

# *Police Court Justice in France: Investigations and Hearings in Ten Cases in the Tribunal de Police*

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I have elsewhere recounted in some detail the procedural aspects of a French murder case involving an investigating judge (*juge d'instruction*) and a hearing before a court comprising three judges and nine jurors (the *cour d'assises*).<sup>1</sup> I have also examined the processing of cases heard at the intermediate level of French criminal jurisdiction in the *tribunal correctionnel*.<sup>2</sup> The purpose of those exercises was to present to an anglophone readership an account of how cases at those two levels of criminal jurisdiction were dealt with in the French system, so that a better understanding of how the French criminal justice system on those two levels actually functions could be obtained by anglophones. This should allow for more informed consideration to be given to the possibility of adoption of French (or civil law) procedures into anglophone (or common law) criminal justice systems. To complete the overall exercise in relation to French criminal justice I propose now to give an account of 10 cases in the *tribunal de police*, the third, lowest and most summary level of criminal jurisdiction in the French system, although in terms of cases dealt with the most frequented. After recounting the 10 cases, which I believe to be typical of their kind, I will consider from a common law or anglophone perspective what appear to be their most significant features, and then examine how far my perceptions accord with the provisions of the *Code de Procédure Pénale* (CPP) and with the views of academic commentators, both French and anglophone, about the French criminal justice system at this level. I will then draw some conclusions about the French criminal justice system as a whole and consider what we anglophones can learn from it.

Some introductory remarks about the *tribunal de police* may be helpful. The *tribunal de police* is the name given to the *tribunal d'instance* (the lowest level trial court) when exercising criminal jurisdiction. There are 476 *tribunaux de police* in France (including her overseas jurisdictions and including three *tribunaux* established independently of the *tribunal d'instance* in Paris, Lyon and

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1 *Anatomy of a French Murder Case* (1997) and, in a shortened version, 'Anatomy of a French Murder Case' (1997) 45 *Am J of Comp Law* 527.

2 'Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionnel' (1998) 46 *Am J of Comp Law* 757.

Marseille).<sup>3</sup> The court has jurisdiction to hear *contraventions*. There are five classes of *contravention*, all now punishable by fine only with maxima ranging from 250 francs for class one *contraventions* to 10,000 francs (20,000 francs for prescribed recidivists) for class five *contraventions*.<sup>4</sup> There is also power to order further penalties such as the suspension of a driving licence or the confiscation of weapons or stolen goods.<sup>5</sup> Class five *contraventions* were, until 1959, *délits* within the jurisdiction of the *tribunal correctionnel* and carrying imprisonment from two months to five years.<sup>6</sup> As we shall see, the *tribunaux de police* list and hear class five *contraventions* separately from *contraventions* in classes one to four and with a differently constituted court. There were some 758,000 decisions rendered by *tribunaux de police* in 1997, compared with some 400,000 by *tribunaux correctionnels* and 2,500 by *cours d'assises*,<sup>7</sup> which means that 65 per cent of cases dealt with in the criminal courts were in the *tribunaux de police*. This makes the *tribunal de police* an important component of the French criminal justice system and well worthy of study.<sup>8</sup> It affects more lives than the two higher levels of criminal jurisdiction.

The *tribunal de police* is presided over by a single judge but the court is 'constituted' in addition by a prosecutor and a recording officer (*greffier*).<sup>9</sup> The judge is a member of the court above in the judicial hierarchy (the *tribunal de grande instance*) who has been designated to sit in the lower court (the *tribunal d'instance*). The prosecutor for class five *contraventions* is a *procureur de la République* or a deputy *procureur (substitut)*, and for class one to four *contraventions* is a *commissaire de police*. The *greffier* notes by hand what transpires at the hearing and subsequently types it up so that it may be placed in the dossier.<sup>10</sup>

The judge, the *procureur* or the *commissaire de police*, and the *greffier* sit together on the bench during a hearing. The judge manages the hearing, interrogates the defendant (*prévenu*) (if present) and any civil party (*partie*

3 Ministère de la Justice, *Les Chiffres-clés de la Justice* (October 1998) at 4.

4 *Nouveau Code Pénal* (hereinafter *NCP*) article 131–13. At the time of this study four French francs were equivalent to \$A1. The franc has now been superceded by the euro, one of which being equivalent to 6.56 francs.

5 *NCP* article 131–14.

6 Jean Pradel, *Droit Pénal Général* (11th ed. 1996) at 325–26. Since 1959 *contraventions* are to be created exclusively by the Executive (for example, Conseil d'Etat) and not the Legislature, that is by Règlements rather than by Lois. See Pradel, above at 323 and *NCP* article 111–2.

7 Above n3 at 11. Of the 758,000 decisions rendered by the *tribunaux de police* 465,000 were by way of ordonnance pénale which does not involve a court hearing: see below n31 and related text.

8 There seems unfortunately to be very little in English on the *tribunal de police* and the processing of *contraventions*. As a not untypical example, in an otherwise quite comprehensive treatment of French criminal procedure by Vogler in John Hatchard, Barbara Huber & Richard Vogler (eds), *Comparative Criminal Procedure* (1996) 14–95 (hereinafter *Vogler*), there is scarcely any treatment of the *tribunal de police* and of *contraventions*. The *tribunal de police* is not even included on the 'Flow Diagram of French Model of Criminal Justice' at 20 (in *Vogler*).

9 CPP article 523.

10 There is no full recording of the hearings and no transcript.

*civile*)<sup>11</sup> or witness. The dossier recording the investigation is available on the bench and is consulted by the judge during the hearing.

Of the 10 cases I propose to examine, the hearings in five of them took place in Poitiers and the other five in Nice. The five in Poitiers involved class five *contraventions* and the five in Nice ranged from class two to class four. I will precede my examination of each of the two sets of cases with overviews of the court sittings at Poitiers and Nice at which these cases were heard.

### ***1. Cases at Poitiers — Contraventions in Class Five***

I attended a sitting of the *tribunal de police* at Poitiers on 26 January 1999. The sitting commenced at 2.15 and finished at 4.15pm. Twenty-nine cases were dealt with in that period, an average of just over four minutes per case.<sup>12</sup> As to those who appeared at the sitting (apart from the judge, the prosecutor and the *greffier*), four defendants appeared with an *avocat*, five appeared without an *avocat*, three *avocats* appeared without their client-defendants, 17 defendants did not appear nor were legally represented, and four civil parties appeared, one with an *avocat*. The defendants were convicted in all cases except three. Of those three cases, one was adjourned for two weeks, one was referred to a higher court (the *tribunal correctionnel*) because of aggravated elements in the charge (making it a *délit* rather than a *contravention*), and one was referred back to the prosecutor for transmission to the children's court as the defendant was a minor (aged 17). The conviction rate for the cases disposed of was thus 100 per cent.

After the sitting I was permitted to examine the dossiers in some of the cases. I also had discussions with the presiding judge about the cases and about the jurisdiction generally.

As a more or less representative sample of the cases dealt with I will discuss five of them, detailing the charge, the hearing and then the contents of the dossier.

#### ***A. Case One***

*The Charge:* Exceeding the speed limit by more than 50 kilometers per hour (kph).<sup>13</sup>

##### *The Hearing*

The defendant was called inside and outside the courtroom but there was no response. The judge, perusing the dossier, stated that the defendant was alleged to have been driving at 185 kph where the limit was 130kph, that there had been no accident but that it was not the defendant's first criminal offence. Asked for his

11 A civil party is someone injuriously affected by an offence who is permitted by the court to join in the prosecution of the defendant and claim civil damages and/or present material relevant to punishment.

