

1983 November 10

[TRIANTAFYLIDIS, P., LORIS, PIKIS, JJ.]

PANAYIOTIS TTOFINIS,

Appellant.

v.

LOIZOS THEOCHARIDES AND ANOTHER

Respondents.

(Criminal Appeal No. 4423).

5 *Private prosecutions—Right to—At common law vests in every citizen injured by the criminal act—Right to private prosecution for alleged violations of the Streets and Buildings Regulation Law, Cap. 96 vests in every citizen whose rights are directly affected by such violation—Section 21 of the Law does not take away the right to a private prosecution.*

10 *Streets and Buildings Regulation Law, Cap. 96—Right to a private prosecution for alleged violations of—Vests in every citizen whose rights are directly affected by such violation—Section 21 does not take away the right to a private prosecution.*

The sole issues in this appeal were:

- 15 (a) The right of the citizen to institute criminal proceedings, that is the right to a private prosecution and,
(b) the implications of sections 21 and 23 of the Streets and Buildings Regulation Law, Cap. 96, on the exercise of this right in relation to infringements of this Law, or regulations made thereunder.

20 *Held*, per Pikis, J., Loris J. concurring and Triantafyllides, P. concurring with the result, that at common law a right to prosecute vests in every citizen injured by the criminal act; that the common law is applicable in Cyprus (see section 29(1)(c) of the Courts of Justice Law, 1960 (Law 14/60) and there is nothing in the Constitution neutralizing the position at common law as regards private prosecutions; that section 21 of Cap. 96 does
25 not purport to confer exclusive powers upon appropriate authorities to prosecute transgressors of Cap. 96 or regulations made thereunder and there is nothing in section 21, or anywhere

else in Cap. 96, taking away the right to a private prosecution; that, however, only where the rights of an individual are directly affected, as in this case where, allegedly, the illegal structure was erected upon his land, a right to prosecute accrues and that in every other case the body entrusted by law for its enforcement is the appropriate authority. 5

Per Triantafyllides, P.:

That the provisions of section 20 of Cap. 96, as well as those of section 21 of the same Law, lead, by inevitable implication, to the conclusion that obligations created by Cap. 96, and by delegated legislation made thereunder, can, as a rule, be enforced only by proceedings instituted by the "appropriate authority" concerned, as defined in Cap. 96, and not by private criminal prosecutions; that this view finds support in the relevant principle of law which establishes that obligations created by a statute can, as a rule, be enforced only in the manner specified therein (see, inter alia, *London Borough of Southwark v. Williams* [1971] 2 All E.R. 175, 179); exceptionally, however, a private individual whose immovable property is actually encroached upon unlawfully as a result of a violation of the provisions of Cap. 96, or of delegated legislation made thereunder—as it is alleged by the appellant to be the situation in the present case—is entitled to resort not only to his remedies in civil law but, also, to the remedy by means of a private criminal prosecution. 10
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Appeal allowed. 25

Cases referred to:

- R. v. Raymond* [1981] 2 All E.R. 246 (C.A.);
R. v. West London Justices [1979] 2 All E.R. 221 (C.A.);
Crane v. D.P.P. [1921] All E.R. Rep. 19 (H.L.);
Bishop of Rochester v. Bridges [1831] 1 B. & Ad. 847 at p. 859; 30
Pasmore v. Oswaldtwistle U.D.C. [1895–1899] All E.R. Rep. 191 (H.L.);
London Borough of Southwark v. Williams [1971] 2 All E.R. 175 at p. 179;
Raymond v. A.G. [1982] 2 All E.R. 847 (C.A.); 35
Gouriet v. Union of Post Office Workers [1977] 3 All E.R. 70 at p. 97 (H.L.);
R. v. Metropolitan Police Commissioner, Ex parte Blackburn [1968] 1 All E.R. 763 (C.A.).

Appeal against acquittal.

Appeal by Panayiotis Ttofinis, with the sanction of the Attorney-General of the Republic, against the judgment of the District Court of Famagusta, Eliades D. J., given on the 16th June, 1983 (Criminal Case No. 411/83) whereby the respondents were acquitted of the offences of building without a permit contrary to sections 3(1)(b), 20(1), 20(3)(a)(b), 20(2)(iii) and 203A of the Streets and Buildings Regulation Law, Cap. 96(as amended) and of erecting a building contrary to the conditions of the permit contrary to sections 3(1)(b), 9, 20(1)(a)(b)(d), 20(3)(a)(b), 20(2)(iii) and 203A of the above law, respectively.

G. Pittadjis, for the appellant.

A. Poetis, for the respondents.

Cur. adv. vult.

