

CPD Course: Prosecution counsel's role in a criminal enquiry and investigation

Resource Person: Mr. Vijay Appadoo, Assistant DPP & Mr. Medaven Armoogum, Senior State Counsel (ODPP)

Attendees: Law Practitioners and Legal Officers

Date: 27th November 2019

Time: 14.00- 16.00

The Institute for Judicial and Legal Studies welcomed Mr. Vijay Appadoo, Assistant DPP and Mr. Medaven Armoogum, Senior State Counsel (ODPP) to deliver a CPD lecture on "Prosecution Counsel's role in a criminal enquiry and investigation". This course sought to look at the role of the counsel for prosecution at the investigations stage and the interaction of the latter with investigative bodies prior to the trial. This is the second part of the series of lecture organised by the IJLS which aims at assessing the role of Counsel (Defence and Prosecution) in a criminal enquiry and investigation. The third and final part, which will be delivered by Magistrates, will delve into the process of a criminal trial up to the sentencing stage or dismissal of the case.

Mr. Armoogum began this session by stating that he would be dealing with the preliminary issues of a Prosecution counsel's role during a criminal enquiry, most notably, the relationship between the police and the Office of the DPP and that Mr. Appadoo would analyse the process of provisional charges up to the trial. Mr. Armoogum deemed that it was appropriate to refer to the provisions of the law so as to obtain a clear picture of the powers of the DPP. Section 72 of the Constitution was quoted and it was stated that the DPP has the power to:

1. Institute and undertake criminal proceedings (can be done by himself or can be done through delegated authority);
2. Take over and continue criminal proceedings; and
3. Discontinue criminal proceedings (this power cannot be delegated as discontinuance of proceedings require the signature of the DPP in person).

The parameters of section 72 of the Constitution was also referred to in light of section 71 which provides the powers of the Commissioner of Police (CP) so as to establish the discretionary role of the DPP in the duties of the Office of the Commissioner of Police (OCP). It was also pointed out that, contrary to the DPP, the CP can be instructed on policy matters by the Prime Minister (can delegate this power). However, it should be noted that the CP has the sole responsibility of the operational control of the police force. One reason cited for this was to promote the independence of enquiries. Moving on, the next issue raised by the resource person involved situations where the CP turn to the ODPP for advice. Reference was made to enquiries where legal matters arise. The appropriate process involves an interim report containing all the factual background of the case along with the legal issue being sent to the ODPP from the CP. The resource

person stressed on the issue of discretion which the CP has with regards to seeking advice from the DPP. For instance, the CP may seek advice from the DPP as to whether the material gathered to effect an arrest (the CP has the power to effect an arrest) may, in the law, amount to 'reasonable suspicion'.

Next, it was highlighted by the resource person that the CP can also seek advice from the DPP upon completion of an enquiry (not all matters are referred to the DPP- subject to the Police Standing orders- e.g. contraventions may be prosecuted at police level upon delegation). The procedure for this situation involves a PF100 form (i.e. a police summary of the case containing all materials facts and the statements from relevant parties along with the reports of evidence). Emphasis was placed on the types of cases which are submitted to the ODPP for advice. Mr. Armoogum pointed out that a contravention case is normally dealt with at the OCP without the need for intervention of the DPP. However, if there are pertinent legal issues such as identification or non-compliance with the law, the case may be sent to the ODPP for advice. On the other hand, cases involving a minor has to be referred to the ODPP as stipulated under the Juvenile Offenders Act as the consent of the former is required (similar situation for public officers- rule of practice instead of rule of law).

Following this, the process through which the DPP reaches his decision on whether to advance with a case or not was referred to. The first step which the resource person cited concerned the evidential test (evidence based on the PF100 form) which would allow the DPP to determine whether there is a reasonable prospect of conviction. However, emphasis was placed on the difficulties for the DPP to reach the exact merits of a case due to the fact that the former has to rely solely on the file sent by the police (ODPP can ask for further information to the CP for clarification on an issue contained in the file). For this reason, neither the test of proof nor the test of establishing a case beyond reasonable doubt is applied. If the evidential test is positive, the DPP will then move on to applying the public interest test. Mr. Armoogum stressed on the fact that the DPP might still decide not to prosecute despite sufficient if the public interest considerations are satisfied (no significant list but relates to the nature of an offence, age, bona-fide mistakes etc...). Another route to justice which the DPP might opt for in lieu of prosecution relates to issue of warnings as per section 3(2) of the Criminal Procedure Act.

Now, it should be noted that the prosecutorial decision may/should be reviewed at any stage of the proceedings, should new elements or materials (which would have impacted the former decision to prosecute) crop up. One such element or material referred to concerned the wish of the complainant (reconciled with the defendant). The next issue dealt by Mr. Armoogum involved the decisions which the DPP can reach by himself when matters are referred to him. They are as follows:

- Judicial inquiry (e.g. cases relating to suspicious deaths);

- Preliminary inquiry (following amendment in 2011, DPP has the discretion to bypass preliminary inquiry and turn directly to assizes);
- Prosecution (sufficient evidence required);
- Warning; and
- No further action (NFA).

