

**Director of Public Prosecutions Opening Statement at the
Administration of Justice and Legal Services Panel Meeting
on Tuesday, 17th November 1998**

Madam Chairman, Ladies and Gentleman, good afternoon. I welcome this opportunity to address you on the principles and factors relevant both to the decision to prosecute or otherwise, and to the decision to intervene in a private prosecution. I will also explain how such considerations applied in a case referred to before this Panel at the meeting on 20th October 1998, and in which a private prosecution brought against a former Crown Counsel (and others) was discontinued after being taken over by the Secretary for Justice.

I. PROSECUTION POLICY

The principles and factors to be taken into account in the decision to prosecute have repeatedly been stated. On 16th April 1998 the Department of Justice issued its booklet entitled '*Prosecution Policy, Guidance for Government Counsel*', and I have caused members to be supplied with copies of that for the purposes of today's meeting. The booklet explains, in short form, the policy, principles and practices of the Prosecutions Division. It is designed to enable the community to have a better understanding of an important aspect of the rule of law, namely the policy and the criteria involved in the making of prosecution policy. Paragraphs 8 to 18 seek to summarise the relevant considerations. It may be that it will not assist the Panel greatly if I simply repeat what is in the booklet, though I shall, of course, be happy to answer any questions.

That said, may I make some general remarks. The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspect and the

community at large to ensure that the right decision is made. A wrong decision to prosecute, or, conversely, a wrong decision not to prosecute, each tend to undermine the confidence of the community in the criminal justice system. There is no rule that suspected criminal offences must automatically be the subject of prosecution.

Decisions whether to prosecute must be taken in accordance with recognised legal criteria. When deciding whether or not to prosecute the prosecutor acts in a quasi-judicial capacity, and does not take orders from the government, politicians, the law enforcement agencies, the media, or anyone else. The prosecutor represents not the government, but the HKSAR. Prosecutors are as independent as is the judiciary. This is spelt out in Article 63 of the Basic Law, which makes clear that the Department of Justice alone controls criminal prosecutions, free from interference. It is re-assuring that this principle now for the first time enjoys an entrenched status by virtue of its placement in the mini-constitution.

A prosecution will be instituted where sufficient evidence exists against an offender and where it is in the public interest to do so. The evidence upon evaluation must demonstrate a reasonable prospect of conviction. This decision requires an assessment of how strong the case is likely to be when presented at trial. A proper evaluation of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as the admissibility of evidence implicating the accused. The prosecutor must also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction.

If satisfied that there is sufficient evidence to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the

public interest requires a prosecution to be pursued. The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued. The resources available for prosecution are not limitless, and should not be used in inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution. Factors which may arise for consideration in determining whether the public interest requires a prosecution include :

- (a) the seriousness, or, conversely, the triviality of the offence, or that it is of a 'technical' nature only;
- (b) significant mitigating or aggravating features;
- (c) the age, intelligence and physical or mental health or infirmity of the accused;
- (d) the accused's character and criminal record;
- (e) the staleness of the alleged offence;
- (f) the accused's alleged degree of culpability for the offence;
- (g) whether prosecuting would be perceived as counter-productive;
- (h) the availability and efficacy of any alternatives to prosecution;
- (i) the prevalence of the alleged offence and the need for deterrence;
- (j) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- (k) whether the alleged offence is of considerable public concern;
- (l) the attitude of the victim of the alleged offence to a prosecution;
- (m) the likely length and expense of a trial;
- (n) whether the accused agrees to cooperate in the investigation or prosecution of others, or the extent to which the accused has done so;
- (o) the likely sentence in the event of a conviction.

The application of these and other relevant factors, and the weight to be given to each, will depend on the circumstances of each case. In practice, the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. That said, if the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.

II. PRIVATE PROSECUTIONS

Madam Chairman, may I now address the concerns of members on the subject of private prosecutions in three ways. First, by describing the private prosecution procedure. Second, by considering the circumstances in which the Secretary for Justice might intervene in such a prosecution. Third, by providing details of the case which was stopped by the Secretary for Justice on 18th September 1998.