15 TRIANTAFYLLIDES, P.: The first judgment of the Court will be delivered by Pikis, J.

PIKIS, J.: The appellant, Panayiotis Ttofinis, laid a charge for approval before the District Court of Famagusta, accusing the respondents, Loizos Theocharides and Andreas Nourous, of infringement of the provisions of the Streets and Buildings Law. Two alternative counts were preferred, charging the accused with building without a permit, or erecting a building contrary to the conditions of the permit. Allegedly, the offensive building was built, in part, on land of the complainant. The charge was approved and the accused were summoned to answer the charges. It may be noticed that the approval of a charge under s.43 of the Criminal Procedure Law—Cap. 155, is a judicial act* notwithstanding the fact that accused has no right to be heard at that stage.**

30 When the accused appeared before the Court, they disputed the validity of the charges, as they had a right to do and, invited the Court to dismiss the charges and discharge them from answering thereto. The challenge was voiced in the context of an application for an interim injunction to restrain the accused from carrying out further building work.

* *R. v. Gateshead Justices* [1981] 1 All E.R. 1027.

** *R. v. Raymond* [1981] 2 All E.R. 246 (CA), and *R. v. West London Justices* [1979] 2 All E.R. 221 (DC).

The learned trial Judge, after hearing argument and reflecting on the rival submissions, decided that the charges were ill-founded and proceeded to acquit and discharge the accused. In his judgment, the charges were incompetently laid because the complainant had no right in law to prosecute the accused. Only the Improvement Board of Ayia Napa had authority in law to prosecute the accused. Once the charges were found to be invalid *ab initio*, the order made ought to be limited to the discharge and not the acquittal of the accused. A verdict of acquittal is legitimate only when the accused is in peril of conviction.*

The arguments on appeal rivetted, as before the trial Judge, on two issues:-

- (a) The right of the citizen to institute criminal proceedings, that is the right to a private prosecution and,
- (b) the implications of sections 21 and 23 of Cap. 96, on the exercise of this right in relation to infringements of the Streets and Buildings Law, or regulations made thereunder.

The learned trial Judge, while acknowledging that a private citizen has, under our legal system, the right to institute criminal proceedings, provided he is aggrieved by the offensive act, this right was invalidated or ousted by virtue of the provisions of s.21, establishing a special procedure for compelling local authorities to discharge their duties, including the prosecution of offenders for violation of the provisions of Cap. 96. Recalcitrant local authorities may be called to task, and their default remedied, in the manner provided by s.21. Under s.21 the Council of Ministers may require, in the first place, the local authority to carry out their duties under the law. In case of non-compliance, their omission may be put right by the appointment of a person or a Board to remedy their default at the expense of the local authority. The trial Judge concluded that s.21 rendered the Improvement Board of Ayia Napa solely responsible for the prosecution of offences under Cap. 96 and regulations made thereunder, to the exclusion of everybody

* *Crane v. D.P.P.* [1921] All E.R. Rep. 19 (HL); see, in particular, the judgment of Lord Pasmore.

else, including an individual injured as a result of the alleged violation. For his view he derived support from the principle enunciated in *Doe d. Bishop of Rochester v. Bridges* (1831) 1 B. & Ad. 847, 859, and echoed in subsequent decisions appropriately depicted at p. 859: "Where an Act makes an obligation, and enforces the obligation in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner". (Also see *Pasmore v. Oswaldtwistle U.D.C.* [1895-1899] All England Law Reports, Rep. 191 (HL), and *Borough of Southwark v. Williams* [1971] 2 All E.R. 175 (CA)).

In order to dispose of this appeal, we shall first examine the right to a private prosecution and explore its origin and, then, consider the implications of s.21—Cap. 96, in the light of the decision of the trial Court. At common law, the right to prosecute is private. A right to prosecute vests in every citizen injured by the criminal act. In its early stages of development, the law was vindicated by according due satisfaction to the victim of crime. In those days no distinction was drawn between criminal and tortuous acts. All injurious acts were punishable at the instance of the injured party by a process of self-help. It was the responsibility of the injured party to bring the culprit to justice (the subject is discussed in *The Rule of Law in Britain*, by Antony Babington, p. 25, and *The English Common Law and Doctrines of Equity and their Application in Cyprus*, p. 14 (publication in Greek).