12 The average duration of the hearings in the tribunal correctionnel at Poitiers discussed in my article, above n2, was 15 minutes.

13 Speed limits are specified in article R 10 and their non-observance punishable generally under article R 232 of the *Code de la Route*. In 1998 exceeding the speed limit by more than 50 kph was elevated from a *contravention* of the fourth class to a *contravention* of the fifth class.

requisitions the prosecutor sought a fine of 1,200 francs and a suspension of the defendant's driving licence for 35 days. In a judgment stated to be *contradictoire*<sup>14</sup> the defendant was fined 1,200 francs and his licence was suspended for 35 days *avec exécution provisoire*.<sup>15</sup>

In addition to the above sanctions a fixed cost of 150 francs is payable by all persons convicted by a *tribunal de police*.<sup>16</sup>

### *The Dossier*

The documents or groups of documents in the dossier were as follows.

1. The record (*procès-verbal*) of the report of and inquiry into the offence by the *gendarmerie*.<sup>17</sup> The speed recorded (by *cinémomètre*) was 195 kph (reduced to 185kph as a margin of reliability). Interrogated by the *gendarmerie* after having been pulled over the defendant stated that he could not recognise the offence as he had not looked at his speedometer when his speed was recorded. An alcohol test administered on the spot proved negative. He accepted a ticket for the offence and was warned that his licence could be suspended.
2. Documents relating to the citation of the defendant to appear at the hearing. These comprised a request for such a citation from the prosecutor to a local *huissier* in the area of residence of the defendant to serve the citation, notice of service of the citation by that *huissier* on the mother of the defendant at the defendant's address, and advice by the local *huissier* to the prosecutor of the service of the citation.
3. A letter from the defendant to the prosecutor stating that the radar device had not been visible, that other vehicles had been travelling at similar speeds at the time, that he had no previous convictions for speeding, and asking that these factors be taken into account in his case.
4. The criminal record (*casier judiciaire*) of the defendant showing a conviction for being absent without leave from the army and a sentence of one month's imprisonment.
5. A request from the prosecutor for an extract of the defendant's birth certificate and such extract.

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14 Signifying that the defendant had been properly cited to appear at the hearing and so could not claim a new hearing, although he could appeal against the judgment. If the defendant had not been cited to appear at the hearing, the case could have proceeded by default (*par défaut*) if he had otherwise been notified of the hearing date ('convoked') but the defendant could then have opposed the execution of the judgment and sought a new hearing. See articles 545, 487 to 495 of the CPP.

15 Execution to be immediate though subject to a stay in the event of an appeal.

16 This is by virtue of article 1018A of the *Code Général des Impôts*.

17 The *gendarmerie* and the *police nationale* are the main police forces in France. The *gendarmerie* operate in county regions and smaller urban areas while the *police nationale* operate in the larger urban areas and on the highways. Within these two forces are the judicial police (*police judiciaire*) who carry out criminal investigations. Where appropriate I will refer to the *police judiciaire* within these two forces simply as 'police'. For a fuller account of the organisation and functions of the police in France, see *Vogler*, above n8 at 58-62.

6. Notes of the hearing by the *greffier* noting the absence of the defendant, the prosecutor's requisitions and the judgment.
7. Advice by the *greffier* to the Departmental Prefect (*Préfet*) of the conviction and of the 35 day suspension, with *exécution provisoire*, of the defendant's licence.<sup>18</sup> (The dossier would eventually contain a printed record of the hearing and judgment but this was not yet there).

### **B. Case Two**

*The Charge:* Driving an uninsured motor vehicle.<sup>19</sup>

#### *The Hearing*

The defendant was called and appeared. He was not represented. He was informed by the judge of the charge and asked what he had to say about it. He said that his vehicle had been uninsured for about two weeks only because at the time he had had heavy expenditures for his children but that he had not been using it until the time he was stopped by the police. Asked for his requisitions the prosecutor sought a fine of 1,000 francs. The judgment was a fine of 1,000 francs plus a driving licence suspension of 15 days but suspended (*avec sursis*) for two years provided there was no similar offence during that period.<sup>20</sup>

#### *The Dossier*

1. *The procès-verbal* of the *police nationale* recording:
  - (a) surveillance of traffic at a point in Poitiers,
  - (b) the stopping of the defendant's vehicle and ascertaining that the required insurance had expired some two weeks earlier,
  - (c) a negative alcohol test,
  - (d) information about the defendant's personal circumstances,
  - (e) the defendant's explanations for the non-insurance ('financial problems'),
  - (f) the immobilisation of the vehicle,
  - (g) the defendant's attendance at the police station the following day,
  - (h) a telephone conversation with a prosecutor when a date for the hearing of the charge was fixed and advised to the defendant by the police,
  - (i) the defendant's attendance at the police station two days later with a current certificate of insurance, and
  - (j) the lifting of the immobilization of the vehicle.

<sup>18</sup> The conviction also involved loss of points from the defendant's driving licence, as to which see articles R 255 and 256 of the *Code de la Route*.

<sup>19</sup> An offence under article R 211-45 of the *Code des Assurances*. Insurance covering injury to third persons or to their goods is compulsory: article L 211-1.

<sup>20</sup> In addition to the fine for driving an uninsured vehicle the defendant is obliged to pay one-half of the amount of the fine to a guarantee fund (*fonds de garantie*) used to compensate victims of road accidents caused by uninsured vehicles. As to this fund see *Code des Assurances* articles L 421-1 to 421-7 and articles R 421-1 to 421-20.

2. The notice (*fiche*) of immobilization of the vehicle.
3. The convocation of the defendant to the hearing of the charge on a fixed date (the date the hearing occurred) by the police 'on the instructions of the prosecutor', with a receipt signed by the defendant.<sup>21</sup>
4. The defendant's criminal record — nil.
5. Notes of the hearing by the *greffier*.
6. Advice by the *greffier* to the Prefect of the conviction and suspended suspension of the defendant's licence (the conviction nevertheless involving loss of licence points, the administration of which is through the Prefect).
7. A print-out of the hearing and judgment, under the headings '*Débats et Procédure, Discussion, et Jugement*', signed by the presiding judge and the *greffier*.

### C. Case Three

*The Charge:* Assault occasioning an incapacity for work not exceeding eight days.<sup>22</sup>

#### *The Hearing*

The defendant was called, was not present, but was represented by an *avocat*. The victim of the alleged assault, also claiming as a civil party, announced his presence. The judge read the charge and noted from the dossier that the assault was alleged to have occurred during an exhibition of skiing and skating equipment, that the victim had lost six days work as a result and that there was a claim from the Health Insurance section of the Social Security Department for medical expenses of 1,110 francs. The *avocat* for the defendant said that his client was not able to be present that day but that he denied the allegation of assault and had two witnesses to support him who could come to court. The victim stated that he had a witness to the assault who had made a statement to the *gendarmerie* and that he wished to make a further claim for compensation, including for moral prejudice. The prosecutor stated that the guilt of the defendant was established by the dossier and requisitioned a fine of 4,000 francs and a suspension for one month of the defendant's driving licence. The judge adjourned the case for two weeks to allow the defendant to be present and to bring his witnesses.<sup>23</sup> He told the victim to detail his claim for compensation in writing to the court before the adjourned hearing.

#### *The Dossier*

1. The *procès-verbaux* of the *gendarmerie* revealing that they had taken statements from the victim (who alleged that the defendant had headbutted

21 This convocation procedure, resulting in a *comparution volontaire* (voluntary appearance) rather than the more formal citation procedure is widely used in the tribunal de police. If the defendant fails to appear the hearing can proceed by default but is not *contradictoire* and the defendant does not lose his right to a subsequent full hearing.

