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The Exercise of Prosecutorial Discretion: Considerations and Ethics.[1]

Sulakshna Beekarry[2]

The decision to prosecute is a serious step. A prosecutor's decision to initiate a prosecution has great impact on the lives and liberty of those affected. It often deprives a family of its sole breadwinner, it involves loss of liberty, interdiction from one's job or loss of employment, financial and emotional pressure on a suspect's family, and stigma in society. This is why the decision to prosecute has to be taken with the utmost care, to ensure that the right suspect is prosecuted for the right offence.

It goes without saying that such a decision goes through a painstaking and thorough process. Even if the prosecution is said to possess the greatest part of discretionary power in the judicial system, there is method to the exercise of this discretion. Rules have been elaborated in most jurisdictions around the world to spell out the manner in which the decision to prosecute is taken. The Code for Crown Prosecutors (UK), issued by the UK Director of Public Prosecutions under Section 10 of the Prosecution of Offences Act 1985, is a notable example. The Criminal Justice Standards for the Prosecution Function of the American Bar Association is another.[3]

Mauritius follows the accepted standards for prosecution and has published its own Guidelines for Prosecution[4]. This document is the working tool of Mauritian prosecutors based at the Office of the Director of Public Prosecutions. It sets out the considerations which apply to the decision making process and gives guidance to prosecutors on the general principles to be applied when making decisions. A test in

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[2] The author is currently Assistant Director of Public Prosecutions (Office of the Director of Public Prosecutions). She holds an LLB from the London School of Economics and Political Science, and an LLM from King's College, Cambridge.

[3] See also the Irish publication on the Role of the Prosecutor at http://www.dppireland.ie/filestore/documents/Chapter 8 and the Public Prosecution of Canada Deskbook on the Duties and Responsibilities of Crown Counsel.

[4] The Guidelines can be accessed online at http//dpp.govmu.org

two limbs is set out[5], first an evidential test, and then a public interest test. These are the general principles that apply in every case, irrespective of the fact that each case must be considered on its own facts and on its own merits.

The Evidential Test

Once an investigation is completed by the police, and the file is submitted to the Director of Public Prosecutions for advice as to any eventual prosecution, the prosecutor who is entrusted with the task of reviewing a file has to decide whether there is sufficient evidence on the file to provide a realistic prospect of securing a conviction against a suspect. The evidence is to be looked at in a fair and objective manner, free from any bias or irrelevant considerations. Questions which arise are usually the following:

(a) Is the evidence on the file credible and admissible, ie. Is there the possibility that it will be excluded under the rules of evidence?

(b) What are the suspect's explanations? Is a court of law likely to find the explanations credible?

(c) Does the evidence support an innocent explanation?

(d) Is there a confession on the file? Was there a breach of any rules in securing the confession?

(e) Is the identification of the suspect likely to be questioned?

(f) Is there further evidence which the police or other investigators should reasonably be asked to find which may support or undermine the account of the witness?

(g) Does any witness have any motive which affects his attitude to the case?

[5] The test is similar to the Full Code Test which is applied in the UK.

(List not exhaustive)

Two important considerations arise here. Firstly, that the finding that there is a realistic prospect of securing a conviction only means that a court of law (or a jury, reasonably directed) is more likely than not to convict an accused. This is a lower threshold than that which will eventually be applied at a resulting trial, where a court will only convict if it finds an accused guilty beyond reasonable doubt. Secondly, prosecutors always bear in mind that a case which does not pass the evidential test should not proceed further, however strong public pressure to see it prosecuted might be, or however important the case.

The Public Interest Test

Where the evidential test is satisfied, a case will usually be lodged before court unless there are public interest factors which weigh against such a course of action. The more serious the offence and the longer the suspect's list of previous convictions, the more likely it is that a prosecution will ensue. This means, in practice, that a prosecutor is duty bound to go on to consider whether a prosecution is required in the public interest after the assessment on the evidence has been made.

