

Effective Judicial Review : A Cornerstone of Good Governance

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Judicial Review : Prosecution Decisions and Criminal Trials

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'What has become of the Golden Rule?'

- Mark Twain

It is a pleasure to have been invited to participate in this conference, and I commend the co-organizers for their initiative in placing such focus upon an issue of importance for everyone concerned with good governance and the development of the law.

It would, certainly until quite recently, have been most unusual for a prosecutor to be involved in a conference of this type. Judicial review, historically, had little, if any, role to play in relation either to prosecution decisions or criminal trials. Traditional approaches placed enormous obstacles in the way of those who wished to seek recourse to judicial review in criminal matters, and not without reason. In 1990, the Court of Appeal of Hong Kong expressed the view that on constitutional grounds the courts could not interfere with the prosecutorial discretion, that the decision to prosecute was not amenable to judicial review, and that there were *'few subjects less adapted to the judicial review procedure under O.53 than the exercise of the Attorney General's discretion in deciding whether to institute criminal proceedings and what charge should be preferred'*¹. It was, of course, open to a trial court to consider if a prosecution should be allowed to continue if advised of an abuse of process. Although of late the approach to judicial review in criminal proceedings has become less inflexible, the concern over the suitability of this form of relief in the area of public prosecutions nonetheless endures.

All agree that the integrity of the prosecutor is vital, and is the key to public confidence in criminal justice. If, however, suspects are prosecuted for wrong reasons, the criminal courts are invariably equipped to supply appropriate redress, most obviously by granting a stay of proceedings. The prerogatives of the prosecutor are wide, and for reasons of public policy they need to be respected.² At this point, it is useful to provide a context.

¹ *Keung Siu Wah v Attorney General* [1990] 2 HKLR 238

² *Dyers v The Queen* (2002) 210 CLR 285

Article 63 of the Basic Law of the Hong Kong Special Administrative Region provides for the Department of Justice to control criminal prosecutions, free from any interference. Article 63 enshrines the principle that in the decision-making process the prosecutor must be free from interference of an improper nature. Of its ambit, it has been said :

... it is to such interference, that is to say, interference of a political kind, to which article 63 is directed. But the rule that ensures the Secretary's³ independence in his prosecutorial function necessarily extends to preclude judicial interference, subject only to issues of abuse of the court's process and, possibly, judicial review of decisions taken in bad faith.⁴

The independence of the prosecutor is fundamental to the due exercise of the prosecutorial discretion. The functions of those who prosecute are discrete from those of others in the criminal justice system, and the prosecutor must operate within secure parameters. By experience and training, the prosecutor is qualified not only to assess the evidence, but to gauge where the public interest lies in any particular case. Indeed, the House of Lords recently noted the absence of any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.⁵ Their Lordships also endorsed the recognition given by the courts to :

... the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.⁶

It can safely be said that the scope for the second-guessing of prosecution decisions must, at most, be minimal. If a remedy alternative to the grant of judicial review exists, recourse ought invariably be had to it. In the case of a decision not to prosecute, the right of an aggrieved person to bring a private prosecution is a clear example of this rule.⁷

³ Secretary for Justice of the Hong Kong Special Administrative Region

⁴ *Re C (A Bankrupt)* [2006] 4 HKC 582

⁵ *R v The Director of The Serious Fraud Office* [2008] 3 WLR 568

⁶ *Matalulu v Director of Public Prosecutions (Fiji)* [2003] 2 HKC 457

⁷ *Ma Pui Tung v Department of Justice* CACV 64/2008

The primacy of the prosecutor in determining whether or not to prosecute, the accusations that will be placed before the court, what evidence will be presented, what pleas will be accepted, and the gravity of the offence is generally recognised. Respect for the separation of powers and the rule of law requires the courts to resist encroachment on the territory occupied by the prosecutor.⁸ Save in the most exceptional circumstances, constitutional imperatives inhibit interference with prosecutorial decisions. The delineation of the functions is grounded upon a recognition of the different roles of prosecutors and courts. The independence of the prosecutor is no less important than that of the judge, and only if a prosecution decision is contrary to settled policy, perverse or otherwise reached in bad faith ought it to lend itself to judicial review.⁹ Even then, the function of the court is not to substitute its own view of the case for that of the prosecutor.

