

Q.B.

A {QUEEN'S BENCH DIVISION}

REGINA v. HARINGEY JUSTICES, *Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS

1995 July 15, 26; 31

Stuart-Smith L.J. and Butterfield J.

B *Justices—Evidence—Prosecution's discretion—Prosecution refusing to call suspended police officer as witness—Discretion of prosecution to call witnesses in magistrates' court—Whether suspended officer to be called by prosecution—Whether justices having power to call witnesses*

C Two defendants were charged with threatening behaviour and assaulting a police officer following an attack on two officers in July 1994. One of the officers was subsequently suspended because of accusations concerning his honesty in a wholly unrelated matter. In accordance with the policy of the Crown Prosecution Service not to call suspended police officers if it could be avoided, the prosecutor gave notice that he would not be calling the suspended officer. The defence asked for him to be called or tendered for cross-examination. The prosecutor declined to do so, and the justices dismissed the case on the ground that it was an abuse of process.

D On an application by the prosecution for judicial review:—

E *Held*, granting the application, (1) that both in the Crown Court and in magistrates' courts the prosecution had an unfettered discretion to decide which witnesses to call, making a selection if appropriate so as to avoid calling unnecessary witnesses; that where there were special reasons for not calling important witnesses their existence should be disclosed to the defence; that in cases triable either way the provision of advance information in the form of witness statements was equivalent to the service of witness statements in the Crown Court, but in cases where advance disclosure was given merely by factual summary and in summary cases the prosecution retained an unfettered discretion as to the calling of witnesses until the trial started and the prosecution evidence was given in outline (post, pp. 356E–H, 357F–G).

F (2) That where, in the exercise of their unfettered discretion, the prosecution chose not to call a witness whose evidence was central to the incident and the justices were satisfied that the interests of justice required him to give evidence and that it was unfair to the defence for him not to do so, they should so rule; that where the prosecution subsequently refused to call the witness the justices had power to call the witness themselves; that the power to dismiss a case as an abuse of process was to be exercised sparingly and only if there was no alternative; and that, accordingly, since the justices could have called the police officer themselves, their order dismissing the case would be quashed (post, pp. 358B–C, 359C–D, G–H, 360C–F).

G *Reg. v. Oliva* [1965] 1 W.L.R. 1028, C.C.A. and *Reg. v. Russell-Jones* [1995] 1 Cr.App.R. 538, C.A. applied.

H The following cases are referred to in the judgment:

*Connelly v. Director of Public Prosecutions* [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401, H.L.(E.)

*Director of Public Prosecutions v. Hussain* (1994) 158 J.P. 602, D.C.

- Reg. v. Cleghorn* [1967] 2 Q.B. 584; [1967] 2 W.L.R. 1421; [1967] 1 All E.R. 996, C.A. A
- Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164, D.C.
- Reg. v. Oliva* [1965] 1 W.L.R. 1028; [1965] 3 All E.R. 116, C.C.A.
- Reg. v. Roberts (John Marcus)* (1984) 80 Cr.App.R. 89, C.A.
- Reg. v. Russell-Jones* [1995] 3 All E.R. 239; [1995] 1 Cr.App.R. 538, C.A.
- Reg. v. Wallwork* (1958) 42 Cr.App.R. 153, C.C.A.
- Reg. v. Wellingborough Magistrates' Court, Ex parte Francois* (1994) 158 J.P. 813, D.C. B

The following additional cases were cited in argument:

- Mills v. Cooper* [1967] 2 Q.B. 459; [1967] 2 W.L.R. 1343; [1967] 2 All E.R. 100, D.C.
- Reg. v. Balmforth* [1992] Crim.L.R. 825, C.A.
- Reg. v. Bromley Magistrates' Court, Ex parte Smith* [1995] 1 W.L.R. 944; [1995] 4 All E.R. 146, D.C. C
- Reg. v. Grafton* [1993] Q.B. 101; [1992] 3 W.L.R. 532; [1992] 4 All E.R. 609, C.A.
- Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42; [1993] 3 W.L.R. 90; [1993] 3 All E.R. 138, H.L.(E.)
- Reg. v. Marylebone Magistrates' Court, Ex parte Gatting and Emburey* (1990) 154 J.P. 549, D.C. D
- Seneviratne v. The King* [1936] 3 All E.R. 36, P.C.