22 An offence under article R 625-1 §1 of the *NCP*.

23 This case, quite exceptionally, offered the prospect of a confrontation at the hearing between witnesses on the two sides.

him in the face and kneed him in the legs and stomach and that he had been treated in hospital for a mouth wound) and from a witness for the victim and that these had been put to the defendant who had denied the allegations against him and had given the names of two witnesses who would support him. The *gendarmérie* had interviewed one of those witnesses who stated there had been no violence between the defendant and the victim. These documents also included a medical certificate on behalf of the victim and a photograph of the defendant from which the victim's witness recognised the defendant. The documents also showed that a prosecutor had requested an investigation by the *gendarmérie* after the victim's complaint to them had been passed on to the prosecutor.

2. A citation by the prosecutor through an *huissier* to the defendant to appear at the hearing and an advice by the prosecutor to the victim of the hearing date.
3. A letter from the defendant to the prosecutor saying he could not be present at the hearing and authorising a named *avocat* to appear for him and a letter from the victim acknowledging receipt of the advice of the hearing date.
4. A letter from the Health Insurance section of the Social Security Department claiming 1,110.61 francs reimbursement of medical expenses incurred on behalf of the victim.
5. Notes of the hearing by the *greffier* summarising the hearing as detailed above.

#### **D. Case Four**

*The Charge:* Malicious but slight (*léger*) damage to the goods of another.<sup>24</sup>

##### *The Hearing*

The defendant, a young Arab man, was present with his *avocate*, as was the victim of the damage, an old woman. The judge read the charge and noted that the damage was to a letter box and the window of a car. The defendant, interrogated by the judge, did not contest the facts but said he would not make any reparation for the damage. He said he had been called a '*sale arabe*' (dirty Arab) by the grandson of the victim and that he and his brother had frequently been abused by the grandson. (The defendant's brother was present in court and he confirmed, by way of loud interjections, what the defendant was saying before he was threatened by the judge with expulsion from the court if he continued, at which he walked out of the courtroom.) The victim claimed 145 francs to repair the letterbox and advised that the replacement of the car window had been paid by the insurer of the car. The prosecutor remarked that the defendant had never registered for military service and then requested a fine of 2,000 francs. The defendant's *avocate* said that he had been the victim of racial abuse, that he had no income and that mediation was necessary to resolve the problems between the two families. The judge fined the defendant 2,000 francs, the payment of 1,500 francs of which was suspended. He also ordered legal aid (*aide juridictionnelle*) to be made available to the defendant. He considered the claim of the victim as a civil party and ordered the defendant to pay her damages of 145 francs.

<sup>24</sup> An offence under article R 635-1 of the *NCP*.

### *The Dossier*

1. This investigation was by the *police nationale*. Their file included the *procès-verbaux* of three interviews — one with the defendant, one with his brother and the third with the victim — and a summary of their investigation (*compte rendu d'enquête*).
2. Convocation of the defendant by the police to the hearing on instructions from the prosecutor and an acknowledgement of the convocation signed by the defendant.
3. Advice by the prosecutor to the victim of the hearing date and a receipt for that advice by the victim.
4. Criminal record of the defendant — nil.
5. Financial statement by the defendant showing no income.
6. Notes of the hearing by the *greffier*.

### **E. Case Five**

*The Charge:* Offer of credit without written notification of the right of retraction.<sup>25</sup>

### *The Hearing*

The defendant was not present but was represented by an *avocat*. The victim was not present either. The *avocat* for the defendant was allowed to explain the circumstances of the case in some detail. The defendant had been an itinerant salesman going around town and village markets. He had agreed to sell a number of saucepans to an elderly woman, the victim, totalling in price 6,900 francs. Payment was to be by six cheques of 1,150 francs each over a period of six months. The cheques, five of them postdated, were signed and handed over at the time of sale in exchange for the saucepans. After the sale the victim wrote to and telephoned the defendant for the return of her money. The defendant had cashed three of the cheques. The victim still had the saucepans. The defendant was now in liquidation but the victim, who was claiming 6,900 francs from the defendant as civil party in these criminal proceedings, had not, as she should have, made any claim in the liquidation. The *avocat* asserted that the victim could not now be constituted a civil party in these proceedings. The *avocat* then handed a file to the judge containing his submissions. The prosecutor, not concerned with the question of civil damages, sought a fine of 2,000 francs. The judge fined the defendant 3,000 francs, with suspension of payment of 2,000 francs. He declared the civil claim of the victim not to be receivable, presumably accepting the argument of the *avocat* for the defendant.

### *The Dossier*

There were two investigative files in the dossier. The first recorded an investigation by the Departmental Branch of the Directorate of Consumer

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25 An offence under article L 311-34 of the *Code de la Consommation*.



Protection and the Repression of Frauds of a complaint by the victim against the defendant. The second was a file of the *police nationale*, opened on a complaint by the Departmental Federation of Rural Families representing the victim, to which was annexed the earlier Departmental Branch file. The main document in the police file was a *procès-verbal* of an interview with the defendant who admitted that he had sold the saucepans to the victim on credit and that he had not given her an invoice and had not notified her of her right to cancel the purchase but stated that he had cashed three of the cheques only, that the victim still had the saucepans and that he thought there had been no fraud. The police informed him that there had been many similar complaints about him and that he had been interviewed seven times before about them.

The other documents in the dossier were:

1. Citations by an *huissier* at the request of the prosecutor to the defendant and the victim to appear at the hearing, receipt acknowledged of the latter but the former returned unclaimed.
2. A letter from the defendant saying he could not attend the hearing but that he would be represented by a named *avocat*.
3. A letter from the *avocat* for the defendant to the *greffier* asking for a copy of the dossier and the cost thereof.<sup>26</sup>
4. A letter from the victim saying she could not attend the hearing and enclosing a medical certificate and asking to be constituted a civil party and claiming 6,900 + 2,000 francs damages.
5. The criminal record of the defendant disclosing a conviction by the *tribunal correctionnel* for refusing to submit to a police road check.
6. An extract from a commercial register of judicial liquidations showing that the defendant ceased his commercial activity some six months after the sale of the saucepans to the victim and that the business was subsequently deregistered.
7. Notes of the hearing and judgment by the *greffier*.
8. The file of the defendant's *avocat*'s submissions.
9. A letter from the defendant's *avocat* requesting a copy of the judgment and enclosing a cheque for 60 francs.

## 2. Cases at Nice — Contraventions in Classes Two to Four

I attended a sitting of the *tribunal de police* at Nice on 7 June 1999. The sitting commenced at 2.15 and finished at 5.15pm. Sixty-one cases were dealt with during that period, an average of about three minutes per case. As to those who appeared at the sitting (apart from the judge, the *commissaire de police* (acting as prosecutor) and the *greffier*), 30 defendants appeared in person (one from detention) and 31 did not appear. Of those who appeared in person two had *avocats* representing them while five of those who did not appear were represented by *avocats*. There was one civil party who was also a defendant in a case with two

<sup>26</sup> *Avocats* for defendants have the right of access to the dossier, not the defendants themselves.

defendants.<sup>27</sup> The defendants were convicted in all cases except for two acquittals and three adjournments, giving a conviction rate of 96.5 per cent for the cases disposed of.

After the sittings I was permitted to examine the dossiers in some of the cases. I also had discussions with the presiding judge and the *greffier* about the cases and the jurisdiction generally.