(1) The Private Prosecution Procedure

The right of a private citizen to institute a prosecution for a breach of the law has properly been called ‘a valuable constitutional safeguard against inertia or partiality on the part of authority’¹. Indeed, under the common law every citizen has exactly the same right to institute any criminal prosecution as the Secretary for Justice or anyone else. (Members are referred to paragraphs 57 to 66 of the Prosecution Policy booklet.) It is occasionally necessary for the Secretary for Justice to intervene in a private prosecution. That can be with a view to pursuing the prosecution, or, alternatively, with a view to stopping it. Experience shows that on the rare occasions when such interventions occur, the latter factor has invariably been relevant.

A private citizen’s right to initiate and conduct a private prosecution originates in the early common law. From the early Middle Ages to the

seventeenth century, private prosecutions were the main way to enforce the criminal law. Indeed, private citizens were responsible for preserving the peace and maintaining the law. Under the English common law, crimes were regarded originally as being committed not against the state but against a particular person or family. It followed that the victim or some relative would initiate and conduct the prosecution against the offender. Another feature of the English common law was the view that it was not only the privilege but the duty of the private citizen to preserve the king's peace and bring offenders to justice.²

Because of the increase in courts and cases in the Middle Ages, the Crown began to appoint Crown Attorneys to intervene in cases of particular interest to the Monarch. Intervention took two forms. The Monarch could initiate and conduct certain prosecutions through a personal representative. The Monarch could also intervene in cases begun by a private prosecutor where the prosecution was of special interest to him. By intervening, the Crown Attorney could then conduct or stop the proceedings. As the English common law developed, the role of Crown law officers grew. Still, private prosecutions were allowed. To this day they are recognised in several English statutes.³

That, then, is the background, and in Hong Kong the right of the private citizen to initiate a private prosecution remains a valuable constitutional safeguard against inertia or partiality on the part of authority. The right to initiate private prosecutions is alive and well, and has regularly been invoked in recent times :

1996 :	10 private prosecutions	(20 summonses)
1997 :	6 private prosecutions	(11 summonses)
1998 (Jan to Sept) :	4 private prosecutions	(14 summonses)

(2) **Intervention in a Private Prosecution**

The Supreme Court of Canada has approved this description :

*The right of a private citizen to lay an information, and the right and duty of the Attorney General to supervise criminal prosecutions are both fundamental parts of our criminal justice system.*⁴

The right to bring a private prosecution is open to abuse and to the intrusion of improper personal or other motives. In other words, the right may be employed to bring groundless, oppressive or frivolous prosecutions. A balance must therefore be struck between, on the one hand, the citizen's right to prosecute, and the responsibility of the Secretary for Justice to ensure that unworthy prosecutions do not proceed. Three matters may be mentioned here :

- (a) Article 63 of the Basic Law provides that the Department of Justice of the HKSAR shall control criminal prosecutions, free from interference;
- (b) Although any private person can institute a private prosecution, the Secretary for Justice can always halt such by entering a *nolle prosequi*;
- (c) In respect of offences in the Magistrates' Court, section 14 of the Magistrates Ordinance, whilst acknowledging the right to bring a private prosecution, expressly recognises that the Secretary for Justice '*may at any stage of the proceedings before the Magistrate intervene and assume the conduct of the proceedings*'. This provision was enacted in 1949, and it demonstrates that the legislature in its wisdom concluded that there would indeed be situations in which it would be right and proper for private prosecutions to be taken over. Hong Kong in this regard is in no sense unique, and parallel powers have been conferred upon

Attorneys General and Directors of Public Prosecutions in, for example, England, Canada, Australia and New Zealand. That said, the Courts have indicated that :

'the power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure'.⁵

That view the Secretary for Justice endorses unreservedly. The taking over of proceedings is indeed an exceptional step.

As I have said, this power to intervene is one which is exercised throughout the common law world. Thus, in Australia, the *'Prosecution Policy of the Commonwealth'* states that a private prosecutor will be permitted to retain conduct of the prosecution unless one or more of the following applies :

- (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
- (b) there are reasonable grounds for suspecting that the decision to prosecute was actuated by improper personal or other motives, or otherwise constitutes an abuse of the prosecution process such that, even if the prosecution were to proceed, it would not be appropriate to allow it to remain in the hands of the private prosecutor;
- (c) to proceed with the prosecution would be contrary to the public interest - law enforcement is necessarily a discretionary process, and sometimes it is appropriate for subjective considerations of public policy, such as the preservation of order or the maintenance of

international relations, to take precedence over strict law enforcement considerations; or

- (d) the nature of the alleged offence, or the issues to be determined, are such that, even if the prosecution were to proceed, it would not be in the interests of justice for the prosecution to remain in private hands⁶.