#### APPLICATION for judicial review.

The Director of Public Prosecutions applied, with the leave of Carnwarth J. granted on 24 February 1995, for judicial review of the decision of the Haringey justices sitting at Highbury Magistrates' Court on 23 November 1994 that the prosecution at the trial of John Ernando-Smith and Mark Smith for threatening behaviour and assault on a police officer should, contrary to its wishes, call or tender a suspended police officer and that, as it would not do so, the charges be dismissed as an abuse of process. The applicant sought an order of certiorari to quash the decision and a declaration that it was in the discretion of the prosecution whether or not to call its witnesses and that, subject to its duty to provide proper disclosure, it should not be compelled to call, examine or tender any particular witness. The grounds on which relief was sought were that the justices had ordered the prosecution to call or tender a witness wrongly, unreasonably and in breach of natural justice, that the justices' order was thereby made without jurisdiction and that the justices had made an error of law when they had dismissed the charges. E

The facts are stated in the judgment of Stuart-Smith L.J. F

*Jeremy Carter-Manning Q.C.* and *Philippa McAtasney* for the prosecution. In the Crown Court the prosecution must have in court all the witnesses named on the back of the indictment but they have a discretion as to which witnesses to call, although they should call witnesses when it is in the interests of justice to do so and the witnesses can give direct evidence that is worthy of belief: see *Reg. v. Oliva* [1965] 1 W.L.R. 1028 and *Reg. v. Russell-Jones* [1995] 1 Cr.App.R. 538. Similarly, in the magistrates' courts the prosecution are obliged to exercise their discretion to call witnesses in the interests of justice. The defence are now often G H

**Q.B. Reg. v. Haringey Justices, Ex p. D.P.P. (D.C.)**

A better aware of the nature of the prosecution case in the magistrates' courts because of the changes to the rules pertaining to the disclosure of unused material: see *Reg. v. Bromley Magistrates' Court, Ex parte Smith* [1995] 1 W.L.R. 944. However, advance information procedures in the magistrates' courts are different to the disclosure rules of the Crown Court and, therefore, the authorities relating to witnesses in the Crown Court can only be used as guidance for the magistrates' courts. The prosecution's discretion as to whether to call a witness is a wide one (see *Reg. v. Balmforth* [1992] Crim.L.R. 825) and they are entitled not to call a police officer in the magistrates' court where there are proceedings alleging dishonesty against him.

A magistrates' court should use its power to dismiss a case for abuse of process only sparingly and when there are signs that the prosecution have manipulated or misused the process of the court: *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164; *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42 and *Director of Public Prosecutions v. Hussain*, *The Times*, 1 June 1994. It is wrong to require the prosecution to call a witness merely in order to allow the defence to fish for inconsistency or to discredit another witness: see *Reg. v. Russell-Jones* [1995] 1 Cr.App.R. 538.

Where it would be inappropriate for the defence to call a witness themselves (see *Reg. v. Wellingborough Magistrates' Court, Ex parte Francois* (1994) 158 J.P. 813) the bench should consider whether they should themselves call the witness: see *Reg. v. Wallwork* (1958) 42 Cr.App.R. 153; *Reg. v. Cleghorn* [1967] 2 Q.B. 584; *Reg. v. Roberts (John Marcus)* (1984) 80 Cr.App.R. 89 and *Reg. v. Grafton* [1993] Q.B. 101.

*Edward Fitzgerald Q.C.* and *Paul Hynes* for the defendants. The prosecution's discretion as to calling witnesses is trammelled by the requirement that they should act in the interests of justice so as to promote fairness in the trial, and this requires calling any witness worthy of belief who can give direct evidence: see *Reg. v. Russell-Jones* [1995] 1 Cr.App.R. 538 and *Seneviratne v. The King* [1936] 3 All E.R. 36. These fundamental principles apply equally in the magistrates' courts and the Crown Court: *Reg. v. Wellingborough Magistrates' Court, Ex parte Francois*, 158 J.P. 813.

