

Session Cases/Sessions (1906-Present)/1961/M'Bain v. Crichton - 1961 JC 25

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## **M'Bain v. Crichton**

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### **HIGH COURT OF JUSTICIARY**

**1961-02-03**

*Crime - Procedure - Private prosecution - Obscene publication - Bill by member of public for criminal letters - Refusal of Lord Advocate to concur - Nature of wrong - Circumstances in which bill refused..*

A private citizen presented a bill wherein he sought the grant of criminal letters to enable him to prosecute a bookseller for exposing for sale, and for selling, a book which the complainer alleged to be obscene and to be designed to corrupt the morals of the public and, in particular, the morals of young people. The complainer claimed that he had suffered a personal and particular wrong as a result of the sale of the book, both because he had been shocked and outraged by reading it, and also because of his special concern with the morals and welfare of young people, and his connexion with organisations having similar interests. The Lord Advocate having refused to concur in the proposed prosecution, the complainer sought either to be permitted to prosecute without his concurrence or that the Lord Advocate should be desired, or required, to give his concurrence to the prosecution.

Alexander Gilchrist M'Bain, chartered accountant, Glasgow, presented to the High Court of Justiciary a bill wherein he applied for criminal letters to bring a private prosecution against Ronald George Brown Crichton, a bookseller in Glasgow, for exposing for sale and for selling a book called *Lady Chatterley's Lover*, by the author D. H. Lawrence, which was alleged by the complainer to be obscene. The Lord Advocate had previously considered the matter, and had come to the conclusion that there was not any justification for a prosecution in connexion with its sale. He had decided, accordingly, not to prosecute at his own instance and he declined to concur in the private prosecution which Mr M'Bain wished to institute.

The bill set forth:-'That albeit by the laws of this and every other well-governed realm, the publication, vending, circulation or exposure for sale of any lewd, impure, gross or obscene book or printed work devised, contrived and intended to vitiate and corrupt the morals of the lieges, particularly of the youth or young persons of both sexes, and to raise and create in their minds inordinate and lustful desires, is a crime of heinous nature and severely punishable; yet true it is and of verity that the said Ronald George Brown Crichton is guilty of the said crime, as actor or art and part; in so far as the said Ronald George Brown Crichton wickedly and feloniously exposed for sale and by the hand of his servant on tenth January 1961, at his said place of business at "The Scottish Centre," 158 Hope Street, Glasgow, wickedly and feloniously sold to the complainer a book, namely, *Lady Chatterley's Lover*, by David Herbert Lawrence, published by Penguin Books Limited, Middlesex, which was lewd, impure, gross and obscene and contained passages of a lewd, impure,

gross and obscene nature, devised, contrived and intended to vitiate and corrupt the morals of the lieges, particularly of the youth or young persons of both sexes, and to raise and create in their minds inordinate and lustful desires; and the said passages, being improper and unfit to be set forth at length or read in any Court of Justice, copies of the said book are now lodged in the hands of the High Court of Justiciary, that the said Ronald George Brown Crichton may have an opportunity of seeing the same; and the said passages in the said book more particularly referred to are at pages ... thereof; all which or part thereof being found proven by the verdict of an assize or admitted by the judicial confession of the said Ronald George Brown Crichton before your Lordships in a Court of Justiciary, to be holden by you or any one or more of your number within the Criminal Court House of Edinburgh, upon a day to be appointed by your Lordships, the said Ronald George Brown Crichton ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.'

In view of the refusal of the Lord Advocate to concur in the proposed prosecution, the Court ordered that the bill be intimated to him and appointed a day for a hearing on it.

The case was heard before the High Court of Justiciary on 3rd February 1961, when the Lord Advocate appeared for the public interest.

Held (1) that it was not the function of the Court to review the Lord Advocate's exercise of his discretion in refusing to concur in a private prosecution, nor to examine the reasons which had affected that exercise, and (2) that the only wrong alleged by the complainer was of a general and public nature, and that he had failed to show that peculiar and special personal interest in the alleged wrong which was necessary to sustain a private prosecution.

This bill for criminal letters has been presented to the High Court of Justiciary by Mr A. G. M'Bain, chartered accountant, Glasgow, asking for criminal letters to enable him to initiate a prosecution against a certain bookseller in Glasgow for exposing for sale and selling in his place of business a book called *Lady Chatterley's Lover*, by D. H. Lawrence, which he alleges is lewd, impure, gross and obscene, and contains passages contrived and intended to corrupt the morals of the lieges, and particularly of the youth of both sexes.