As a more or less representative sample of these cases I will detail five of them.

### A. Case One

*The Charge:* Exceeding the speed limit by more than 40kph.<sup>28</sup>

#### *The Hearing*

The defendant was present, unrepresented. He said he was speeding because he was searching for medicine for his sick child and it was late at night and there was very little traffic. The *commissaire* requisitioned a fine of 1,800 francs. The judge asked the defendant if he preferred mainly a fine or mainly a suspension of licence. The defendant replied that he preferred mainly a fine as he needed his vehicle for work. He was fined 1,000 francs and his licence suspended for 15 days, but only for driving other than for his work (*activité professionnelle*).<sup>29</sup>

#### *The Dossier*

1. A photograph of the defendant driving a motor vehicle, with the date, time and speed of the vehicle inscribed on the photograph.
2. A *procès-verbal* by the *police* with the details of the offence.
3. A recognition of the offence signed by the defendant with an explanation that he had been searching for medication for his sick child at the time.
4. A requisition by the *police* to an *huissier* to cite the defendant to a hearing, the citation by the *huissier* and an acknowledgement by the defendant of personal service.
5. The criminal record of the defendant — nil.
6. Notes of the hearing by the *greffier*.

### B. Case Two

*The Charge:* Failing to stop at a red traffic light.<sup>30</sup>

#### *Procedure by Ordonnance Pénale*

This offence was originally processed by *ordonnance pénale*. The prosecution,

<sup>27</sup> Case Five.

<sup>28</sup> Under article R 232-2 of the *Code de la Route* exceeding the speed limit by more than 40kph is a *contravention* of the fourth class.

<sup>29</sup> Such suspension is provided for under article R 131-1 of the *NCP*. Under this article the judge is required to specify the nature of that *activité* and the conditions under which the defendant may drive but this is generally dealt with by the *greffier* in consultation with the defendant.

<sup>30</sup> Such a stop is required by article R 9-1 and failure to do so is punishable under article R 232 of the *Code de la Route* as a *contravention* of the fourth class.

including authorised police officers, may requisition a judge of the *tribunal de police* to issue an *ordonnance* (order) against a defendant specifying the *contravention* alleged and the amount of the fine suggested. The judge may accept the requisition, vary the amount of the fine suggested, discharge the defendant from liability, or request the prosecution to proceed to a hearing in the ordinary way. If the matter is to proceed by *ordonnance pénale*, the *ordonnance* is served on the defendant by registered letter. The defendant may within 30 days pay the fine or oppose the execution of the *ordonnance*. If the defendant opposes the *ordonnance* (which happened in this case) the matter proceeds to a hearing in the ordinary way. If there is no opposition or payment the *ordonnance* has the effect of a judgment. With limited exceptions all *contraventions* may be processed by *ordonnance pénale*.<sup>31</sup>

### *The Hearing*

The defendant was present at the hearing, unrepresented. He accepted that he had driven through a red light but said he had not been aware of the light being red at the time. This meant he had not intentionally driven through a red light and therefore had not committed a criminal offence, or at least there were extenuating circumstances (*circonstances atténuantes*) from which he should benefit before the court. The judge remarked that the defendant's explanations were 'provocative'. The *commissaire* requisitioned a fine of 1,600 francs and a 15 day suspension of the defendant's driving licence. The defendant said that he needed his motor vehicle for work. The judge fined him 1,600 francs but did not suspend his licence.

### *The Dossier*

1. A requisition from an *officier de police* acting as prosecutor (and so an *Officier du Ministère Public* (OMP)) for an *ordonnance pénale* fining the defendant 1,600 francs.
2. An *ordonnance pénale* signed by a judge in the terms of the requisition.
3. A declaration of opposition to the *ordonnance* signed by the defendant.
4. A requisition from an OMP to an *huissier* to cite the defendant, the citation by the *huissier*, and an acknowledgement of service by the defendant.
5. The defendant's criminal record — nil.
6. The notes of the hearing by the *greffier*.

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31 The *ordonnance pénale* procedure is regulated by articles 524 to 528-2 and articles R 42 to 48 of the *CPP*. The main exception is in respect of class five *contraventions* alleged against minors (under 18 years of age). The procedure is entitled in the Code '*Procédure Simplifiée*'. Of the 758,000 decisions rendered by the *tribunaux de police* in 1997 some 465,000 were by way of *ordonnance pénale*: above n3 at 11. An even more simplified diversionary procedure is by way of an *amende forfaitaire* (fixed fine or penalty) regulated by articles 529 to 530-3 and articles R 49 to 49-13 of the *CPP*. This procedure is applicable to *contraventions* in classes one to four under the Code de la Route and the *Code des Assurances* in relation to motor vehicle insurance. The *amende forfaitaire* will be reduced (*minorée*) if paid promptly but increased (*majorée*) if not paid within 30 days or the *contravention* contested. There were some 10,740,000 *amendes forfaitaires majorées* in 1997: above n3 at 11.

### C. Case Three

*The Charge:* Being drunk in a public place.<sup>32</sup>

#### *The Hearing*

This was another case where the defendant had made opposition to an *ordonnance pénale* proposing to fine him 500 francs. The defendant contested the offence on the basis that he had been for a long time taking medication for epilepsy and this had had the effect of making him appear intoxicated. He approached the bench and showed the judge some prescriptions for medication.<sup>33</sup> The judge glanced at them and told the defendant to return behind the bar of the court. The defendant said further that he had consumed one bottle of beer only before he was arrested by the police. The *commissaire* stated that he was leaving the sanction to be applied to the 'appreciation of the court'. The defendant was fined 500 francs, the amount in the *ordonnance pénale*.

#### *The Dossier*

1. The police report of the offence including a *constatation* (statement) by a police officer that the defendant's breath smelt strongly of alcohol, that he had difficulty standing upright and that his speech was incoherent, and an explanation by the defendant that he had drunk one beer but that he was under medical treatment and was not drunk.
2. The *ordonnance pénale*, requested by an OMP.
3. A letter of opposition to the *ordonnance*.
4. A medical certificate from a doctor who had visited the police station where the defendant was being held and who stated that the defendant's condition was compatible with a degree of sobering up (*dégrisement*).
5. Citation documents (as in the two previous cases).
6. The defendant's criminal record — one offence of stealing with violence.
7. The notes of the hearing by the *greffier*.

### D. Case Four

*The Charge:* Making land available for the ritual killing of animals other than in an *abattoir*.<sup>34</sup>

#### *The Hearing*

The defendant was not present but he was represented by an *avocat*. The *avocat* informed the court that the defendant had been approached by some Muslim men who wanted to buy some of his sheep and kill them on his property in the Islamic

32 An offence under article R 4 of the *Code des Délits de Boissons et des Mesures contre l'Alcoolisme* and punishable as a *contravention* of the second class.

33 The judge later remarked to me that he had smelt alcohol on the defendant's breath at this time.

34 An offence under article 11 of Décret No 97-903 of 1 October 1997 by the *Conseil d'Etat*, punishable as a *contravention* of the fourth class by article 21(b)7 of the same Décret.

manner.<sup>35</sup> The defendant had agreed to this and a number of sheep had been sold and killed accordingly. The defendant believed that it was no longer illegal to kill sheep ritually other than in an abattoir as there had been no press notices by the *Préfecture* in recent times that the practice was illegal as there had been in past years.<sup>36</sup> The *avocat* also argued that Muslims were entitled to have sheep killed in accordance with their religion and if the licensed abattoirs in the area would not do it, as was alleged to be the case, then others should be permitted to allow it on their land. The *commissaire* requisitioned a fine of 2,000 francs. The judge fined the defendant 1,500 francs.