It was contrary to principle not to call the suspended officer as the defendants were unable properly to deploy their defence by cross-examining on the basis that both officers had together fabricated the allegations. It was inappropriate for the defendants to call the officer themselves as such cross-examination would not be permissible in those circumstances. Further the officer could not be compelled to attend by the defendants as his anticipated testimony was on the face of matters adverse to the defence case: see *Reg. v. Marylebone Magistrates' Court, Ex parte Gating and Emburey* (1990) 154 J.P. 549. The justices were right to find that the interests of justice and fairness required the prosecution to call the officer. The magistrates' courts have the power to dismiss a case as an abuse of process. Once the justices had properly found the prosecution to be acting contrary to the interests of justice it was open to them to use that power: see *Connelly v. Director of Public Prosecutions* [1964] A.C.

1254; *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164 and *Mills v. Cooper* [1967] 2 Q.B. 459.

*Carter-Manning Q.C.* replied.

The justices did not appear and were not represented.

*Cur. adv. vult.*

31 July. STUART-SMITH L.J. handed down the following judgment. This is an application for judicial review of a decision of the Haringey justices sitting at Highbury Magistrates Court on 23 November 1994 at the trial of John Ernando-Smith and Mark Smith on charges of threatening behaviour and assault on a police officer (1) that the prosecution, contrary to its wishes, must call or tender a suspended police officer as a prosecution witness, (2) to dismiss the charges for abuse of process on the prosecution declining to call the suspended officer. The prosecution seeks an order for certiorari to quash the decision and declaratory relief. I should point out that the justices did not direct the prosecutor to call or tender the witness; they invited him to do so and, when he declined, they dismissed the case.

The charges arose out of an incident on 4 July 1994 and involved two officers on duty in uniform, Police Constables Hine and Hanna. A car went past them, stopped and the driver, Ernando-Smith, made an obscene gesture at the officers. The officers followed in their car; Ernando-Smith continued to gesture at them. The car was stopped and approached by police. Ernando-Smith aimed a blow at P.C. Hanna, then ran off and was eventually caught. As P.C. Hine was attempting to handcuff him, he lashed out. Mark Smith, who had also been in the car, approached with a sheet of plastic wood. P.C. Hanna drew his truncheon and told him to put the sheet down, whereupon Mark Smith brought it down on P.C. Hanna, injuring a finger. P.C. Hanna says he struck out with his truncheon in self-defence. Mark Smith ran off. P.C. Hanna saw Ernando-Smith punch P.C. Hine, who hit him with his truncheon to try and get the handcuffs on. They handcuffed Ernando-Smith. Meanwhile, other police officers had arrived. P.C. Hanna, assisted by another officer, pursued and arrested Mark Smith, in the course of which Mark Smith hit out at the officers. Altogether six officers came to assist.

On 22 November, the day before trial, Mr. Sininan, the Crown Prosecution Service prosecutor, learnt that P.C. Hine had been suspended for possible misconduct involving dishonesty. He considered it was possible to prove the case on the evidence of P.C. Hanna, together with the evidence of other officers who later came on the scene. It is Crown Prosecution Service policy not to rely on evidence of suspended officers if this can be avoided. On 23 November, at the court, Mr. Sininan told the defence lawyers that he was not calling P.C. Hine and that he no longer wished to rely on his evidence because he had been suspended because of an allegation that he had been involved in the theft of some money. But he would be made available to the defence if they wanted him. P.C. Hine was not actually present at court but the prosecution would consent to an adjournment if his presence was needed.