Since the Lord Advocate has refused his concurrence to the proposed prosecution, this Court ordered intimation of the bill to be made to the Lord Advocate, as is the custom, and appointed a day for the hearing of the bill. The Lord Advocate has appeared in person at this hearing and has informed the Court that he has fully investigated the matter more than once and, in the exercise of that wide discretion which is invested in the Lord Advocate, he has come to the conclusion

1 Hume on Crimes, vol. ii, pp. 118 et seq

2 Ibid., pp. 126 and 127; *J. & P. Coats, Limited v. Brown*, 6 Adam, 19, 1909 S. C. (J.) 29; *Mackintosh v. H. M. Advocate*, (1872) 2 Couper, 236; *Robertson v. H. M. Advocate*, (1887) 1 White, 468, 15 R. (J.) 1

3 *J. & P. Coats, Limited v. Brown*, 6 Adam, 19, Lord Justice-Clerk Macdonald at p. 37, 1909 S. C. (J.) 29, at pp. 33 and 34

4 Ibid., Lord Justice-Clerk Macdonald at p. 40, 1909 S. C. (J.) at p. 35, Lord M'Laren at pp. 43-45, 1909 S. C. (J.) at pp. 37 and 38

5 Macdonald on Criminal Law, (5th ed.) p. 152; *H. M. Advocate v. Robinson*, (1843) 1 Broun, 643

6 *Mackintosh v. H. M. Advocate*, 2 Couper, 236, Lord Justice-Clerk Moncreiff at pp. 252 and 253, Lord Deas at p. 255

7 Ibid., Lord Deas at pp. 256 and 257 that a prosecution would not be justified in connexion with this matter. He has therefore decided not to prosecute at his own instance and not to give his concurrence to the private prosecution which the present complainer desires to raise.

The Lord Advocate is quite entitled to take up this position. In this country he is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion. This system has operated in Scotland for centuries, and—see Alison on Criminal Law, vol. ii, p. 88—the result has completely proved the justice of these principles, for such has become the public confidence in the decision of the Lord Advocate and his deputies on the grounds of prosecution, that private prosecutions have almost gone into disuse. It is utterly inconsistent with such a system that the Courts should examine, as it was suggested it would be proper or competent for us to do, the reasons which have affected the Lord Advocate in deciding how to exercise his discretion, and it would be still more absurd for this Court to proceed to review their soundness. Any dicta indicating that such a course is open to any Court are, in my view, quite unsound.

But the lack of the Lord Advocate's concurrence is not necessarily fatal to a private prosecution. Although we cannot review the exercise of the Lord Advocate's discretion nor his reasons for exercising it in the way he did, this Court can permit, and on rare occasions has permitted, a private prosecutor to proceed without the Lord Advocate's concurrence. But to entitle a private prosecutor to do so, he must be able to show some special personal interest in the matter which, notwithstanding the Lord Advocate's decision in the public interest, satisfies us that a private prosecution in respect of this special personal interest may proceed. Hume on Crimes, vol. ii, at p. 119, puts it thus: 'To support his instance the individual complainer must be able therefore to show some substantial and peculiar interest in the issue of the trial; an interest arising out of some injury which he, beyond others, has suffered on the occasion libelled, and at which he is entitled to feel more than the ordinary indignation, with which his fellow citizens will regard it. It is not therefore sufficient, that he has some feeble and remote concern in the issue, or one of a general nature, in common with a whole neighbourhood, or with all of the same order or class of society.' A similar principle is laid down in Alison on Criminal Law, vol. ii, p. 100, where the learned author expresses the matter thus:—'To support his instance or title to carry on such a process (that is to say, a private prosecution) the private party must be able to show some substantial and peculiar interest in the issue of Crichton. the trial, an interest arising from what he, beyond all others, has suffered on the occasion libelled, and at which he is entitled to feel more than ordinary indignation.' (Compare also Macdonald on Criminal Law, (5th ed.) p. 212; Renton and Brown, Criminal Procedure, (3rd ed.) p. 27 and p. 197.) The same principle is referred to in the opinion of Lord Justice-Clerk Macdonald (with whose opinion Lord Kinnear, Lord Low and Lord Pearson concurred), in the case of *J. & P. Coats, Limited v. Brown*, 1 at pp. 33 and 34. That was a case where a private prosecution for fraud was allowed to be instituted without the concurrence of the Lord Advocate. In that case, however, the special personal interest was demonstrable since the complainers were themselves the persons alleged to have been defrauded in the sale of coal to them by a coal merchant. They were, therefore, able to show that, in the words of Alison and of Hume, which I have already quoted, they, 'beyond all others,' had 'suffered on the occasion libelled.'