As a rule, a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. The Guidelines for Prosecution enumerate a number of such factors to be taken into consideration such as:

- The seriousness of the offence

- Whether a prosecution is likely to result in a significant sentence

- Whether (especially in assault cases) the offence involved the use of a weapon or the threat of violence

- Whether the offence was repeated over a period of time, or it was an isolated occurrence

- Was the offence committed on a child or an otherwise vulnerable person

- Was the offence committed against public officers on duty

- Whether a prosecution would have a significant impact on maintaining community confidence.

- Whether the suspect was in a position of authority or trust and he took advantage of his position.

- If there are other available and equally efficient alternatives to prosecution eg. disciplinary proceedings at work.

The above factors are intended to provide guidance to the prosecutor in the exercise of his discretion. The weight to be attached to a particular factor will depend on all the circumstances of a case. In deciding whether a prosecution is required in the public interest prosecutors may take into account the views of the victim and those of the victim's family; this is the case especially in sexual offence cases where victims often express the wish to halt court proceedings for personal reasons like psychological stress or recent change in personal circumstances (marriage).

One consideration which always lingers at the back of a prosecutor's mind is that of public funds and resources. The cost to the criminal justice system, and to the country, remains a relevant factor always. Cost is a relevant factor when making an overall assessment of the public interest.

The Decision Not to Prosecute

Where a prosecutor finds, on an application of the two-stage test, that a case is not to go forward, the matter is usually classified by the police ("No further action" in common legal jargon). The possibility of administering a warning remains in cases where the offence is minor, so long as the suspect has not seriously disputed his guilt and he has no previous conviction for a similar offence.[6]

Private Prosecutions are a rare occurrence, although the law makes full provision for the possibility that a private party, aggrieved by a decision by the DPP not to institute a prosecution, can lodge a prosecution before the Supreme Court and the lower courts.[7] The issues that arise on a private prosecution were considered at length in **Edath-Tally v Glover** [1994] SCJ 409, a case where the District Court of Curepipe made a referral under Section 84 of the Constitution as to whether an individual could bring a prosecution under the Dangerous Drugs Act 1986. The Supreme Court observed that the DPP has primary power to prosecute offences. If he declines to do so, and the Judge gives leave, only then can an individual enter a private prosecution.

There is no such requirement for leave or for a certificate of non prosecution from the DPP where private prosecutions are entered before the lower courts. Moreover, the DPP retains the power to discontinue a private prosecution at any stage, pursuant to his powers under section 72(3)(c) of the Constitution. This is

[6] Please see Section 3(2) of the Criminal Procedure Act on the requirements before a warning may be given.
[7] Criminal Procedure Act, Sections 4, 5 and 6, and District and Intermediate Courts (Criminal Jurisdiction) Act, Sections 118, 121 and 122.

precisely what happened in the case of **Mohit**, a case where a private prosecution had been discontinued by the DPP and where the aggrieved party asked that this decision to stop proceedings be judicially reviewed. **Jeewan Mohit v The Director of Public Prosecutions of Mauritius** [2006] UKPC 20 (25 April 2006) remains, to date, one of the most important decisions in this area of the law.

Judicial Review (of the DPP's decisions)

The exercise of prosecutorial discretion is reviewable by the courts. The law is now settled after **Mohit** (above):

"If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review".[8]

The powers conferred on the DPP by Section 72(3) of the Constitution are clearly amenable to judicial review. The Privy Council rejected the argument that the possibility of removal under Section 93 of the Constitution provided an adequate safeguard against unlawfulness, impropriety or irrationality. The DPP, like any other public officer, is amenable to judicial review on grounds such as bad faith, excess of power, abuse of process and lack of independence.[9]

The threshold of reviewability, however, is higher than for other public officers in view of the fact that the DPP holds a constitutional post and being given the wide ("polycentric") character of the discretion being exercised.[10]

In Krishan Kumar Malhotra v Director of Public Prosecutions [2015] SCJ 261, the applicant entered judicial review proceedings against the DPP's decision not to appeal against a sentence delivered by the Intermediate Court (a sentence of one year imprisonment considered as being too lenient by the applicant who was the victim of a premeditated criminal assault). At the hearing of the application for leave, the DPP agreed that a decision not to appeal was indeed

[8] R v Panel on Take Overs and Mergers, Ex p Datafin PLC [1987] QB 815, at 847 applied in Mohit at Paragraph 20.