It follows that if a judicial review in relation to a prosecutorial decision were to succeed, and this has not yet occurred in this jurisdiction, a court could do no more than to require a reconsideration of the decision. It could not mandate a change of view.¹⁰ Were it otherwise, this would compromise the position of the court itself. In Australia, the point has properly been made that :

*The integrity of the judicial process – particularly its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.*¹¹

As part of the decision-making process, the prosecutor applies wide experience, an instinctive sense of what the situation requires, and an informed judgment, based on the facts. A court called upon to review a prosecution decision may not enjoy these advantages. The application of the solid professional judgment of the prosecutor ought only to be reviewable in the most exceptional of cases, and in Canada it has been said that ‘*flagrant impropriety*’ or ‘*malicious prosecution*’ are appropriate tests for the rare occasions when such a

⁸ *R v Power* [1994] 1 SCR 601

⁹ *Kwan Sun Chu, Pearl v Department of Justice* [2006] 3 HKC 207

¹⁰ *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326

¹¹ *Maxwell v The Queen* (1996) 184 CLR 501

situation might arise.¹² In the United States of America, it has been said :

*This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.*¹³

In deciding whether or not to prosecute, the unique skills of the trained prosecutor are brought to bear. Finely balanced considerations of public interest may come into play, and full weight attaches to the views of the victim, the feelings of the community and of alternatives to prosecution. Judicial review is concerned with the legality of the decision rather than with the merits, and there is little scope for its intrusion into decisions taken by a prosecutor acting in accordance with established prosecution policy. The administration of justice is dependent, in large measure, upon the probity of the prosecutor, and unless it is at least arguable that exceptional circumstances exist the courts must act decisively to nip in the bud challenges to the exercise of the prosecutorial discretion which might at first blush appear attractive but which in reality lack real substance. They should also be vigilant in avoiding any unnecessary extension of the criteria for the granting of leave. The Court of First Instance has said :

It is not possible, of course, to foresee and classify every circumstance in which this court can hold, without

¹² *Krieger v Law Society of Alberta* (2002) 217 DLR (4th) 513

¹³ *Wayte v United States of America* 470 US 598 (1985)

*impermissible encroachment, that the Secretary has acted outside his constitutional powers. There may be exceptional circumstances that arise. But this proviso is not to be read as somehow acting to reduce the role of the Secretary to that of an ordinary administrator. The prosecutorial independence of the Secretary is a linchpin of the rule of law.*¹⁴

Quite apart from providing the means for challenging the legality of a decision, the point has been made that judicial review also encourages high standards by decision makers and concentrates their minds.¹⁵ They realise that the decisions they take may have to be explained at some point to independent judges, and this ensures they act in a reasoned way. Whilst transparency in respect of public prosecutions is a good thing, there are inevitably limits to how far the prosecutor can legitimately go in providing the particular reasons for a decision. Once a decision is taken to prosecute, the matter is *sub judice*, and extra-curial comment may prejudice the fairness of a trial. If the prosecutor decides not to prosecute, the position of the suspect must be protected. The prosecutor should not say things which may stoke up debate in the media and elsewhere as to the guilt or innocence of a suspect who is not to be charged. Whilst the prosecutor can indicate in general terms the basis of a decision, it will invariably be inappropriate to engage in a detailed discussion of the issues. Just as the judge must protect the interests of the accused who stands trial, so must the prosecutor safeguard the position of the suspect who does not. Full deference must therefore always be accorded by the courts to the parameters within which the prosecutor is required to operate when issues of judicial review arise in respect of prosecutorial decisions which are impugned, for whatever reason.

That the decision of whether or not to prosecute is only reviewable in what the House of Lords has recently called '*highly exceptional circumstances*'¹⁶ is reassuring to the prosecutor, for various reasons. First, it respects the position of the prosecutor. Second, it enables the criminal courts to deal with the issues that affect criminal cases. Third, it ensures that cases proceed to trial for resolution, and are not subject to delay. The issue of delay is an important one, and those concerned with the grant or otherwise of judicial review must keep in

¹⁴ *RV v Director of Immigration and Another* [2008] 2 HKC 209

¹⁵ Lord Pannick QC, *The Times*, 3 July 2008

¹⁶ *R v Director of The Serious Fraud Office* [2008] UKHL 60

mind that persons accused of crime may often have reasons of their own for delaying the start of their trial for as long as possible. This is equally an issue where judicial review is sought in relation to decisions taken by the criminal courts in ongoing cases.

