Statement by DoJ on decision to withdraw prosecution
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The Department of Justice has in its response to media enquiries of October 17, 2016 (response), explained the reasons why the department withdrew the prosecution against the defendant in a case at a residential care home for persons with disabilities. The Department of Justice has since received a number of further enquiries on the same case, to which the department has also replied. In view of the community's concerns over the case, the Department of Justice today (October 27) issued this consolidated statement so as to help the public appreciate the reasons for the department's withdrawal of the prosecution concerned and to clarify certain misunderstandings.

Prosecution Policy

According to the Prosecution Code:

There must be legally sufficient evidence to support a prosecution; that is, evidence that is admissible and reliable and, together with any reasonable inferences able to be drawn from it, likely to prove the offence. (Para. 5.4.)

The test is whether the evidence demonstrates a reasonable prospect of conviction. (Para. 5.5.)

The public interest is not served by proceeding with cases that do not satisfy this test. (Para. 5.7.)

A prosecutor remains under a duty continually to review a prosecution that has been commenced. The prosecution must be discontinued if, following a change of circumstances, a reapplication of the prosecution test at any stage indicates that the evidence is no longer sufficient to justify a reasonable prospect of conviction or the interests of public justice no longer require the prosecution to proceed. (Para. 10.1.)

The Complainant's evidence in this case

If the Complainant had been fit to give evidence, her evidence would have been direct evidence in support of the charge.

Generally speaking, in criminal cases, to prove the truth of what a witness has seen or said, the witness has to personally appear in court to give evidence under oath and tell the court what he or she has seen or said. Otherwise, what the witness has seen or said would be classified as "hearsay evidence" from the legal perspective and is not admissible in court. Hence, the record of meeting(s) between a witness and other person(s) that took place before the court hearing normally cannot be admitted as evidence.

However, according to section 79C of the Criminal Procedure Ordinance (the Ordinance), unless an exception specified in that section applies, the court shall grant leave to admit as evidence a video recording made of an interview between a "mentally incapacitated person" and a police officer, or a social worker or clinical psychologist who is employed by the Government.

One of the exceptions set out in section 79C(4) of the Ordinance is that "it appears that the ... mentally incapacitated person will not be available for cross-examination".

Separately, section 79C(6)(a) of the Ordinance provides that:

"Where a video recording is admitted-
The ... mentally incapacitated person shall be called by the party who tendered the recording in evidence;"

In this case, on as early as August 15, 2014, the prosecution had arranged for the Complainant to be video interviewed in accordance with the Ordinance, and planned to apply to the court for leave to admit the recording as evidence. The relevant application has subsequently been made to the court in accordance with the "Live Television Link and Video Recorded Evidence Rules" (Cap. 221J, Laws of Hong Kong).

However, even with leave granted by the court, based on the above-referred legal provisions, the prosecution would still have to call the Complainant as a witness for cross-examination. Otherwise, the requirements of section 79C(4) of the Ordinance could not be fulfilled.

The trial for the case was originally scheduled to commence on February 2, 2015. However, as the Complainant had been admitted to a hospital, the prosecution applied to the court to adjourn the trial. That was the first adjournment of the case. Subsequently during the period from March 2015 to April 2016, the prosecution had on six occasions obtained specialist medical reports on the Complainant through the Hospital Authority. The purpose was to assess whether the Complainant had recovered from post-traumatic stress disorder and become fit for cross-examination. In those various assessments, the Complainant was diagnosed to be suffering from the above-mentioned conditions and continued to be unfit to give evidence in court proceedings. A medical specialist even pointed out that if the Complainant were to be compelled to appear in court, it would cause enormous stress to her mental condition and threaten her chance of recovery. Taking into account the health condition of the Complainant and the contents of the above-mentioned specialist medical reports, the prosecution had on a total of four occasions applied to the court to adjourn the trial of the case. Earlier this year, the prosecution even specifically sought the expert advice of a medical specialist on the

Complainant's prognosis. Ultimately, having considered carefully the views of all the specialists covering a period of more than one year, the prosecution came to the conclusion that the Complainant had remained unfit to be called as a witness, and it was not possible for the prosecution in the foreseeable future to call the witness for cross-examination in accordance with the requirement of section 79C(4).

A resident of the residential care home concerned (Bridge of Rehabilitation Limited) has made available a video recording taken with a portable phone. That recording shows that the Complainant had, upon enquiry, replied that she had been assaulted by the defendant. The legal considerations mentioned above are equally applicable to this video recording. As a matter of law, if the Complainant cannot be called as a witness, the video recording cannot be produced as evidence to prove the truth of the answers given by the Complainant therein. Further, the individual interviewing the Complainant in that video recording was not a police officer, a social worker or a clinical psychologist employed by the Government. The recording could not be admissible as evidence under the Ordinance.

Remaining circumstantial evidence in the circumstance that the Complainant could not be called

Given the Complainant is unfit to give evidence, the prosecution had to consider whether the remaining evidence (after excluding the video recording record provided by the Complainant) would be sufficient for convicting the defendant. After detailed assessment, the Department of Justice formed the view that there was no reasonable prospect of proving any relevant charge against the defendant with the remaining evidence. The prosecution hence decided to withdraw the prosecution. The prosecution also raised with the judge its considerations of the evidence when objecting to the defendant's application for costs. The judge pointed out (in

paragraph 17 of his Reasons for Decision) that "the prosecution had no alternative but to withdraw the charges against the defendant" ("控方是在無奈情況下才撤銷對被告的指控"). The "Reasons for Decision in respect of the application for costs" (Reasons for Decision) issued by the judge on October 4, 2016, is attached (in Chinese only).