Despite the power to intervene, there is a recognition throughout the civilised world that the access of citizens to the courts will not be impeded save in special circumstances. The taking over of proceedings is exceptional.

(3) **The Private Prosecution which was Stopped**

Since 1 July 1997, the Secretary for Justice, upon my advice, has used the power contained in section 14 of the Magistrates Ordinance to terminate one private prosecution, namely, that initiated by a gentleman called Mr. Cheung Hung-ngai. What happened was as follows :

On the **23rd April, 1998** Mr. Cheung laid a private information against ten persons charging them jointly with one offence of False Accounting, contrary to section 19(1)(a) of the Theft Ordinance, Cap. 210. The information was laid in the North Kowloon Magistracy. One of those accused was a solicitor and a former Crown Counsel. Two of the accused were serving officers of the Independent Commission Against Corruption.

On the **5th August, 1998** the Secretary for Justice in writing informed the Principal Magistrate at the North Kowloon Magistracy of the fact of her intervention in and assumption of the conduct of these proceedings.

On the **18th September, 1998** Counsel appearing on behalf of the Secretary for Justice stopped the case against the ten accused.

The background to the matter is that, on the **22nd August, 1995**, Mr. Cheung was convicted in the District Court of the offence of False Accounting. A Mr. Leung, then a Crown Counsel, prosecuted him. Mr. Cheung was sentenced to three years' imprisonment. He was released in 1997. He appealed to the Court of Appeal, but his application was rejected on **18th October, 1996**, when the court described the case against him as '*overwhelming*', and added that the trial '*judge had clearly come to the right conclusion*'. On **17th October, 1997**, Mr. Cheung applied to the Court of Appeal to ask it to certify under section 32 of the Hong Kong Court of Final Appeal Ordinance that a point of law of great and general importance was involved in his case, but that was refused. Then Mr. Cheung, on **13th January, 1998** applied to the Court of Final Appeal for leave to appeal against his conviction claiming both that a point of law of great and general importance was involved in his case, and that grave and substantial injustice had been done to him. In rejecting Mr. Cheung's application, the Court of Final Appeal observed that '*no injustice of any kind has been done.*'

The facts of the fraud of which Mr. Cheung was convicted were as follows. Mr. Cheung traded under the name of Starlight Trading Company (Starlight). He and a Mainland Chinese company had been engaged in a joint venture for the manufacture of footwear. The factory was in Dongguan. The factory was operated by the joint venture company. Mr. Cheung owned 51% of the shares in the joint venture company, while the remaining 49% were owned by the Chinese partner. In September 1992, Mr. Cheung purchased a quantity of machinery to be utilised in the joint venture factory. The machinery was then delivered to that factory. Mr. Cheung had purchased the machinery for HK\$1,392,380. As a result of a deception perpetrated upon the Chinese joint venture partner by Mr. Cheung, as the District Court was ultimately to conclude, the Chinese partner paid HK\$2,226,410 to Mr. Cheung as its contribution towards

the acquisition cost of that machinery. According to the Chinese partner, the arrangement was that Mr. Cheung would buy the machinery. The two partners would then contribute towards the purchase price of the machinery in the same proportions as their partnership equities, i.e. 51% / 49%. When the time came for the Chinese partner to make its contribution towards the acquisition cost, Mr. Cheung represented to the Chinese partner, dishonestly as the District Court was to find, that the total cost of the machinery was US\$587,800 and on that basis, the contribution from the Chinese partner was to be the Hong Kong dollar conversion of 49% of that figure. This was in fact HK\$2.22 million. This figure significantly exceeded the actual acquisition cost of the machinery. Mr. Cheung personally derived the benefit of the profit thus generated. The false invoice, which was the subject of the charge against Mr. Cheung, was raised when the Chinese partner asked to see evidence from the supplier that the acquisition cost of the machinery was US\$587,000. The invoice was false in that it wrongly showed that the acquisition cost was that sum. Mr. Cheung was charged with and convicted in the District Court of False Accounting in respect of that false invoice.

The particulars of the offence of which Mr. Cheung was convicted were that the relevant document was false in a material particular in that it purported to show that he had paid US\$587,000 for the purchase of the machinery.

Having had his appeals rejected, and a petition to the Chief Executive rejected, Mr. Cheung then launched his private prosecution.

