R. Qd., 180.

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issued: *Thompson* v. *Harvey* (1); *Clarke* v. *Bradlaugh* (2); *Thorpe* v. *Priestnall* (3); *Beardsley* v. *Giddings* (4); *Brooks* v. *Bagshaw* (5); *R.* v. *Jack* (6); *Justices Act* 1886 (Qd.). (50 Vict. No. 17), secs. 42, 52.

Henchman, for the respondent. Sec. 25 is only intended to secure that the defendant shall have notice within fourteen days of the alleged offence that a prosecution is being commenced, in order that the evidence available for the defence may be preserved. The facts in this case amply satisfy the intention of this section, because the notice and the summons was served the very next day after the offence, and the prosecution took place, with several adjournments, at from ten to twenty-five days from the service of the notice. Under these circumstances the present objection is a pure technicality without any merits. This requirement of notice before criminal proceedings was peculiar to this Act, until the *Motor Car Act* 1903 (Eng.), (3 Edw. VII. c. 36), sec. 9 (2); and it differs from the requirement of notice in some civil actions. In the latter the defendant has to be given a certain time by notice before the action in which to consider whether he will admit or contest the claim, whereas in criminal cases no time at all need be allowed before the institution of proceedings. Hence it is clear that the notice is not a condition precedent to the lodging of the complaint. Also it is immaterial that the notice should be literally of an "intended" prosecution, if it is only a matter of five minutes between the time when the complaint was actually lodged and the time when it could properly have been lodged; *de minimis non curat lex*. The clearest and most reasonable meaning of sec. 25 is that the licensee must be given a notice of the prosecution within fourteen days of the offence; the remaining words of the section are only ancillary, or descriptive of the notice; they cannot be treated as conditions precedent: *Hardcastle on Statutory Law*, 3rd ed., 104. *Thorpe* v. *Priestnall* (3), and that line of cases are distinguishable; they turned upon the words "no prosecution shall be instituted;" whereas sec. 25 enacts that "no licensee shall be convicted."

(1) 4 H. & N., 254; 28 L.J.M.C., 163.
(2) 8 Q.B.D., 63.
(3) (1897) 1 Q.B., 159.
(4) (1904) 1 K.B., 847.
(5) (1904) 2 K.B., 798.
(6) 6 Q.L.J., 60.

No costs should be given against the respondent; this is a quasi-criminal matter in which the Crown appears in the public interest; and the appellant can only succeed, if at all, on a technical point.

Power in reply. Costs should only be refused for a technicality if it was an after-thought. But the appellant took the objection as soon as the evidence for the prosecution closed, and has relied throughout upon this point. When the Crown saw that the conviction was bad, it should have withdrawn the proceedings and had the conviction quashed under the powers given by sec. 215 of the *Justices Act* 1886. The Crown is answerable for costs if it supports the mistakes of others: *R.* v. *Whelan* (1), even though the successful appellant has been guilty of reprehensible conduct: *Fraser* v. *Graham*; *Ex parte Graham* (2).

GRIFFITH C.J. The 25th section of the *Liquor Act* 1886 enacts that no licensee shall be convicted of any offence against certain provisions of the *Licensing Act* 1885, and of the *Liquor Act* 1886, "unless within fourteen days after the day on which the offence is alleged to have been committed notice in writing of the intended prosecution is given to the person intended to be prosecuted, specifying the section of the Act for breach of which the prosecution is intended to be instituted." Three times that section uses words importing futurity. It speaks of notice of an intended prosecution; of a person intended to be prosecuted; and of a prosecution intended to be instituted. It follows that the notice must be given before the prosecution is instituted. Now a prosecution is instituted by the laying of the complaint. In the present case no notice had been given when this complaint was laid, so that the case falls within the precise language of the Statute. There is no ambiguity, and there is no context to show that the plain words ought to receive some other construction. It follows, therefore, that the point taken by the appellant was a good one, and that the information ought to have been dismissed. I think the appeal should be allowed.

(1) 6 Q.L.J., 165.

(2) 1905 St. R. Qd., 137.

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BARTON J. I agree; I think the case should have been dismissed.

ISAACS J. I agree, and I would like only to add that in this case, whichever way you look at it, the prosecution must fail because the notice that was given was a notice that "an information will be laid against you." That was attempted to be proved in aid, not of an information afterwards laid, but of an information then already laid. The two things do not cohere; so, whatever interpretation is given to the section, there was absolutely no previous notice given at any time of the information that had been laid, and there was no summons afterwards issued in pursuance of the notice that was given.

GRIFFITH C.J. With regard to costs, we do not see any satisfactory reason for departing from the ordinary rule that the loser pays.

Appeal allowed; order appealed from discharged; order to quash made absolute with costs; respondent to pay the costs of the appeal.

Solicitors, for appellant, *Chambers & Macnab.*

Solicitors, for respondent, *Hellicar* (Crown Solicitor).

N. G. P.