A Counsel for both defendants, who were separately represented, made an application to the court seeking to require the prosecution to call P.C. Hine or tender him for cross-examination. They submitted that failure to do so would result in unfairness to the defence and that it would be an abuse of the process of the court to insist on a trial that was unfair. The justices acceded to this submission. They invited Mr. Sininan to call or tender P.C. Hine, but he declined to do so. Accordingly, they dismissed the case on the grounds that it was an abuse of process

B Three questions arise for consideration. First, did the Crown Prosecution Service have a discretion not to call P.C. Hine as a witness? Secondly, if so, was the discretion properly exercised? Thirdly, if the answer to either of the first two questions is "No," were the justices correct to dismiss the prosecution as an abuse of process? There is very little authority on the duty of the prosecutor to call witnesses in the magistrates' court. The position in the Crown Court is, however, now well established. In *Reg. v. Oliva* [1965] 1 W.L.R. 1028, 1035-1036 Lord Parker C.J. said:

D "the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution as to whether they should call them either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interests of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."

F In *Reg. v. Russell-Jones* [1995] 1 Cr.App.R. 538, 544-545 the principles have been conveniently and succinctly summarised by Kennedy L.J.:

G "(1) Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intend to rely), if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served. (2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered. (3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. See *per* Lord Parker C.J. in *Reg. v. Oliva* [1965] 1 W.L.R. 1028. . . . (4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the

prosecutor regards the witness's evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say 'incredible,' then his evidence cannot help the jury assess the overall picture of the crucial events, hence, it is not unfair that he should not be called. . . . (5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal. (6) The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others. (7) A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken."

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Reverting to the first principle stated by Kennedy L.J., it is clear that at the stage that the prosecution are deciding which witnesses are needed to prove their case, i.e. before any statements are served (or under the old procedure the witnesses' names were on the back of the indictment) the prosecution have an unfettered discretion as to which witnesses to call. They must decide how they prove the case; they should not call unnecessary witnesses. For example, there may be a large number of witnesses of some major disaster from whom a selection should be made. There may be special reasons why they do not wish to call even an important witness, for example because of the extreme youth of a complainant and the likely adverse consequences or because the witness is too frightened and refuses to give evidence. The prosecution must of course disclose the existence of the witness and the fact that they are not proposing to call him or her; and in many cases this is done by sending a copy of the witness's statement. Then the defence can call the witness if they wish.

The same general principles should apply in the magistrates' court as in the Crown Court. But the problem is to determine at what point the procedure in that court is equivalent to service of statements (or the

A placing of names on the back of the indictment), so that from that moment the prosecution's discretion is fettered. The procedure differs depending on whether the offence is triable either way, i.e. on indictment or summarily, or only summarily. In the case of an offence triable either way, the Magistrates' Courts (Advance Information) Rules 1985 (S.I. 1985 No. 601) apply. In such cases the defendant, or those representing him, can request the prosecutor to supply him with advance information. The prosecutor must then supply either (a) a copy of the parts of the written statements of witnesses which he proposes to adduce in evidence or (b) a summary of the facts and matters of which he proposes to adduce evidence (see rule 4). If the prosecutor is of the opinion that disclosure of a particular fact or matter in compliance with rule 4 might lead to intimidation of the witness, he is not obliged to comply with the rule but he must inform the defence that certain information is being withheld (see rule 5). But in summary proceedings there is no requirement of advance information, though in practice it is frequently given voluntarily, presumably in the same way as provided for in rule 4, that is to say either by sending the statement or a summary of the facts. This is obviously sensible since in all but relatively simple cases the defence may otherwise need an adjournment to prepare the defence properly. That is what was done in this case: copies of the statements of the eight police witnesses, including that of P.C. Hine, were provided to the defence in advance of the trial

Mr. Fitzgerald submits that the discretion ceases to be unfettered in those cases triable either way when the prosecutor provides advance information, whether by sending witnesses' statements or a summary of the facts. In summary cases he submits that a similar point is reached if advance information is in fact provided. But there is obviously a problem if the prosecutor chooses to provide a summary of the facts rather than provide witnesses' statements, since the former will not necessarily identify the witnesses who will prove the facts relied upon. Moreover, it is undesirable that this court should lay down a procedure which may have the effect of making prosecutors reluctant to provide advance information in summary cases for fear that their discretion thereby becomes limited. No solution is ideal; but in my judgment in cases triable either way, where the prosecution by way of providing advance information serve copies of witnesses' statements, that is the equivalent moment to the service of witnesses' statements in the Crown Court, but in other cases the prosecutor should retain an unfettered discretion until the case starts, and the outline of the evidence is given to the court. That stage was not reached in the present case.