### *The Dossier*

1. The *procès-verbaux* in the file of the *police nationale* contained:
  - (a) a complaint by local butchers that sheep were being killed illegally on a particular property;
  - (b) a report of a visit to the property by the police where they observed some 30 sheep hanging from trees with their throats cut and some 60 others apparently standing by to be killed, some 150 Muslim people including men holding knives, and the defendant who said he was the owner of the property; and
  - (c) a statement by the defendant to the police at the police station to the effect that Muslims had come to him to buy sheep from him 'in order to kill them on his property according to their religion for an upcoming religious celebration, that he had agreed not believing it was illegal so to kill the sheep as there had been no notices by the *Préfecture* in the press in recent times to that effect.
2. Documents citing the defendant to the hearing (as in the previous cases).
3. A letter from the defendant to the prosecutor saying he could not attend the hearing as he would be in the mountains looking after his sheep and protecting them from wolves and nominating an *avocat* who would appear for him.
4. The defendant's criminal record — nil.
5. Notes of the hearing by the *greffier*.

### **E. Case Five**

*The Charges:* Defendant 1: Assault not occasioning an incapacity for work.<sup>37</sup>

Defendant 2: Threatening repeatedly to commit an assault.<sup>38</sup>

35 This manner includes cutting the sheep's throat and uttering appropriate words then hanging the animal up so that all its blood drains out onto the ground.

36 This appears to have amounted to a plea of mistake which, although apparently as to the law, could in Australia have been argued to have been a mistake of fact: see for example, *Iannella v French* (1968) 119 CLR 84. The court did not respond to this 'defence'.

37 An offence under article R 624-1 of the *NCP*, punishable as a *contravention* of the fourth class.

38 An offence under article R.623-1 of the *NCP*, punishable as a *contravention* of the third class.

### *The Hearing*

This case involved a physical confrontation between a woman's son (D1) and the woman's cohabitational male partner (D2) who was not the son's father. D1 had gone to visit his mother at D2's apartment but had been intercepted by D2 at the entrance to the building where a scuffle had taken place which had resulted in injury to D2's eyes.

D1 was present at the hearing, with an *avocat*. D2 was not present but was represented by an *avocat*.

D1's story to the court was that he had tried to telephone his mother at D2's apartment but that D2 had answered the phone, abused him, then hung up on him. D1 had then gone around to the apartment, rung the bell of the apartment from the entrance to the building, after which D2 had come down to the entrance, abused D1, pushed him to the ground and started to kick him. D1 had tried to defend himself but D2 had pulled out a handgun and fired two blank shots at him. D2's son had then called down from the balcony of D2's apartment that there was no danger because the gun was not loaded.

D2's story told by his *avocat* was that D2 had gone down to the entrance to speak to D1 and that D1 had pushed him to the ground, had punched and kicked him and had pushed his fingers into D2's eyes. D2 had never pulled a gun, in fact he did not possess one and had even had the police search his apartment without finding one. D2 made a complaint to the police against D1 for assault soon afterwards.

The *commissaire* requisitioned a fine of 1,000 francs for each of the defendants.

D2's *avocat* addressed the court to the effect that the aggression and violence had come entirely from D1, that D2 was the only one injured, that D1 had abused and threatened D2 over a long period at his office (as a witness could testify), at his home and over the telephone. The *avocat* also referred to a report, included in his written conclusions, from an ophthalmologist as to the injuries to D2's eyes and that they had resulted in an incapacity for work of more than eight days. After his address the *avocat* handed a file of 'Conclusions' to the judge.

D1's *avocat* then addressed the court. He reiterated D1's story, said that D2 had been continuously abusive to D1, had prevented him seeing his mother and generally hung up on him when he tried to telephone his mother. He said D1's story of the gun had been corroborated at the time by D2's son. He asked for D1 to be constituted as a civil party in the charge against D2 and asked for symbolic damages of one franc.

D1 then addressed the court until the judge said he had heard enough.

The judge fined D1 1,000 francs and suspended his driving licence for one month.<sup>39</sup> He discharged D2 but ordered him to pay one franc in damages to D1.

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<sup>39</sup> The suspension of the defendant's driving licence for up to three years is permitted as a supplementary punishment for this offence by article R 624-1 §1 of the *NCP*.

*The Dossier*

1. The file of the *police nationale* contained —
  - (a) a *procès-verbal* of an interview with D2;
  - (b) a request for a medical examination of D2 by a court-appointed expert doctor;<sup>40</sup>
  - (c) the report of that doctor;
  - (d) a *procès-verbal* of the junction of the complaint by D1 with that by D2;
  - (e) a *procès-verbal* of an interview with D1;
  - (f) a *procès-verbal* of the search by written consent<sup>41</sup> of the apartment of D2 for a gun (none found); and
  - (g) a notation that D2's son had gone to Ireland and so could not be interviewed.
2. Citation documents for the two defendants to attend the hearing (as in the previous cases).
3. An authority by D2 for a named *avocat* to appear on his behalf.
4. 'Conclusions' by the *avocat* for D2.
5. The criminal records of both defendants — nil in each case.
6. Notes of the hearing by the *greffier*.

### ***3. Comments on the Ten Cases from an Anglophone Perspective***

I propose to focus on two features of these cases in the *tribunal de police* that are particularly significant for comparative purposes. The first is that the evidence against a defendant is to be found in the dossier, not in testimony (and exhibits) at the hearing as in an adversarial trial in common law systems. The second is that, despite the intent of the *Code de Procédure Pénale* and the views of French commentators (as to both of which see later), there appears in fact to be no more prosecutorial direction or supervision of police investigation than there is in common law systems.<sup>42</sup>

#### ***A. Evidence in the Dossier Not in Testimony at the Hearing***

All the defendants in the 10 cases examined had made statements to the police about their alleged offences and these had been recorded in the dossier. However, of the 11 defendants only six appeared at their hearings, which meant there was no oral evidence from five of them, and of the six appearing three essentially repeated what they had said to the police while three made lengthier explanations, two of

40 Recourse to 'qualified persons' for 'technical or scientific examinations' is provided for by article 77-1 of the CPP.

41 Such consent is required by article 76 of the CPP for a search of premises in the course of an *enquête préliminaire* as this was and as to which see below.

42 These two features were also noted and discussed in my article on cases in the *tribunal correctionnel*, above n2 at 774-777.

those with embellishments from their *avocats*. As to the evidence of victims, there were three cases with victims at Poitiers in only two of which victims appeared, as civil parties, and they said nothing about the facts of their cases relying on what was contained in the dossier. There was only one case involving a victim in Nice and that was the mutual assault case (case five) in which the two defendants were also victim-complainants. Only one of those appeared, the other relying on his statements in the dossier and the pronouncements of his *avocat*.<sup>43</sup> As to witnesses other than defendants and victims none were called at these hearings. There were three witness statements in the dossiers of the Poitiers cases (two in case three and one in case four), and one medical certificate (case three).<sup>44</sup> There were no witness statements in the Nice dossiers<sup>45</sup> but there were two medical reports (cases three and five). It may be noted that most of the defendants in these 10 cases made admissions to the investigating police which were recorded in the dossiers but no police were called at the hearings to give evidence of those admissions. It may also be noted that the prosecutors at the hearings appeared to proceed on the basis that guilt had been established by the dossier. The prosecutor in case three at Poitiers stated just that, and the prosecutors in all cases simply 'requisitioned' a penalty, never addressing the question of whether guilt had been established.