The private prosecution targeted ten persons involved in his trial. They included the prosecutor in his District Court trial, the two ICAC officers responsible for the investigation, both of whom had testified against him, and seven other persons who had also been prosecution witnesses in the District Court trial.

The charge laid in the North Kowloon Magistracy by Mr. Cheung against the ten accused was also one of False Accounting. The document the subject of this charge was not the document in respect of which Mr. Cheung had been charged and convicted, but was an exhibit which had featured in his District Court trial. This document was in fact the invoice which the prosecution had alleged to be the genuine invoice in the transaction described above. Although the authenticity of this document, and the veracity of the information contained in it, had not in any way been questioned during the District Court trial, it was suggested for the first time in the private prosecution that this document was a fake. Mr. Cheung had maintained since his trial in the District Court, but not actually during that trial, that this document was brought into being for the purpose of manufacturing a case of False Accounting against him. The nub of Mr. Cheung's allegation was apparently that anyone who had had any role to play either in the production or subsequent use of the questioned document, including anyone who had utilised it as an exhibit in his trial, which would include the prosecutor and the ICAC investigators, was guilty of having falsified it.

The private prosecution was drawn to the attention of the Department of Justice, and, given the history of the matter, consideration was given as to whether the Secretary for Justice should exercise her powers of intervention.

On the **12th May, 1998** Mr. Cheung was informed by letter that the Secretary for Justice was considering whether she would exercise her powers of intervention under section 14 of the Magistrates Ordinance. Shortly thereafter Mr. Cheung was invited to supply the Department of Justice with a summary of his case and a list of witnesses which he duly provided. That list included the Government Counsel who had prosecuted at the appeals of Mr. Cheung in the Court of Appeal and Court of Final Appeal, and another Government Counsel who had written to Mr. Cheung.

In fairness to Mr. Cheung, if for no other reason, I decided that police should investigate his allegations, and, on **27th May, 1998**, the Department of Justice formally referred the matter to the Commercial Crime Bureau for investigation. As part of that investigation, a lengthy witness statement was taken from Mr. Cheung, among others.

Upon completion of that investigation, the Commercial Crime Bureau were satisfied that the document which was the subject of the charge which Mr. Cheung had laid in the North Kowloon Magistracy was a genuine document and that the information that was contained in it was authentic.

The results of the police investigation and all other materials were then considered by a senior government lawyer, who concluded that there was no evidence to support the charge laid by Mr. Cheung against any of the ten accused.

However, to ensure impartiality, and to avoid any possible suggestion of bias, I decided that an independent assessment should be made of the case. The case papers were therefore sent to a senior barrister at the private Bar. He was instructed to advise whether there was sufficient evidence to prosecute anyone for any offence arising out of Mr. Cheung's allegations. Private counsel advised that there was no evidence to establish a prima facie case of any criminal offence against any of the ten accused. He concluded that there was no merit in the private prosecution. I accepted that advice.

In light of these conclusions, there was only one realistic course open to the Secretary for Justice : to stop the prosecution. That was done.

The private prosecution brought by Mr. Cheung against those who had prosecuted him and testified against him was misconceived from the start. People should not be subject to prosecutions which are brought merely for their own sake with no prospect of success, nor should frivolous or vexatious

prosecutions be allowed to continue. A thorough police investigation, and independent legal opinion revealed that the private prosecution brought by Mr. Cheung was wholly devoid of merit. It had no prospect of success. It constituted an abuse of the prosecution process. This case, if nothing else, demonstrates *par excellence* why it is necessary for the Secretary for Justice to have the power in the public interest to take over private prosecutions and to stop them in exceptional circumstances.

I. Grenville Cross SC

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¹ Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435, 477.

² P. Burns, 'Private Prosecutions in Canada : The Law and a Proposal for Change' (1975), 21 McGill Law Journal.

³ See, eg, section 4 of the Prosecution of Offence Act 1979, s4 : '*Nothing in this Act should preclude any person from instituting or carrying on any criminal proceedings; but the Director [of Public Prosecutions] may undertake, at any stage, the conduct of those proceedings if he sees fit.*'

⁴ *Dowson v R* (1983) 7 CCC (30) 527, 535-6.

⁵ Fletcher Moulton LJ in *Dyson v Attorney General* [1911] 1 KB, 410, 418.

⁶ Prosecution Policy of the Commonwealth, 1990.