The number of private prosecutions dropped significantly in the nineteenth century, with the establishment of an organised Police Force and assignment to it of responsibility for the detection and prosecution of crime and the creation in 1879 of the Office of the Director of Public Prosecutions. The Director of Public Prosecutions was entrusted with power to prosecute, as well as supervise the process of prosecution of offenders. The establishment of machinery for the prosecution of offenders by public authorities, did not change the nature of the prosecution that remained private in character. Moreover, the setting up of machinery for the prosecution of offenders by persons other than the injured party, was in addition and not in substitution of the right of the injured party to prosecute, subject to the power of the Director of Public Prosecutions to

take over or interfere with a private prosecution for the purpose of aborting it (see, *Raymond v. A-G* [1982] 2 All E.R. 487 (CA). *Re Cyprus Article 113.2 of the Constitution*). A private prosecution is still regarded at common law as a fundamental constitutional right of the citizen, the importance of which has not been minimised by the creation of public authorities for the prosecution of crime. In the words of *Lord Diplock in Couriet v. Union of Post Office Workers* [1977] 3 All E.R. 70, 97 (HL), "it exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law". Compared to the early days of the common law, the prosecution of crime is nowadays regarded as pre-eminently a public duty. But, as acknowledged in *R. v. Metropolitan Police Commissioner, Ex parte Blackburn* [1968] 1 All E.R. 763 (CA), the prosecution of crime cannot in law be regarded as the exclusive province of any authority. No public authority can rank above the law.

In my judgment, the right of a private prosecution symbolizes the common interest in law enforcement. Also, it earmarks the interest of victims of crime to invoke the criminal arm of the law for their protection, a right not subordinated to the exercise of discretionary powers by a public authority, except in the face of clear language. The position in Cyprus with regard to private prosecution, is very much similar to that obtaining in England. Section 29(1)(c) of the Courts of Justice Law—14/60, makes, in the absence of statutory provision to the contrary, the common law applicable in Cyprus, whereas sections 20, 23 and 24 of the same Law define the criminal jurisdiction of the Courts, solely by reference to the nature of the offence and the locality where it is committed in the case of territorial jurisdiction. The Criminal Procedure Law, Cap. 155, on the other hand, makes English Criminal Procedure Law applicable, unless inconsistent with special provisions of our law, whereas s.37 makes the commencement of criminal proceedings dependent on the approval of the charge without postulating emanation of the proceedings from any particular source as a precondition.

There is nothing in the Constitution neutralising the position at common law as regards private prosecutions. On the contrary, Article 113.2 is an empowering enactment conferring wide powers upon the Attorney-General with regard to prose-

cution, in addition and not in derogation of those vesting in other persons or authorities. Likewise, the power conferred upon Police authorities to prosecute under s.17(2) and s.19 of the Police Law—Cap. 285, is not exclusive but supplementary to the right of the victim of crime to prosecute the suspect.

Not every individual has the right of private prosecution. Only victims of crime have this right. Unlike the Roman Law, the common law never recognised *actio popularis* in any sphere of the law.

The next question is, whether Cap. 96 of the Streets and Buildings Law vested, in local authorities, by virtue of s.21 or any provision, exclusive power to prosecute offenders for contraventions of the provisions of the law. The answer is in the negative. Certainly, s.21 does not purport to confer exclusive powers upon appropriate authorities to prosecute transgressors of Cap. 96 or regulations made thereunder. All it accomplishes, is to establish a procedure for remedying defaults of “appropriate authorities” in the discharge of their duties, including failures to prosecute offenders. There is nothing in s.21, or anywhere else in Cap. 96, taking away the right to a private prosecution. The principle in *Doe* and subsequent decisions is, as we comprehend it, simply this: Where a law establishes a procedure for bringing administrative authorities to reckoning unless that procedure is first exhausted, the Court will, in the exercise of its discretion, withhold the issue of a prerogative writ. We would only be justified to uphold the ruling of the trial Judge if the Streets and Buildings Law provided that no one, other than an appropriate authority under the law, had the right to prosecute offenders. Section 21 is irrelevant to the right of a private prosecution. Therefore, the decision of the trial Judge must be reversed.

By allowing the appeal it must not be assumed that we decide that a citizen, however affected by the violations of the provisions of Cap. 96 or regulations made thereunder, has a right to prosecute the offender. On the contrary, as explained in this judgment, the right to prosecute vests only in the victim of crime. Only where the rights of an individual are directly affected, as in this case where, allegedly, the illegal structure was erected upon his land, a right to prosecute accrues. In other words,

there must be direct encroachment upon one's rights in order to sustain a private prosecution. In every other case the body entrusted by law for its enforcement, is the appropriate authority. In consequence, the owner of adjoining property does not have a right per se to move the machinery of the law whenever his neighbour builds on his own land in violation of the provisions of Cap. 96. 5

Lastly, to allay the fears of the learned trial Judge that the acknowledgment of a private prosecution in respect of violations of Cap. 96, and regulations made thereunder, may lead to duplicity of proceedings, we may remind that the Court has inherent powers to control proceedings before it with a view to avoiding multiplicity. 10

In the result, the appeal is allowed. The case will be remitted back to the trial Judge, with a direction to hear and determine the case. The respondents shall pay the costs of this appeal. The appeal is allowed with costs. 15