But, in the present case, the wrong complained of, if it is a wrong (and on that matter, of course, it would be quite improper for us at this stage to express an opinion one way or the other), the wrong, if it exists, is of a quite general and public nature, committed against a whole neighbourhood or perhaps against the whole country, and, in its very nature, devoid of that personal and peculiar interest without which no private prosecution ever has been sustained in Scotland. In the terms of the complainer's bill itself the wrong is not a wrong alleged to have been done to a particular individual, but a wrong to the lieges in general, or, at any rate, to the younger members of the public in general. The wrong alleged is therefore a purely public one.

It was contended before us that there was an element of private interest as well, because of the official position which the complainer held as vice-president of the Glasgow Union of Boys' Clubs. But that interest, even if it had been averred in the bill, is just as much a public interest as the interest which is averred in the bill. It does not partake of that essential quality without which the prosecution could not proceed at the instance of a private party, because it does not show that the complainer personally and beyond all others has suffered owing to the wrong libelled. At the highest it would only invest him with an interest as protector of the morals of a class of persons in the community—namely the younger members of it. This is in its very nature a public and not a private or personal interest.

This distinction is no mere technicality. It involves a clear and definite principle embedded in our law, stated in the institutional writers and referred to again and again in the decisions of this Court. Mr Gow has said all that could be said in favour of this prosecution proceeding at the complainer's instance without the Lord Advocate's

16 Adam, 19, at p. 37, 1909 S. C. (J.) 29, at p. 33 and 34 concurrence, but I am clearly satisfied that no interest sufficient for that purpose has been made out. In these circumstances, there is no case which would justify this Court in granting the present application.

My motion to your Lordships is that we should refuse it.

LORD CARMONT.—I concur.

LORD GUTHRIE.—I also agree. In view of the submission of counsel for the complainer, it is essential to emphasise the limited function of the Court in an application for criminal letters. The Court is not here to review the Lord Advocate's exercise of his discretion in declining to prosecute the exposure for sale and selling of the book mentioned in the bill. That would be to confuse the functions of a Court of law and of the Minister of the Crown charged with the duty of the prosecution of crime. This Court has not the information, nor the means of obtaining the necessary information, to test the Lord Advocate's reasons for declining to prosecute, and in many cases it would be in the highest degree undesirable that his reasons should be disclosed. Therefore, the question before us is the very limited one, whether, notwithstanding the Lord Advocate's exercise of his discretion by refusing to prosecute, criminal letters should be granted enabling the present complainer to bring a prosecution as a private citizen.

In deciding whether or not such an application will be granted, the Court will consider the facts alleged in the bill in order to decide whether the circumstances therein set forth are such, that an exceptional remedy should be allowed to the complainer.

Now, in the bill which is before us, what is said is that the book is obscene and contains passages contrived and intended to corrupt the morals of the lieges, especially of young people. There is no statement of special harm inflicted on the complainer as an individual. His complaint is that the public wellbeing will be affected.

It is an essential feature of criminal administration in Scotland that the Lord Advocate is the public prosecutor, upon whom rests the duty of deciding whether or not to bring a charge against a person in the circumstances reported to him. This system of prosecution by the Lord Advocate in the public interest has been tried and tested. It has worked well in the past, and it continues to work well at present. Indeed, it is a branch of Scottish legal administration of which we have reason to be proud. It is, therefore, only in highly exceptional circumstances that private prosecution will be authorised, and it is necessary, before permission for a private prosecution be granted by the Court after a refusal to prosecute by the Lord Advocate, that the complainer should have a particular and special interest to bring the prosecution as a private individual. This particular and special interest must be averred. Here, in the bill, no circumstances are stated enabling us to hold

that the complainer has a particular and special interest as a private individual. The only interest which he sets forth is the common interest of good citizens in safeguarding the morality of the community. That is not enough to justify the Court in authorising a private prosecution where the Lord Advocate has refused to proceed. Indeed, the matter may be summed up by saying shortly that the good intentions of the complainer, which we can all respect, are not sufficient to entitle him to the exceptional remedy which he claims.

*The Court refused the bill.*