[9] Examples of these categories (non-exhaustive) are listed by the Supreme Court of Fiji in Matalulu DPP [2003] 4 LRC 712.

[10] Please see Paragraphs 17 and 18 of Mohit.

reviewable, and that no distinction was to be drawn for the purposes of review between different types of decision by the DPP. The Supreme Court found that the high threshold of reviewability of the DPP's decisions has to be borne in mind at the stage of the application for leave, and held in this case that the application did not disclose an arguable case. The width of the DPP's discretion was a determining factor in reaching this conclusion.[11]

Abuse of process is one of the grounds listed for possible judicial review proceedings in Matalulu v DPP (above), although it is made clear that the proper forum for review of that action would ordinarily be the court involved. One such situation arose in The State v Miriam Mpopoya [2011] SCJ 232, a drug trafficking case where the defence moved that the averment of trafficking in the information be struck out on the ground of abuse of process. The complaint was that this course of action had been adopted in other cases, whilst the DPP refused to accede to a request in this particular case.

The Supreme Court, when hearing the motion for abuse of process, considered and applied Mohit (above), and found that there was no evidence to indicate bad faith or dishonesty in the decision making process. The motion was therefore refused.[12]

Is there a duty to give reasons?

In law the DPP is not required to give any reasons for his decisions. If he decides to give reasons, there is no legal rule governing their form or content: "This is a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given."[13] In the recent years, reasons have been given (and Communiqués read out in court or

[11] Page 13 of the judgment.
[12] The Court also relied on The State v Francis Igudo Tukei and Anor [2008] SCJ 74 to the effect that "… the DPP may have his reasons and it is not the duty of the Court to enquire."
[13] Paragraph 22 of Mohit.

published) in cases where it is felt all the circumstances demanded that a particular decision be explained.

Internal Review: Is there the need for a formal Protocol?

Before applications for review of the DPP's decisions reach court, representations are often made internally for decisions to be reviewed or changed. Victims or their families often write to request that a decision be looked at again. Dr. Malhotra's counsel, for example, had resorted to a letter first to ask that the sentence in his case be appealed against as it was "unduly lenient". It is the current practice that representations for review are considered in all cases where they are made and decisions reviewed where such a course of action is warranted. There is no need for new evidence to come to light to allow for this possibility. A change in a decision, however, is not a common occurrence, and requires strong grounds and justification.

To allow for better access to justice for victims, it may be worth considering the need to put in place a formal mechanism ("Internal Review Protocol"). Such a Protocol will formalise the existing practice of reviewing decisions, and structure it. This will facilitate access to justice for all those concerned by an exercise of prosecutorial discretion where it is felt that the wrong decision has been taken. Care will have to be taken, however, in the drafting of such of a document, to ensure that the floodgates are not open either. Clear criteria will have to be developed so that the whole procedure adopted for internal review is fair.[14]

Prosecutorial Ethics

[14] For an overview of the kind of issues that may arise, please see John Carlin and the Director of Public Prosecutions, Supreme Court of Ireland Appeal No. 105/2008.

It is generally accepted in most jurisdictions around the world that prosecuting counsel is to regard himself as a Minister of Justice and is not to press for a conviction at all costs. He is not to be "betrayed by feelings of professional rivalry, to regard the question as one of professional superiority and a contest for skill and preeminence"[15] Prosecutors have been said to be "Ministers of Justice", rather than advocates.[16]

The landmark judgment in this area is that of **Barry Victor Randall v The Queen** [2000] UKPC 19. The conviction of the appellant in this case on appeal from the Cayman Islands was quashed since Prosecution Counsel did not behave as a "Minister of Justice" and his conduct had been insulting and overbearing. It is a perfect example of how a prosecutor can conduct a trial in a manner which is grossly and fundamentally unfair.

The appellant's complaints of unfairness fell under several heads: prejudicial comments during the examination of prosecution witnesses, repeated interjections during the opponent's cross-examination, running commentary throughout the trial, imputations against defence counsel's conduct and treating one's opponent with contempt. The Privy Council observed that there is one overriding requirement throughout any trial[17]: to ensure that a defendant accused of crime is fairly tried, and that a number of rules have been developed to safeguard the fairness of the trial, one of which is the duty of prosecuting counsel to act fairly at all times.