Where in the exercise of their unfettered discretion the prosecution choose not to call a witness, such witnesses will fall into one of two categories. First, there are those whose evidence is helpful to the defence and tends to contradict the Crown's case. On being notified of the existence of such a witness, the defence can make arrangements to call him. Secondly, there are those whose evidence supports the Crown's case but, for whatever reason, it is decided not to call him or her. In the ordinary way the defence will obviously not wish such a witness to be called. But there may be exceptional cases where the defence do wish such

a witness to be called. The instant case was such a one. Rightly or wrongly the defence considered that they would have a better prospect of establishing their case, which was that the two police officers were out to harass and assault two young black men, if they could cross-examine both officers and no doubt try to exploit discrepancies between them to show that the evidence was fabricated. Where the witness is a police officer it is in my view unrealistic to require the defence to call him and I do not think it is in the interests of justice that they should be required to do so. The situation with other witnesses may well be different and each case will have to be considered in the light of its own facts.

What then is to happen if, in the exercise of their unfettered discretion, the prosecution choose not to call a police officer. If the court is satisfied that the interests of justice require that he should give evidence and that it would be unfair to the defence that he should not do so, they should so rule, though I would emphasise that in my view this will be an exceptional case and the justices should not lightly reach this conclusion. That is what they did in the present case, and in my judgment that was a conclusion that they were entitled to reach. Indeed Mr. Carter-Manning does not seriously dispute that. Having so ruled, the prosecutor has a choice. He can either call the witness, which in the case of a police officer I would expect him to do, or decline to do so. What is clear is that the court cannot compel the prosecutor to call a witness. I will consider later in this judgment what the court should do.

This was not a case where the prosecutor considered that P.C. Hine was an unreliable witness not capable of belief. The question of the witness's credibility should be determined in relation to the content of the witness's evidence and not in relation to his credit generally unless the prosecution have reason to believe that the evidence he would give is or may be untrue because he has been found guilty of perverting the course of justice in other cases or for some such similar reason. Some purely collateral act of dishonesty, whether proved or merely suspected, does not mean that a witness's evidence on a wholly unrelated matter is not credible.

I turn to consider the policy of the Crown Prosecution Service in relation to police officers who have been suspended. This is explained in the evidence of Mr. Youngerwood, assistant chief crown prosecutor, in paragraph 5 of his affidavit. Where the officer has been convicted or disciplined in disciplinary proceedings this fact will be disclosed to the defence, the witness called and his credibility tested in the knowledge of those matters. In paragraph 5(b) and (c) the witness explains the position where there is a suspension or complaint:

“(b) where an officer is merely suspended pending completion of the inquiries or is merely the subject of a complaint which has not been adjudicated on, the prosecution will take the initial decision as to whether to call that officer in any subsequent trial. If it is considered necessary to call that officer because of the significance of his evidence in a case which clearly justifies prosecution in the public interest, it will be rare, if at all, that the credibility of that officer can be challenged in any subsequent trial on the basis of the mere complaint or suspension because, even if the prosecution thought it necessary to

A disclose such information or allegations to the defence, the defence would not be able to cross-examine the officer on any allegations which had not been adjudicated on either by conviction or disciplinary findings in order to attack the credibility of the witness. In such a scenario the prosecution knowingly run the risk of a subsequent conviction or disciplinary finding enabling the defence to appeal on the basis that the conviction is, in terms, unsafe or unsatisfactory;

B (c) where an officer has been suspended or is the subject of a complaint which has not been adjudicated upon *and* the prosecution take the view that it is possible to proceed in a subsequent trial without that officer's evidence; then it is C.P.S. policy, that whenever it is possible to so do, the officer will not be relied upon by the prosecution. It follows that, in such a scenario, any subsequent adjudication against that officer would not normally affect the safety of any conviction in a trial in which he did not participate."