From the way in which these cases were processed it may be concluded that guilt for the offences dealt with by the *tribunal de police* was determined by the dossier rather than the hearing. This confirms the conclusion drawn from my study of cases in the *tribunal correctionnel*.<sup>46</sup> The consequences of that conclusion would seem to be as follows.

- (a) The investigation as recorded in the dossier, rather than the hearing is the crucial phase for determining guilt, in contrast with anglophone systems in which the hearing, or the trial is the crucial phase.<sup>47</sup>
- (b) The purpose of the hearing, as well as determining penalty, appears to be the judicial confirmation in public of the conclusion of guilt drawn from the investigation as recorded in the dossier. This is confirmed by the fact

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43 This victim, although the more seriously injured, made no claim for damages, while the other victim, apparently not injured, made a claim for and was awarded symbolic damages of one franc.

44 In case three there was an adjournment to allow for the defendant and his 'witnesses' to be present although there was a statement from one of his witnesses already in the dossier. It may be that witnesses are more likely to be required for adjourned than for initial hearings as the investigation and the dossier are taken to be complete before the initial hearing.

45 In case five one witness (as to the seemingly important matter of whether a gun had been fired) was noted as having left the jurisdiction before any statement could be taken. At the hearing it was stated that a witness could testify as to whether one of the defendants had been harassing the other but nothing further was said or done.

46 Above n2.

47 This is not to suggest, as I stated in the earlier article (id at 775 fn59), that an anglophone trial is a better way of determining guilt or not than a French investigation. A thorough and recorded investigation soon after the event could well be more reliable in that regard than a trial well after the event relying on the memory of witnesses, and this quite apart from the adversarial treatment of the evidence at the trial.



that the conviction rate for all the cases at the hearings I attended in Poitiers and Nice was 98 per cent.<sup>48</sup>

- (c) The French system at his level, based primarily on the dossier, is essentially a documentary or written one, in contrast with anglophone systems in which the crucial trial phase is characterised by orality.

### **B. Respective Roles of Prosecutors and Police in the Investigation**

A perusal of the dossiers in the 10 cases here under study did not reveal any direction or supervision by prosecutors of the investigations carried out by the police.<sup>49</sup> Even in the cases at Nice which were prosecuted by a *commissaire de police* there was no record in the dossier of any communication between the investigating police and a *commissaire*. In one only of the 10 cases examined did a prosecutor become involved (case three at Poitiers) and that was simply to formally request the *gendarmerie* to investigate a complaint that had been made to them and passed on to the prosecutor and which the *gendarmerie* were already investigating. The normal pattern appears to be for the police to initiate and pursue an investigation and when it is completed to forward the results in the form of *procès-verbaux* to the prosecutor (including *commissaires*). The prosecutor will then arrange, either through an *huissier* or the police, for the parties to be informed of the hearing date. Any communication by the prosecutor with the police is more likely to be about a hearing date than the investigation.

It may be noted in this context however that some communication may occur pre-hearing between the prosecutor and the parties. This will normally be after citation or convocation. In one of the 10 cases examined the defendant wrote to the prosecutor with an explanation for his offence (case one at Poitiers), and in three of the cases the defendants wrote to the prosecutor advising that they could not be present at the hearing but that they would be represented by an *avocat* (cases three and five at Poitiers and case four at Nice). As to victims, in three cases the prosecutor notified hearing dates to victims and the victims responded in writing to the prosecutor (cases three, four, and five at Poitiers).

## **4. Accordance Between the Two Significant Features Noted and the Code de Procédure Pénale (CPP)**

### **A. Proof by Dossier or by Testimony**

The provisions dealing with the procedure applicable in the *tribunal de police* are to be found in Book Two, Title Three, Chapter Four of the CPP. The chapter is entitled '*De l'instruction définitive devant le tribunal de police*', indicating the conclusive or decisive *investigatory* nature of the hearing procedure. The provisions in the chapter expressly adopt the procedures applicable to hearings in

48 This is a little above the average of 95 per cent for the *tribunaux correctionnels*. See above n2 at 776.

49 This conclusion confirms a similar conclusion in relation to my study of cases in the tribunal correctionnel. See above n2 at 776-7.

the *tribunal correctionnel*.<sup>50</sup> The important dispositions for present purposes are that the court can only base its decisions on proofs brought before it in the course of the hearing,<sup>51</sup> that depositions (*procès-verbaux*) and reports are to serve only as information for the court,<sup>52</sup> that the defendant is to be interrogated first,<sup>53</sup> that the witnesses are then to give their evidence,<sup>54</sup> and that they are to give it orally, assisted exceptionally by documents if authorized by the presiding judge.<sup>55</sup> These provisions purport to mandate the 'principle of orality' for hearings in the *tribunal correctionnel* and in the *tribunal de police*, which I suggest is not the reality for the hearings in either court.<sup>56</sup> There is, however, an important provision in the CPP regarding the procedure at hearings in the *tribunal de police* only which significantly derogates from the principle of orality and justifies reliance upon material in the dossier at the hearing. This is article 537 which provides that *contraventions* can be proved either by *procès-verbaux* or reports, or, in the absence of such *procès-verbaux* and reports or in support of them, by witnesses. The article further provides that the *procès-verbaux* or reports of the judicial police (or other officials) are to be accepted as conclusive (*font foi*), until proof to the contrary is adduced, which proof may be in writing or by witnesses. This provision would explain the heavy reliance on the dossier at hearings in the *tribunal de police* and provide the justification for accepting as evidence of guilt the material in the dossier. What is surprising to an outside observer is that no mention was made of this provision during the hearings in the *tribunal de police* I attended or in the associated dossiers. And in fact it seems to be little referred to, as we will see, by French academic commentators. That is perhaps because the system takes for granted the traditionally central and determinative nature of the dossier despite legislative attempts to move the system towards orality at the hearing.

### **B. Respective Roles of Prosecutors and Police in the Investigation**

The provisions dealing generally with the investigative powers of the judicial police and prosecutors are to be found in Book One, Title One, Chapters One & Two respectively of the CPP. As to the judicial police, their powers are to be exercised under the direction of the prosecutor.<sup>57</sup> Those powers are: to record offences, to seek out those responsible and collect proofs,<sup>58</sup> to receive complaints and denunciations, and to carry out the types of investigation appropriate to the various types of offence.<sup>59</sup> There are no powers in the CPP specifically directed to the investigation of *contraventions* by the police. Such an investigation would normally however be by way of an *enquête préliminaire*, a form of investigation

50 Above n9, articles 535 and 536 adopting articles 400–5, 406–8, 418–26, 426–61, 458–62.

51 Id article 427.

52 Id article 430, but see article 537 referred to later in the text.

53 Id article 442.

54 Id article 444.

55 Id article 452.

56 As to hearings in the *tribunal correctionnel* see above n2 at 774–5.

57 Above n9, article 12.

58 Id article 14.

59 Id article 17.

applicable both to non-flagrant *délits* and to *contraventions*. Such *enquêtes* are regulated by arts. 75 to 78 of the CPP. They provide that the judicial police are to proceed to such *enquêtes* either on instructions from a prosecutor or on their own initiative, but that their operations are to be under the supervision of a prosecutor.<sup>60</sup> They also provide for searches of premises (only with written consent)<sup>61</sup>, the detention of suspects (*garde à vue*) for up to 20 hours (extendable to 48 hours by a prosecutor) for the purposes of the investigation,<sup>62</sup> obtaining technical or scientific reports when so authorised by a prosecutor,<sup>63</sup> and for the attendance of witnesses at the police station for interview, under compulsion through a prosecutor if necessary.<sup>64</sup> In the 10 cases examined here there was no detention of a suspect or compelled attendance at a police station. There was however one search of premises, by written consent (case five at Nice). As to prosecutors, their relevant powers are to enforce the criminal laws,<sup>65</sup> to receive complaints and denunciations and decide what to do about them,<sup>66</sup> and to take or have others take all acts necessary for the investigation and prosecution of offences and, to that end, to direct the activities of the judicial police.<sup>67</sup> Despite some overlap in their powers, the legislative scheme envisages the police investigating offences under the direction or supervision of prosecutors. It appears in fact, however, that, at least for *enquêtes préliminaires*, the police normally investigate without reference to prosecutors and then send the results of their investigations, recorded on paper, to the prosecutors. The prosecutors then arrange and notify hearing dates and deal with any resultant communications from defendants and civil parties or their legal representatives.<sup>68</sup>