It was held that the prosecutor in this case had conducted himself as no minister of justice should conduct himself. The departure from good practice had rendered the trial unfair, and there was no guarantee that the jury had not been distracted from the crucial issues in the case. The trial judge in **Randall** too had failed to exercise the authority vested in him to control the proceedings and enforce proper standards of behaviour[18].

[15] Regina v Puddick [1865] 4 Foster and Finlason 497.
[16] The King v Banks [1916] 2 K.B. 621
[17] Paragraph 10 of the judgment
[18] It is worth considering whether a different result would have been achieved if the Judge had called Prosecuting Counsel to order.

The Privy Council made it clear, however, that not every departure from good practice will render a trial unfair. Isolated occurences will not count; nor will departures which are not "so gross or so persistent or so prejudicial or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe."

In **Nyron Smith v The Queen** [Privy Council Appeal No. 102 of 2006], the Privy Council once again reiterated that "they do not condone inappropriate behaviour by any counsel, least of all prosecuting counsel in a criminal trial, who owe a duty to behave as ministers of justice rather than partisans seeking to achieve a conviction by any means possible". In this case too, prosecuting counsel had not kept the standard of propriety and fairness to be expected of a prosecutor, but the departures did not approach the level of gross, persistent or prejudicial behavior which could affect the fairness of a trial.[19] The Judge, too, had set matters right in her summing up.

In **Huggins & Ors v The State** (Trinidad and Tobago) [2008] UKPC 30, prosecuting counsel was said to have made disparaging and belittling remarks about witnesses and counsel. One accused's evidence was referred to by him as a "script" and as a "parrot recital"; the defence was a "smokescreen" and defence counsel was said to resort to "scandal, bacchanal, aggression and tactics designed to cause a drama and intimidate witnesses". The Privy Council held that the proper approach of an appellate court to complaints of conduct conducing to unfairness of the trial is well exemplified by **Randall v The Queen**, and found that in this case counsel's departure from good practice, although very reprehensible, fell short of being so gross, persistent or prejudicial as to render the trial unfair.

Canada

[19] Other cases of interest include Mohamed v The State [1999] 1 WLR 552, Bernard v The State [2007] UKPC 34, [2007] 2 Cr App R22 and Benedetto v The Queen [2003] UKPC 27, [2003] 1 WLR 1545.

In Canada the role of the prosecutor within the justice system has been the subject of a decision of the Supreme Court since 1955. **In Boucher v R** [1955] S.C.R. 16[20] it was held that:

"It cannot be over emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented. The role of prosecutor excludes any notion of winning or losing, his function is a matter of public duty than which in civil life there can be none charge with greater personal responsibility. It is to be efficiently performed with an in grained sense of the dignity, the seriousness and the justness of judicial proceedings".

It is generally accepted that the prosecutor is not the lawyer for the police or for victims or complainants. The prosecutor is the representative of the "State" – an organization which includes the accused among its members.

In **Regan**[21] in 1949, the Supreme Court of Canada had also made it clear that there are 3 distinct components to the "Minister of Justice" concept: (1) Objectivity, uncoloured by subjective emotions or prejudices, (2) Independence from other interests which may have a bearing on the prosecution and (3) lack of animus – either negative or positive – towards the suspect or accused.

Whilst fairness, moderation and dignity should characterize Crown Counsel's conduct during litigation, this does not mean that prosecution counsel cannot be vigorous or through. In the case of **Cook**[22] in 1997, the Supreme Court of Canada affirmed that vigorous Crown advocacy is "a critical element of this country's criminal law mechanism".

Ireland

[20] https://www.canlii.org/en/ca/scc/doc/1954/1954canlii3/1954canlii3.html
[21] https://scc-csc.lexum.com/scc-csc/en/item/1949
[22] R v Cook [1997] 1 SCR 1113 at paragraph 19.