The resource person also highlighted the possibility of opting for private prosecution as was seen in the case of *Edath-Tally v. Glover [1994] SCJ 409*. However, it should be noted that the Supreme Court requires a certificate from the DPP with regards to private prosecution (likewise, the intermediate court- under Courts Act and district courts require the parties to notify the DPP). The reason behind such an approach is to allow the DPP to exercise his functions under section 72 of the constitution. Mr. Armoogum ended his part of the lecture by dealing with the judicial review of the DPP's decisions. Reference was made to the case of *Mohit v. DPP [2005] PRV 31*.¹ The general rule is that all decisions (e.g. discontinuing proceedings or charge preferred) of the DPP are reviewable but the standard of review is not similar as compared to other public decisions (*Malhotra v DPP 2015 SCJ 261*).

In the second part of the lecture, Mr. Appadoo talked about the specific legal requirements related to provisional charge.² He stated that the provisional charge intervenes to bring a certain equilibrium between the need of the police to enquire and the rights of the citizen ('accused'). Moreover, the purpose of a provisional charge is to inform someone who has been arrested by police of the possible charges being levied against him (early stage of enquiry). Likewise, the provisional charge serves as a basis for the detention or conditional release of the suspect. The case of *Mootoosamy v. The Queen [1981] MR 476* was referred to.³ However, it should be noted that there are no statutory provisions with regards to provisional charge and that it is governed by case laws. Section 5 of the Constitution is the only piece of law which provides some sort of guidance on provisional charges. Mr. Appadoo deemed that a balancing exercise should be carried out to assist the need of the police to carry out its enquiry and the need of the suspect to be granted his rights (e.g. bail).

Next, the issue of bail was tackled by Mr. Appadoo. Reference was made to the Bail Act 1999 and it was stated that in principle, the question whether a defendant or a detainee shall be released on bail or remanded in custody lies within the exclusive jurisdiction of the Bail and Remand Court. The resource person also drew reference to the case of *Noordally v. Attorney General & Anor [1986] MR 204* which provides that the suspect

¹ Other cases cited- *Malhotra v DPP [2015] SCJ 261* & *CP v DPP [2018] SCJ 141*

² Cases cited- *THE STATE v BUNDHUN S (2006 SCJ 254)*, *GORDON-GENTIL ALAIN v STATE OF MAURITIUS (1995 MR 38)* & *Shaik v. The State (1994) MR 149*

³ "..... it is fundamentally a process to bring a suspect before the Court, and at the same time to inform him of the nature of the charge against him. If the enquiry results in a prosecution, the suspect is never tried under the provisional information, which is struck out and replaced by a regular information."

remaining at large is the rule; his detention is the exception, and he must be tried within a reasonable time or released. It was further stated that a magistrate, whilst dealing with the issue of bail, must conduct a balancing exercise between four factors (guiding principles) which are as follows:

- Case for the defence- Right to liberty;
- Case for the defence- Presumption of innocence;
- Case against the defence- Protection of society; and
- Case against the defence- Uphold the administration of justice.

Besides the factors listed above, the magistrate also needs to take into consideration the following conditions for releasing a person on bail:

- If he surrendered to custody or appears before a Court as and when required;
- Ensure that he does not commit an offence while on bail;
- Ensure that he does not interfere with witnesses or otherwise obstruct the course of justice; and
- Ensure that he makes himself available for the purpose of enabling inquiries.

Following this, Mr. Appadoo dealt with the aspect of information. It was stated that an information contains the formal charge and is usually comprised of three parts; the heading (*DPP v Digamabar [1978] SCJ 35*), the body - elements of the offence (prosecution has to prove all elements averred in the information) and the jurat (*Hoonooman v R 1976 SCJ 77*). The purpose of an information is to inform an accused of the charge against him so that he has the chance to prepare his defence (section 10 of the Constitution). Moreover, the information serves to assist the court as to the charge against an accused and as such to determine whether the offence charged in the information tallies with the evidence produced in court. Moving away from the information, Mr. Appadoo also dealt with another pertinent aspect which relates to arraignment as stipulated under Part IV of the Criminal Procedure Act. He stated that the trial court must always ensure that an accused understands the charge against him and the consequences of the plea (case of *Sookun v R 1982 MR 230* for a change of plea).

The next aspect of a trial which the resource person sought to explain concerned the abuse of process. He stated that the burden of establishing that the pursuit of a particular proceedings would amount to an abuse of process rests on the accused and the standard of proof is the balance of probabilities. The case of *Police v Ramjee G [2012] INT 25* was cited. Delay is the most common ground on which the claim of abuse of process is often raised in practice. Mr. Appadoo stated that whilst determining whether there was an unreasonable delay which might amount to an abuse of process, the court must consider the length and the reasons of such delay. Reference was made to the case of *Boolell v State [2005] PRV 39* which dealt with the issue of reasonable time with regards to a trial in line with section 10 of the Constitution. It was also pointed out that there are other forms of abuse such as the methods used to investigate the offence in question as per the case of *R v Heston- Francois [1984] 1 AER 785*.

As a conclusion, both the resource persons stated that the relationship between the DPP and CP is crucial with regards to the proper administration of justice. The assistance provided by the ODPP to the police with regards to legal uncertainties during an investigation was stressed upon. With regards to the proper administration of justice, Mr. Appadoo highlighted the importance of using judiciously the provisional charge as well as adhering to the proper structure of an information and respecting the conditions with regards to bail. Lastly, the resource persons stated that the prosecutor's duties consist of assisting the court as well as fighting the case as per the relevant facts and laws.