If in the course of trials decisions are taken by judges or magistrates which are not to the liking of an accused, these can, ultimately, be challenged through the appellate machinery available to those convicted in criminal cases. The criminal courts are equipped to deal with most, if not all situations which arise, and must be allowed to do so. Were it otherwise, judicial reviews would proliferate to the impediment of the disposal of the work of the criminal courts. It is trite that access of the citizens to the courts is a good thing, but the question must be, to which court? The notion that in criminal matters the trial courts and the appeal courts are ordinarily the most appropriate venues for the determination of issues affecting the prosecution of suspects is well established, and ought not to be whittled away. This means, for example, that it is the trial judge who has the responsibility for ensuring that the criminal process is not abused by the prosecution, and it is not for the Court of First Instance by judicial review to substitute an opinion of its own.¹⁷ In all situations, full weight ought always to be given to what has been described as the '*strong presumption against the Divisional Court entertaining a judicial review application where the complaint can be raised within the criminal trial and appeal process*'¹⁸.

Applications for judicial review in relation to rulings of the courts in cases which are subject to trial are on the increase. This trend should not be allowed to develop to the detriment of the proper administration of criminal justice. The principle that judicial review is an avenue of last resort, and that it will only be in the most exceptional circumstances that a court will stop criminal proceedings *in limine*¹⁹, requires scrupulous adherence. The use of pre-emptive interlocutory review while cases are in progress disrupts and delays proceedings which, by their very nature, require to be timeously processed. Adjournments of trials affect the availability of witnesses and their recollections, create uncertainties, increase costs and generate systemic turbulence. The criminal courts possess appropriate mechanisms to achieve justice, and these ought rarely to be by-passed.

¹⁷ *Attorney General and Another v Tsang Yuk Kiu* [1996] 3 HKC 38

¹⁸ *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326

¹⁹ *Ng Pak Min v HKSAR* HCAL 70/1999

The experiences of different jurisdictions have shown how satellite litigation can frustrate the objectives of criminal justice and distort the trial process. Persons facing trial will sometimes have a motive of their own for seeking to prolong things by putting off the day of reckoning, particularly if they are on bail and money is no object. Trials are being delayed by very long periods in some instances in consequence of judicial review proceedings, and this cannot be desirable. The ingenuity of those who formulate the applications for judicial review and then pursue appeals once the applications are refused is remarkable, although this may not always resonate with those who believe that justice delayed is justice denied. Collateral challenges in criminal cases interrupt the ebb and flow of the trial and ought rarely to be permitted.²⁰ The public interest requires that once an accused is charged before a court he should be tried, and that proceedings should not unnecessarily be disrupted. The problems that can arise were recently considered by the Court of Appeal in circumstances where the start of a trial had been delayed for three years by the process of judicial review, and which is continuing into 2009. The Court said :

*This disruption may find aggravated form as in the present case, where there is an ex parte application made for leave; leave is granted without hearing the prosecutor respondent; an application is then made to set aside leave; that is refused; there is an appeal from that refusal, an appeal that may find its way to the Court of Final Appeal and, if the leave is not disturbed, there is a judicial review and renewed appeals from whatever decision emerges therefrom; and whilst all this is going on, hearing dates for trial are repeatedly vacated.*²¹

The prosecution acts on behalf of the Hong Kong Special Administrative Region, and is just as much entitled to have a fair trial of its case as is the accused. If substantial delays occur in criminal proceedings in consequence of challenges elsewhere, it may not be possible for the prosecution to exercise its rights to the full. At the very least, if collateral challenges are to be mounted which will disrupt outstanding criminal cases, they should be prioritised in terms of listing at each stage. The fast-tracking of judicial review

²⁰ *Ko Kit and Others* CACV 138/2008

²¹ *Yeung Chun Pong and Others v Secretary for Justice* (No. 4) [2008] 2 HKC 46

cases which are associated with criminal trials must now fall for serious consideration by those who administer the courts. The proper management of the criminal justice system requires no less.

The effect of judicial review proceedings upon criminal cases has been significant of late, and has brought problems in its train. Tensions have developed which have affected the due operation of the criminal courts. If this is a price worth paying to protect the fundamental rights of the individual, then so be it. But even in a changing environment, the capacity of traditional mechanisms to produce justice as part of the customary trial process is not to be underestimated. As things stand, one can only conclude that collateral challenges in ongoing criminal cases have increased, are increasing and ought to be diminished.