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Where the witness's evidence is peripheral or merely corroborative of other evidence that is unlikely to be in dispute, there can be no possible objection to this approach. But where, as here, the witness is effectively the complainant and on any basis is central to the incident which gave rise to the charge it is in my view unsatisfactory. There is no reason to suppose that the witness is not capable of belief, unless, as I say, the alleged wrongdoing is closely associated with the case itself. The proper course in such a case is for the witness to be called by the prosecutor; he should be asked at the outset of his evidence whether he has been suspended, since otherwise the court will assume that he is a serving officer; he should be asked the reason for his suspension and whether he admits or denies what is alleged. There should be no cross-examination on these matters, save to elucidate anything that is unclear, since it does not detract from a witness's credit that allegations which are denied have been made against him. Moreover, in my opinion, he should give evidence in accordance with his statement and not merely be tendered for cross-examination. That is a procedure which is only applicable in the case of a corroborative witness, where the defence have challenged the evidence of the primary witness who is being corroborated. It follows in my judgment that the fact that P.C. Hine had been suspended from duty on the grounds that he had was no sufficient reason not to call him, either as part of the prosecution case or after the justices had ruled that he was a necessary witness.

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G In the light of Mr. Sininan's refusal to call P.C. Hine, were the justices right to dismiss the case as an abuse of process? I accept that justices do have power, if they are satisfied that the prosecution are so conducting the case that the defendant cannot obtain a fair trial, to dismiss the case as an abuse of process: see *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1347, *per* Lord Devlin and *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164. But it is a power that should only be exercised sparingly and only if there is no alternative course: see *Director of Public Prosecutions v. Hussain* (1994) 158 J.P. 602.

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Was there any alternative in this case? In my view there was. The justices could have called the witness themselves. It is clearly established

in the Crown Court that the judge has such a power: see *Reg. v. Wallwork* (1958) 42 Cr.App.R. 153; *Reg. v. Cleghorn* [1967] 2 Q.B. 584 and *Reg. v. Roberts (John Marcus)* (1984) 80 Cr.App.R. 89. But there is very little authority as to what is the position in the magistrates' court. In *Reg. v. Cleghorn* Lord Parker C.J. said, at p. 587:

"It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have a right to call a witness who has not been called by either party."

The cases I have referred to are cited in *Stone's Justices' Manual*, 127th ed. (1995), vol. 1, p. 746, para. 2-30 as support for the proposition and I can see no reason in principle why the position should be different in the magistrates' court. In *Reg. v. Wellingborough Magistrates' Court, Ex parte Francois* (1994) 158 J.P. 813, McCowan L.J., with whose judgment Buxton J. agreed, said that justices had such power. I agree. Even in the case of a professional judge it is a power to be exercised rarely. But in my judgment this was one of the rare cases where the justices should have exercised the power in preference to dismissing the case. In so saying, I do not intend any criticism of the justices or their clerk. There has hitherto been no reported case confirming their power to do so or in what circumstances it should be exercised. Moreover, either they were never invited to consider such a course or, if they were, they were discouraged from doing so by the prosecutor; the evidence is unclear on the point. In future I would not expect the prosecution to decline to call a police officer if a similar situation arose again.

I have had some doubt whether we should order certiorari and quash the decision to dismiss the case as an abuse of process on this limited ground, or whether in the exercise of our discretion we should refuse to do so. But since Mr. Carter-Manning does not ask the court to remit the case to the justices with a direction to continue the trial, I have come to the conclusion that we should quash the order, though in practice it will make no difference to the defendants. In the relief sought, the prosecution asked for a declaration but Mr. Carter-Manning accepts that the declaration asked for is not felicitously worded and for my part I hope that the prosecution will derive from this judgment sufficient guidance on the topic.

BUTTERFIELD J. I agree.

*Application allowed.  
Justices' order quashed.*

*Solicitors: Crown Prosecution Service, Headquarters (Special Casework Unit); B. M. Birnberg & Co.*

[Reported by DURAND MALET ESQ., Barrister]