## 5. *Accordance Between the Two Significant Features Noted and the Views of French Commentators*

### A. *Proof by Dossier or by Testimony*

Pradel, one of the leading French academic commentators, states in relation to hearings in the *tribunal de police* that the judge interrogates the defendant, that the court then hears the witnesses successively and separately, that the witnesses may be confronted between themselves or with the defendant or the civil party, that the court hears any experts, and that if necessary the court will listen to the reading out of the *procès-verbaux* in the dossier by the *greffier*.<sup>69</sup> Pradel does not see the

60 Id article 75.

61 Id article 76.

62 Id article 77.

63 Id article 77-1.

64 Id article 78.

65 Id article 31.

66 Id article 40.

67 Id article 41.

68 This confirms my conclusion about investigations for cases heard in the *tribunal correctionnel*, including investigations by way of *enquêtes de flagrance*. See above n2 at 776-7.

69 *Procédure Pénale* (9th ed, 1997) § 562 ff. Pradel, like other French academic commentators, seems to base his pronouncements on criminal procedure more on the CPP than on what actually happens.

process as based on article 537 of the CPP allowing *procès-verbaux* to serve as proofs. Another leading authority, Stefani, Levasseur and Boulloc, dealing with hearings in the French criminal courts generally, also stresses the orality of hearings, including the questioning of witnesses, and notes in relation specifically to hearings in the *tribunal de police* that the *greffier* is to take notes of the declarations of the witnesses as well as of the responses of the defendant. Article 537 is not relied upon as allowing dossier-based proofs in the *tribunal de police*. The rationale advanced by Stefani, Levasseur and Boulloc for orality at the hearing is that the law does not want the judges to decide after only reading the dossier but wants them to have personal experience of the human reality of the parties and the witnesses to the drama.<sup>70</sup> I must confess that such experience largely eluded me at the hearings I attended, particularly the hearings at which not even the parties were present. A third authority, Merle and Vitu, concedes by contrast that, although there is a principle of orality applicable generally to French criminal hearings, *procès-verbaux* ordinarily constitute proof in the *tribunal de police* and that this is authorized by article 537 of the CPP.<sup>71</sup> In an assessment of hearings in the *tribunal de police* that accords with my own experience of them, Merle and Vitu write that the reading, often summary, of *procès-verbaux* emanating from public officials constitutes proof, and that if the defendant is unrepresented and the prosecutor, as frequently happens, requests simply ‘the application of the law’, the hearing is reduced to practically nothing.<sup>72</sup>

### **B. Respective Roles of Prosecutors and Police in the Investigation**

As already noted, the investigation of *contraventions* is by way of an *enquête préliminaire*. My study indicates that prosecutors play virtually no role in such *enquêtes*. French commentators, however, suggest a more active role for prosecutors. Pradel speaks of an ‘informal dialogue’ between prosecutors and police and the alternation of investigative initiatives between them during an *enquête*.<sup>73</sup> Pradel also notes the more general powers of prosecutors to direct an investigation by the police, to be informed of investigative measures taken by the police and if necessary to take over the investigation.<sup>74</sup> Stefani, Levasseur and Boulloc refer to the obligation of the police to inform a prosecutor immediately of any offence of which they have knowledge but note that generally the prosecutor instructs the police to investigate offences not requiring an investigating judge themselves.<sup>75</sup> Another commentator, Casorla, states that the police are under the direction and strict control of the prosecutor.<sup>76</sup>

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70 *Procédure Pénale* (16th ed, 1996) § 673 ff.

71 *Traité de Droit Criminel*, Vol 2, *Procédure Pénale* (4th ed, 1989) §§651–52.

72 *Id* at §652.

73 Above n69 at 410.

74 *Id* at 389.

75 Above n70 at 331.

76 *La Preuve en Procédure Pénale Comparée* (1992) 63 *Revue Internationale de Droit Pénal* 183 at 202.

As to the cases prosecuted by a *commissaire de police* in Nice, there appeared to be no involvement at all in them by a *procureur de la République* although theoretically a *procureur* would still have power to direct the police investigation and to direct the *commissaire* prosecuting at the hearing. In these cases the investigating police forwarded the recorded results of the investigations to a *commissaire* who then proceeded to arrange hearings or to request *ordonnances pénaux*. There was no indication on the dossiers of any involvement by a *commissaire* in the investigation

## 6. *Accordance Between the Two Significant Features Noted and the Views of Anglophone Commentators*

### A. *Proof by Dossier or by Testimony*

Few anglophone commentators deal specifically with the *tribunal de police*. Among those who do Sheehan is of the view that class five *contraventions* were dealt with in the same way as *délits* in the *tribunaux correctionnels*;<sup>77</sup> his view of hearings in those courts is that as the court could base its decision on the facts contained in the dossier the prosecutor would frequently refrain from citing any witnesses.<sup>78</sup> As to *contraventions* in classes one to four, Sheehan states that the defendant is presumed guilty; if he admits the offence when asked by the judge he will be fined but that if he has an explanation to make the judge will 'ignore it, accept it or adjourn the case for a fuller hearing at a later date'.<sup>79</sup> The normal case in classes one to four was clearly seen as involving neither prosecution witnesses nor evidence as to liability from the defendant. On this issue Tomlinson notes a resemblance in many respects between the hearing of a *délit* before a *tribunal correctionnel* (where witnesses are generally not called) and of a *contravention* before a *tribunal de police* but notes also the provision in article 537 of the CPP providing that police reports in the dossier are to be 'presumed true absent proof to the contrary'. This, says Tomlinson, obviates the need for witnesses to appear before the *tribunal de police* and allows it to rely upon the dossier.<sup>80</sup> Frase, in an introduction to a translation of the CPP, also refers to the presumption under article 537 of the CPP and notes as a result that 'trials in police court are almost always brief and simple',<sup>81</sup> presumably without oral evidence. Finally Spencer, although speaking generally about the French criminal courts, notes that they 'do not recognize the primacy of oral evidence' but take account of *procès-verbaux*, even when their deponents give oral evidence.<sup>82</sup>

77 *Criminal Procedure in Scotland and France* (1975) at 81. At the time Sheehan was writing class five *contraventions* were punishable with imprisonment up to two months.

78 *Id* at 74.

79 *Id* at 80. Sheehan does not refer in this connection to article 537 of the CPP.

80 'Non-adversarial Justice: The French Experience' (1983) 42 *Md LR* 131 at 144-45.

81 Introduction to *The French Code of Criminal Procedure* (Revised Edition, 1988) at 30-31.

82 BS Markesinis (ed), 'French and English Criminal Procedure: A Brief Comparison' *The Gradual Convergence* (1994) 36-37.

