



New South Wales
Council for
Civil Liberties

NSW Council for Civil Liberties Inc.

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11th November 2013

Bruce Barbour,
NSW Ombudsman
Level 24 580 George St
Sydney 2000
Email: nswombo@ombo.nsw.gov.au

Dear Bruce

CALL FOR OMBUDSMAN INVESTIGATION: TRIVIAL AND VEXATIOUS POLICE PROSECUTION

Strong statements made by NSW Magistrate David Heilpern inferring possible collateral (political) reasons for a police prosecution in a recent case¹ raise serious issues about the administration of criminal justice in NSW. NSWCCL considers these issues should be investigated by the Ombudsman.

This is a case where the applicants were two of a crowd protesting against Coal Seam Gas (CSG) on the North Coast in January 2013. They had each been charged with two criminal offences to which they pleaded not guilty. The charges were withdrawn and a new charge of attempting to commit a traffic offence was laid. The applicants sought a permanent stay of the proceedings against them.

Was there a political collateral purpose in issuing a fresh charge?

The defence argued that the new prosecution had been launched for collateral purpose - possibly for a political aim connected with the high profile issue of CSG and/or possibly because of embarrassment by 'Sydney' at the failure of a specialist police unit to comply with LEPRA in the context of the original charge.

¹ Bradley James Rankin and Alan Leslie Roberts v Police 2013

The prosecution did not offer any evidence to counter either of these claims. They argued that there was no evidence for the claims beyond conjecture. They did not, however, offer any alternative explanation of purpose that did not involve collateral matters.

The magistrate gave considerable credence to the defence claim because he could see no other apparent reasonable explanation for what otherwise presents as an extraordinarily frivolous, if not irresponsible, decision to initiate a trivial, vexatious, weak and costly new prosecution. The magistrate addresses the collateral purpose issue in the following paragraphs:

82 *The defence contends...that the prosecution has been instituted for a collateral purpose. They submit that a question arises as to whether the prosecutions are being pursued for a political aim, given the high profile issue of CSG in the community. The defence further submit that the prosecution may be as a result of embarrassment by 'Sydney' over the visiting specialist unit police and their failure to comply with LEPRA.*

83 *It is correct that the courts will not usually look behind the reason for a prosecutorial discretion. However, this is an exception to that situation. The applicants have 'fair and square' laid out their concerns relating to these matters in their submissions. Two solicitors have prepared lengthy affidavits replete with attachments to support this application. The response from the prosecution is to simply point out that there is no evidence beyond mere conjecture. To an extent that is true – there is no smoking gun that proves political interference or specialist squad interference. However, not have the police chosen to dispel these suggestions with any evidence, or any alternative scenario that does not involve collateral purpose. The informant has not filed any evidence to explain why the new charges have been laid, and had they, any cross-examination may have shed light on this issue. There is nothing in the submissions which dispel the applicants contentions. In particular, there is nothing from the informant to explain why his superiors determined to withdraw the charges, and he then instructed another prosecutor to run a different matter.*

84 *In my view, the burden on the applicant relating to collateral purpose may be shown by inference. In this case I find myself asking "what could possibly be the reason for continuing on with such an 'innocuous' charge in these circumstances?" Whilst suspicion is not enough, what else is the court to conclude when the prosecution offers no other alternative to the issues raised by the applicant? Why else would the police risk a costs order against them in the original matters which were withdrawn (which could run into many tens of thousands of dollars), drive a prosecutor up from Sydney to run the matters, arrange police witnesses to travel from Sydney all for an 'innocuous' minor traffic matter.*

85 *The defence is correct that the CSG issue is political, to say the least. The arrests in this case are just one set of many, and the defendants who have come before me are generally over 50 years, well-educated with a fair smattering of farmers and professionals. It is in that context that the realistic suspicion of political interference arises.*

86 *My mind has wavered on this issue. There is suspicion, and there is lack of any other rational purpose. However I have formed the conclusion that I am not satisfied to the requisite degree that the prosecution ...has been launched for a collateral purpose. Accordingly, I do not take into account the matters raised by the applicants on this issue.²*

² Rankin&Roberts v Police 2013

The magistrate made an on balance decision to exclude the collateral purpose issue- but his analysis and the lack of any alternative explanation by the prosecution, leave a disturbing and unanswered question about police motivations.

Why did the police pursue a new charge that was trivial, weak and vexatious?

Notwithstanding his exclusion of the collateral purpose issue, the magistrate granted a permanent stay of proceedings in relation to the new charge. His reasons are worth quoting extensively as they go to the heart of the NSWCCCL concerns about this prosecution.

107 Given the minor nature of the offence, the clear, unequivocal and inexcusable breaking of an agreement by the prosecution, the vexatious nature of further proceedings, the lack of any explanation for the delay in fresh charges, the inherent weakness of the case and the repetitive and successive nature of the ongoing proceedings, the failure by the prosecution to comply with the practice directions of the court thus leading to wasted time at Maclean, taking all these together in my view the continuation of these proceedings is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of process of the court.

108 And the fault for each of the matters referred to in the paragraph immediately above lies with the respondent police and whoever is instructing the prosecutor in relation to the fresh charges. It was perfectly clear that you couldn't interfere with the passage of a vehicle when there is no vehicle. The requirements of LEPRA are not new or difficult- just say your name at a station and warn people that if they do not move they may be arrested. An agreement to run a test case and a commitment to withdraw charges is exactly that, and the courts will not stand idly by whilst promises are broken without any explanation whatsoever beyond 'instructions'. The Local Court is not some platform for the prosecution where charges can be withdrawn one day and reinstated in some different form the next without any notice to the court of the vacation of the original hearings. And if police from Sydney are not happy with the actions of police on the North Coast, then that can be sorted out in a way that does not disadvantage the recipients of a promise, the court and ultimately the people of New South Wales.

109 It may well be that any one or even more of these matters would not have reached the threshold required. It is the combination of each of them (excluding the collateral purpose issues) that would, in my view, lead right thinking people to the conclusion this is not just unfair: to allow it to continue would bring the criminal law and the court itself into disrepute.

³

In the light of these reasons, an independent investigation is necessary to establish whether or not there was a legitimate purpose for this vexatious and weak police prosecution.

Without this, the unchallenged, reasonable suspicion that political pressure from some higher place was brought to bear on the police prosecutors will remain. Such reasonable suspicion will undermine public confidence in the integrity of the criminal justice system and the professional independence of NSW police prosecutors.

³ Rankin&Roberts v Police 2013

This concern is exacerbated by the subsequent indicator by the police prosecution that they may be considering an appeal against the magistrate's decision.⁴ In the context of the magistrate's reasons for his findings, this appears to be an extraordinary and provocative option to entertain.

NSWCCL urges you to undertake an independent investigation of this matter in the public interest. We would be most willing to discuss further with you or your officers.

NSWCCL has also written to the Police Commissioner and the Police Minister on the matter seeking their explanation for the prosecution.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Lesley Lynch'.

Dr Lesley Lynch
Secretary
NSW Council for Civil Liberties
0416497508

⁴ Mark Colvin indicated NSW Police had declined to answer his questions as the case was within the 21 day appeal period. ABC PM 4th Nov 2013