In **D.O v The Director of Public Prosecutions** [2006] IESC 12, the Supreme Court of Ireland was called to consider the nature of the cross-examination of the accused carried out by Prosecuting Counsel. The cross-examination (both in content and tone) was held to have been intimidating, disparaging and demeaning. The accused was said to be a sexual deviant, a pervert and was cross-examined on his sexual tendencies. Such a cross-examination was found to be in the nature of an aberration, and was held to have distracted and prejudiced the jury. The conviction was quashed.

It was pointed out that the principles governing the conduct of prosecutions are not established simply for the benefit of the defence but in the interests of society so as to ensure that a trial is fair, that the risk of an innocent person being convicted is avoided, and that confidence in jury verdicts is maintained.

The Office of the Director of Public Prosecutions in Ireland has defined the Role of the Prosecutor in Court in minute detail and has noted that the role of the prosecutor is frequently misunderstood. A prosecutor does not have a "client" in the conventional sense and acts in the public interest.

American Bar Association

The American Bar Association has published the Criminal Justice standards for the prosecution function and gone with the common law trend that the prosecutor serves the public interest and he is "to seek justice within the bounds of the law, not merely to convict" (Standard 3-1.2)

In addition, the prosecutor should know and abide by standards of professional conduct, and has a heightened duty of candour to the courts. The rules about conflicts of interest are to be respected, and improper bias avoided.

The U.S. Supreme Court in **Berger v United States** has observed that:

"The prosecutor may prosecute with earnestness and vigor – indeed he should do so. But while he may strike hard blows he is not at liberty to strike foul ones. It is as

much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one".

Singapore

In an address ("The role and duties of a Prosecutor – The Lawyer who never loses a case, whether conviction or acquittal") delivered in November 2011, Steven Chong, Judge, Supreme Court of Singapore[23], reiterated that a Court, an accused party and the community are entitled to expect that the prosecutor will act with "fairness and detachment with the sole and unadulterated objective to establish the whole truth in accordance with the law." It is for this reason that prosecutors are ascribed the noble title as "Ministers of Justice" because they are strictly speaking not "advocates". The role of the prosecutor excludes any notion of winning or losing a case. Professional pride should never come in the way of the pursuit of the truth because nobody has the right to sacrifice justice to achieve professional success.

Mauritius

Paragraph 13 of the Code of Ethics for Barristers follows the above, on the standards applicable to criminal cases. It is accepted, as set out in Paragraph 13.1, that

"Prosecuting Counsel shall not attempt to obtain a conviction by all means at his command. He shall not regard himself as appearing for a party. He shall lay before the Court fairly and impartially the whole of the facts which comprise the case for the prosecution and shall assist the Court on all matters of law applicable to the case".

Many of the cases cited above were reviewed and applied in **Ajay Dookhee v The Director of Public Prosecutions** [2010] SCJ 71, Court of Criminal Appeal, a case where Prosecuting Counsel had been said to have made inflammatory, emotive and

[23] Justice Chong is now a Judge of Appeal at the Supreme Court of Singapore, after having served as Attorney General.

vindictive statements, and to have made emotional appeals for the victim and his family. The Court applied the test set out in **Randall** (above) as to whether there were such departures from good practice in the course of the Appellant's trial so as to deny him the substance of a fair trial. It found that this threshold was not met, as prosecuting counsel's comments were grounded on facts and were not so gross or so persistent or so prejudicial or so irremediable that the trial had to be condemned as unfair.

Conclusion:

Prosecutorial discretion may well be the widest exercise of discretion in the criminal justice system, yet it is far from being arbitrary or haphazard. There are rules to be followed, and prosecutors ultimately remain answerable to the courts and the public at large. When used judiciously, this discretion can deliver consistent results. Its polycentric nature allows for a wide range of considerations to be taken on board, and the paramount consideration in a decision to prosecute remains the quest for justice. With the recent practice of giving reasons in sensitive cases, and the existence of judicial review as a remedy, more decisions will come out in the open, allowing the public to be in a better position to judge their fairness. The exercise of prosecutorial discretion is now less insulated from public scrutiny and criticism. The Prosecutor's role, too, is now clearly defined, with set parameters of behaviour, that need to be abided by.