### **B. Respective Roles of Prosecutors and Police in the Investigation**

The prevailing anglophone view, particularly since a 1977 article by Goldstein and Marcus,<sup>83</sup> has been that judicial, including prosecutorial, supervision of police investigations in 'inquisitorial' systems is a 'myth'. This view has been taken about French criminal investigations generally but particularly those without an investigating judge, that is, investigations into cases that are normally heard in the *tribunaux correctionnels* and the *tribunaux de police*. Similar views have been expressed by Frase<sup>84</sup> and Van Kessel.<sup>85</sup>

As to anglophone views more specifically relating to the investigation of *contraventions*, Sheehan sees investigations into class five *contraventions* being handled in the same way as investigations into non-flagrant *délits*,<sup>86</sup> that is by way of *enquêtes préliminaires*, and although prosecutors may check by way of supervision some of the police records, this is particularly in relation to any *garde à vue* which is a feature of *enquêtes flagrantes* rather than of *enquêtes préliminaires*.<sup>87</sup> As to *contraventions* in classes one to four, Sheehan notes that their investigation and prosecution is in the hands of the police and that prosecutors will only intervene to deal with legal points or other such difficulties.<sup>88</sup> Although Tomlinson sees prosecutorial supervision of the police as being 'quite intensive by American standards' he notes that most prosecutors do not insist that the police submit to supervision with respect to 'minor offences'.<sup>89</sup>

## **7. Conclusion**

It can be concluded from this study of cases in the *tribunal de police* that the evidence as to guilt is to be found in the dossier not in testimony at the hearing and that the investigation of such cases is carried out by the judicial police with virtually no involvement by prosecutors. The same conclusions were reached in my study of cases in the *tribunal correctionnel*,<sup>90</sup> which means that the conclusions apply to over 99 per cent of all criminal cases that proceed to a hearing in France. As to the dossier/testimony issue for cases in the *tribunal de police*, article 537 of the CPP provides a legal basis for reliance on the dossier as proof

83 Goldstein & Marcus, 'The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany' (1977) 97 *Yale LJ* 240.

84 Richard Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?' (1990) 78 *Cal LR* 539 at 557-58 ('prosecutors rarely take direct charge of an investigation and infrequently order investigation of facts that the police would not themselves investigate' but at the very least they must be kept informed of the existence and progress of the investigation.)

85 'Adversary Excesses in the American Criminal Trial' (1992) 67 *Notre Dame LR* 403 at 421-22 ('the police usually conduct the actual investigation in terms of interviewing witnesses, interrogating suspects and gathering physical evidence' and the prosecutor develops a comprehensive case file or dossier.)

86 Above n77 at 81.

87 *Id* at 20.

88 *Id* at 80-81.

89 Above n80 at 146-47.

90 Above n2 at 774-5.

and for creating an exception to the orality principle that is said to be of general application in French criminal hearings by French commentators. In fact article 537 points to the reality of hearings in the *tribunal correctionnel* and to some extent hearings in the *cour d'assises*. It points also to the overall continuing importance of the dossier in the French criminal justice system and consequently to the privileging of written depositions over oral testimony in that system. Such privileging, it should be noted, also entails privileging the investigation over the hearing (or the trial) and consequently secret over public processing. As to the respective roles of the judicial police and the prosecutors in investigations, this study confirms that, at least where there is no investigating judge, and despite the indications in the CPP and the views of French commentators, criminal investigations are initiated and carried out by the judicial police with minimal involvement by prosecutors. Prosecutors only really become involved when they receive the results of the police investigation and arrange dates and attendances for the hearings. Prosecutors may also during this phase, as we have seen, have some communication with the parties, although mainly it seems about attendances and representation at the hearing. It should also be borne in mind that as regards *contraventions* in classes one to four not only the investigation but the prosecution at the hearing is in the hands of the police, so for these *contraventions* there appears to be little or no need for any involvement of *procureurs*.

Another matter of interest arising from this study is the significant diversion of minor offences from court hearings. This is by two procedures. The *ordonnance pénale* is a type of negotiated justice by which a defendant can accept a fine proposed by a prosecutor and acquiesced in by a judge rather than go to court and almost certainly do no better.<sup>91</sup> It is a procedure much used — 61 per cent of cases dealt with by *tribunaux de police* in 1997 were dealt with through *ordonnances pénales*.<sup>92</sup> The other procedure is the *amende forfaitaire*. This is a matter between the police and defendant usually in a motor traffic context. The procedure has both carrot and stick elements — if the defendant receives a *contravention* notice (equivalent to an 'infringement notice' or a 'ticket') specifying an amount payable, s/he will pay less (*minorée*) if payment is made promptly but more (*majorée*) if payment is not made within the normal period (usually 30 days). The use of this procedure (as anyone who has driven in France will probably be aware) is substantial — there were some 10,740,000 *amendes forfaitaires majorées* (that is not paid within time) in France in 1997.<sup>93</sup>

Finally, what can anglophones learn from the French criminal justice procedures as manifested in cases processed through the *tribunal de police* and the *tribunal correctionnel*? Are there French procedures which could be adopted into anglophone systems? The fundamental problem in this connection is that the French system is structured around the investigation which produces a dossier in which are to be found the proofs of culpability. The hearing provides for a public

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91 This is similar to the German *Strafbefehl* procedure, as to which see Huber, above n8 at 157–159.

92 Above n3 at 11.

93 Ibid

exposure of the main elements of the dossier and is primarily focused on sentencing. Anglophone systems on the other hand are structured around a trial (rather than a hearing) in which oral evidence is determinative of guilt. It is highly unlikely that anglophone systems would be interested in abandoning their trials for a system of proofs drawn from a dossier collated pre-trial. And this, of course, is to say nothing about the vast majority of our cases that never get to trial but are dealt with on a plea of guilty, which has no formal counterpart in the French system. There are, however, at least three French procedures or arrangements worthy, I think, of consideration by anglophones. The first is the central role played by prosecutors in the French system. Although they do not appear to play any significant role in investigations, they have the power to direct or supervise them and the judicial police are aware of what prosecutors expect of them. Prosecutors are advised of the occurrence of serious offences and attend the scenes of the most serious and give appropriate instructions to the police. They create and are in charge of the dossier, arrange hearing dates, correspond with the parties, appear at the hearing and on appeals, and supervise the execution of sentences. There is a good argument that criminal justice systems need an organising, overseeing and overall responsible player. Anglophone systems do not really have one and the prosecutor seems to be the most appropriate candidate. The second is the civil party system. This has the benefits, generally lacking in anglophone systems, of allowing victims of crime to play a major role in the criminal justice process and to obtain financial compensation in that process rather than through separate civil proceedings. The victimology movement (resulting, amongst other things, in criminal injury compensation schemes and victim impact statements for sentencing purposes) is now pushing anglophone systems in that direction but we could learn more from the French in this regard than we have so far. The third procedure is the *ordonnance pénale*. This procedure has allowed considerable reductions in lower court lists in France (and Germany) but is generally not availed of in anglophone systems. It does involve a judge at the pre-trial stage but this should not be an insurmountable obstacle for anglophone systems, some of which already countenance schemes involving pre-trial sentence indication by judges.<sup>94</sup>

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94 See for example, the *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW) adding Part 12 (Sentence indication hearings pilot scheme) to the *Criminal Procedure Act 1986*. As to this scheme and the 'contest mention' scheme in the Victorian Magistrates' Court see John Willis, 'The Sentence Indication Hearing' (1997) 7(2) *Journal of Judicial Administration* 98.