TRIANTAFYLIDES P.: I have had the benefit of reading in advance the judgment which has just been delivered by my brother Judge Mr. Justice Pikis and I am broadly in agreement with him as regards the outcome of this particular case. 20

I would like, however, to formulate as follows my own, somewhat more limited, approach to the matter of the right to institute a private criminal prosecution for a contravention of a provision of the Streets and Buildings Regulation Law, Cap. 96, and of delegated legislation made thereunder: 25

In my opinion it is essential to bear in mind in this respect not only the provisions of section 21 of Cap. 96, to which I do not think that I should refer in detail, but, also, those of subsections (3), (4), (5) and (6) of section 20 of Cap. 96, as amended by the Streets and Buildings Regulations (Amendment) Law, 1963 (Law 67/63), which read as follows: 30

“(3) In addition to any other penalty prescribed by this section, the Court, before which a person is convicted for any offence under subsection (1), may order— 35

(a) that the building or any part thereof, as the case may

5 be, in respect of which the offence has been committed shall be pulled down or removed within such time as shall be specified in such order, but in no case exceeding two months, unless a permit is obtained in respect thereof in the meantime from the appropriate authority:

10 Provided that such authority may, in granting such permit, impose such terms and conditions as to it may seem fit and the provisions of section 4 of this Law shall apply to every such permit;

(b) the person convicted to pay the costs of the proceedings and any fees connected with the charge, which such person ought to have paid and which he failed or refused or neglected to pay.

15 (3A) _____

20 (4) If any person against whom an order has been made under the provisions of subsection (3) or (3A) shall fail or neglect to comply with such order within the time specified therein, it shall be lawful for the appropriate authority to carry out such order and any costs incurred for the carrying out thereof shall be payable to the appropriate authority by the person against whom the order was made and such costs shall be deemed to be a penalty within the meaning of the Criminal Procedure Law, and
25 payment thereof shall be enforced accordingly.

30 (5) Any person against whom an order has been made under subsection (3) or (3A) who disobeys or fails to comply with such order shall, notwithstanding that the appropriate authority has proceeded to carry out or has carried out such order, be guilty of an offence and shall be liable to imprisonment not exceeding three months or to a fine not exceeding fifty pounds or to both such imprisonment and fine.

35 (6) All fines recovered in respect of any offence committed against this section shall be payable to the appropriate authority concerned".

The above quoted provisions of section 20 of Cap. 96, as well as those of section 21 of the same Law, lead, in my view,

by inevitable implication, to the conclusion that obligations created by Cap. 96, and by delegated legislation made thereunder, can, as a rule, be enforced only by proceedings instituted by the “appropriate authority” concerned, as defined in Cap. 96, and not by private criminal prosecutions; and this view of mine finds support in the relevant principle of law which establishes that obligations created by a statute can, as a rule, be enforced only in the manner specified therein (see, *inter alia*, *London Borough of Southwark v. Williams*, [1971] 2 All E.R. 175, 179).

I am, however, prepared to accede to the proposition that, exceptionally, a private individual whose immovable property is actually encroached upon unlawfully as a result of a violation of the provisions of Cap. 96, or of delegated legislation made thereunder—as it is alleged by the appellant to be the situation in the present case—is entitled to resort not only to his remedies in civil law but, also, to the remedy by means of a private criminal prosecution.

I leave open, at this stage, in order to consider it further, if and when the occasion arises, the issue of whether or not encroachment upon the proprietary rights of a person in a manner other than that alleged in the present case might entitle him to file a private criminal prosecution in respect of a violation of the provisions of Cap. 96 or of any delegated legislation made thereunder.

In the light of the foregoing I agree that this appeal should be allowed and that the trial Court should proceed to try this case on the basis of the charge which has been filed on behalf of the appellant.

I should point out that, in any event, it was not a proper course for the trial Court to acquit and discharge the respondents, as it appears to have done, because there was no trial of the case on its merits and the trial Court merely held that it lacked jurisdiction; consequently, there was no possibility in law of convicting or acquitting the respondents as accused persons.

TRIANTAFYLLIDES P.: Mr. Justice Loris, who has also heard

this case, is not with us today as he is, unfortunately, indisposed, but Mr. Justice Pikiis is authorized by him to read his judgment.

PIKIS J.: I will read what has been already written down and sent to me by my brother Judge Mr. Justice Loris.

5 LORIS J.: I am in agreement with the judgment of Mr. Justice Pikiis. I have nothing to add.

TRIANTAFYLLIDES P.: In the result this appeal is allowed with costs and this case should now be heard by the District Court before which it is pending.

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Appeal allowed.
Retrial ordered.