Paragraph 11 of the Reasons for Decision refers to another video recording. The duration of that recording is 1 minute and 11 seconds. It was taken by a resident with a portable phone from outside the defendant's office, in an attempt to record what was happening inside it through the door made of frosted glass. As the door was closed and made of frosted glass, the image captured was not clear. In the absence of evidence given by any individual inside the room, the recording could not prove the occurrence of any illegal acts inside the room. When considering the evidence of the case, and also before the ultimate decision to withdraw the prosecution, the prosecution had indeed very carefully considered this video recording.

There was CCTV recording of the institution showing that the defendant and the Complainant had been in the defendant's office at the same time. However, as the recording could not capture what happened in the office at all, it was of even less use when compared with the video recording mentioned above.

The Police had seized from the defendant's office tissue papers stained with the defendant's semen. The prosecution had also carefully considered the relevant forensic evidence, and raised it with the judge when opposing the defendant's application for costs. As the judge pointed out in paragraph 10 of his Reasons for Decision, "(t)he Police discovered in the dust bin of the defendant's office six pieces of tissue papers (P17 and P18). It was

confirmed, after laboratory tests, that these tissue papers had on them human semen. The DNA of the semen matched with that of the defendant, and the semen also contained a mixture of substances containing the DNA of the defendant and X." However, the prosecution was not able to obtain evidence to prove how the "mixture of substances" came about, the means by or the circumstances in which the DNA of the Complainant came to exist in the mixture, or from which part of the Complainant's body or type of bodily fluid which her DNA originated. Neither had the prosecution any evidence to rule out the possibility that the defendant's semen and the Complainant's DNA might have been left on the tissue papers concerned at different times.

As such, there is no reasonable prospect of proving, by way of the circumstantial evidence mentioned above, that the defendant had had sexual intercourse with the Complainant, or that the defendant had committed indecent assault against her. The Department of Justice stresses that the decision to withdraw the prosecution was not made merely because of the fact that the Complainant could not be called. The case was withdrawn because, in the prosecution's view upon careful assessment of the overall evidence of the case, the remaining evidence in the absence of the Complainant's testimony, could not demonstrate a reasonable prospect of proving any relevant charge. If the department were of the view that the remaining evidence could still demonstrate a reasonable prospect of proving any criminal offence against the defendant, the department certainly would not have withdrawn the prosecution.

Prosecution of cases involving "vulnerable witnesses" - reform and outlook

As has been pointed out in the previous response, the Department of Justice has established procedures in handling the prosecution of cases involving vulnerable

witnesses. In particular, the processing of the cases concerned would be expedited. "The Statement on the Treatment of Victims and Witnesses" (the Statement) sets out the rights of and the standard of service that victims and witnesses (including mentally incapacitated persons) should deserve in the criminal legal process. The Statement sets out the principles and guidelines regarding how the rights of witnesses (including mentally incapacitated persons) should be protected, e.g. where justified, prosecutors should make appropriate applications to the court for, e.g. the use of screens to shield witnesses while testifying in court, the use of two-way closed circuit television to enable witnesses to give evidence outside the courtroom through a televised link to the courtroom, and admission of video-recorded interviews as evidence-in-chief of witnesses who are mentally incapacitated persons.

However, to respect the rule of law, prosecutors should, at the same time, consider the right of a defendant to a fair trial. A prosecutor remains under a duty continually to review a prosecution that has been commenced. The prosecution must be discontinued if, following a change of circumstances (as in the current case where the Complainant has become unfit to be called, and hence could not be cross-examined by the defence), a re-application of the prosecution test at any stage indicates that the evidence is no longer sufficient to justify a reasonable prospect of conviction or the interests of public justice no longer require the prosecution to proceed.

The Department of Justice reiterates that it treats most seriously the rights of mentally incapacitated persons. We are aware and take note of the views of all interested individuals and organisations. In this regard, we shall examine the procedures in handling prosecutions involving mentally incapacitated persons to see if there is room for further improvement, so that we can better safeguard their

rights.

In respect of the law reform relating to "hearsay evidence", the Law Reform Commission published the "Report on Hearsay in Criminal Proceedings" in 2009 which contained detailed recommendations. One of the recommendations is to endow upon the court a discretion to admit "hearsay evidence" of a declarant who is unfit to be a witness because of his physical or mental condition, on the condition that the court is satisfied with the "reliability" of the evidence. After the publication of the report in September 2009, the Department of Justice consulted the Legislative Council Panel on Administration of Justice and Legal Services in April 2012. It also organised a (small-scale) forum on the way forward in May 2012, for which representatives of the Judiciary, the Bar and the Law Society were invited to attend. With the benefit of the above consultations, a working draft bill is being prepared by the Department of Justice, with a view to taking forward the next stage of the consultation exercise to seek the views of legal professional bodies, the Judiciary and other stakeholders. If the law reform can be implemented, it will be helpful in avoiding the situation where prosecution cannot proceed/continue to proceed as a result of a mentally incapacitated person not being able to appear in court to give evidence.

It is hoped that the explanation set out above can address public concerns regarding the case in question.

Ends/Thursday, October 27, 2016

Reasons for Decision in respect of the application for costs (Chinese only)