

## **Instituting Private Prosecutions**

*The right of private prosecution has been called ‘a valuable constitutional safeguard’. The Director of Public Prosecutions considers its origins, its role, and the circumstances in which the Secretary for Justice intervenes in privately instituted prosecutions*

When Legislator Emily Lau Wai-hing initiated a private prosecution in April 1998 against the Director of the Xinhua News Agency for an alleged failure to comply with a data access request, she exercised a right which has its origins in the early common law. In the event, the prosecution collapsed after the summons issued by the magistrate at the behest of Ms Lau was quashed by the Court of First Instance on the basis that the allegation levelled against the Director ‘was, on any view of the matter, misplaced’ (*Jiang Enzhu v Lau Wai Hing Emily* [1999] 3 HKC 8). Notwithstanding its outcome, the prosecution put the spotlight squarely upon a right which is invoked by a handful of citizens each year, and which deserves to be better understood.

The right of private prosecution has been called ‘a valuable constitutional safeguard against inertia or partiality on the part of authority’ (*Gouriet v Union of Post Office Workers* [1978] AC 435). It provides a remedy to the individual who wishes to see the law enforced. At common law every citizen has exactly the same right to institute proceedings as has the prosecuting authority. It is a right which has a distinguished pedigree.

From the early Middle Ages through to the seventeenth century, private prosecutions were the main means of enforcing the criminal law. The private citizen was responsible for preserving the peace and maintaining the law. Under the common law of England crimes were originally regarded as being committed not so much against the state as against a particular person or family. It followed that the victim or a relative would prosecute the suspect. A feature of the early common law was the notion that it was not only the privilege but also the duty of the citizen to preserve the king’s peace and to bring offenders to justice.

Such was the increase in courts and cases in the Middle Ages that the Crown began to appoint Crown Attorneys to intervene in cases of interest to the monarch. Intervention took two forms. The monarch could initiate and conduct certain prosecutions through a personal representative. If the prosecution was of special interest the monarch could also intervene in cases started by a private prosecutor. By intervening the Crown Attorney could either conduct or stop the proceedings.

The expansion of the role of the Crown law officers affected significantly the conduct of public prosecutions. Also, the formation of regular police forces, charged with the duty to prevent and detect crime and to bring criminals to justice, meant that the need for prosecutions to be instituted and financed by private citizens was greatly reduced. However, the system of private prosecution has survived these developments. It continues, subject to certain restrictions, to enjoy a respectable position in modern schemes of criminal justice.

The right of private prosecution is not absolute. A private prosecutor has two hurdles to surmount. He must persuade a magistrate to issue a summons. Then, if he wishes to retain control of the case, and not everyone does, for it can be an expensive process, he may have to persuade the Department of Justice not to take it over. The criteria will be different.

The magistrate has a discretion whether to issue a summons. In so deciding the magistrate should ascertain at least : (1) whether the allegation is of an offence known to law and, if so, whether the essential ingredients of the offence are prima facie present; (2) that the time limits have been complied with; (3) that the court has jurisdiction; and (4) whether the informant has the necessary authority to prosecute (*R v West London Metropolitan Stipendiary Magistrate, ex p Klahn* [1979] 1 WLR 933).

The magistrate should consider as well whether the allegation is vexatious (*R v Bros* (1901) 85 LT 581). Although it is not incumbent upon him to go so far as to hold a preliminary inquiry, he must at least satisfy himself that it is a proper case in which to issue the summons. In most cases it will suffice for the magistrate to confine himself to the material provided by the informant, but he must not ignore material circumstances.

The magistrate retains a residual discretion to hear a proposed defendant if that is felt to be necessary for the purpose of reaching an informed decision. If the Secretary for Justice has not given a consent to prosecute in a case where such is mandatory then a summons cannot be issued. Regard must

equally be had to whether the incident has already been considered by the prosecuting authority which is pursuing what it considers to be other, more appropriate charges. Unless there are special circumstances, such as apparent bad faith on the part of the public prosecutor, the magistrate should pause long before issuing a summons at the behest of a private prosecutor against a person who is already facing charges laid by the authorities (*R v Metropolitan Stipendiary Magistrate, ex p Chaudhry* [1994] QB 340).

If the magistrate has any concerns, he should examine all the relevant circumstances. A misconceived private prosecution can cause great distress to the defendant, even when it is dismissed. The likelihood of the Secretary for Justice taking over the proceedings of the private prosecutor will necessarily be a matter for consideration. There is, however, no conflict as such between the right of the individual to prosecute and the discretion of the magistrate to decide whether or not to issue a summons. A refusal to issue a summons is, after all, amenable to judicial review (*R v Highbury Corner Magistrates' Court, ex p Tawfick* [1994] COD 106).

Once the summons has been issued, it is open to the Secretary for Justice to intervene. Such intervention may be with a view to continuing or terminating the private prosecution. As the Supreme Court of Canada has recognised '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' (*Dowson v R* (1983) 7 CCC (3d) 527). The Basic Law vests the ultimate control of prosecutions in the Department of Justice.

The taking over of prosecutions is exceptional. That said, if the right of private prosecution is abused intervention may be unavoidable. The procedure is open to the intrusion of improper personal or other motives. It may be used to bring groundless, oppressive or frivolous prosecutions. The state of the evidence may be such that there will clearly be no case to answer if the case is pursued (*R v DPP, ex p Duckenfield* [2000] 1 WLR 55). There may be a duplication of proceedings. The prosecution may be contrary to the public interest, included in which is a consideration of the likelihood of conviction, and of the appropriateness of conviction. In any such situation the power and the duty of the Secretary for Justice will be to take over the conduct of the criminal proceedings and to offer no evidence (*Gouriet v Union of Post Office Workers*, [1978] AC 435).

This is a sensitive area. It is necessary to seek to achieve a balance

between the citizen's right to prosecute and the responsibility of the Secretary for Justice to ensure that unworthy prosecutions do not proceed. The Secretary enjoys wide powers of intervention. Section 14 of the Magistrates Ordinance provides that the Secretary 'may at any stage of the proceedings before the magistrate intervene and assume the conduct of the proceedings'. Like powers are enjoyed by those responsible for public prosecutions throughout the common law world. However, '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 process' (*Dyson v Attorney General* [1911] 1 KB 410).

Public prosecutors in Hong Kong recognise that the access of citizens to the courts should not be impeded save in exceptional circumstances. Intervention cannot occur without the personal sanction of the Secretary for Justice. If a decision is made to take over and abort a privately instituted prosecution, it cannot be impugned in the courts unless it is 'manifestly such that it could not be honestly and reasonably arrived at' (*Raymond v Attorney-General* [1982] 1 QB 839).

Private prosecutions have been instituted with some regularity in the courts of Hong Kong both before and after reunification. In 1996, there were ten private prosecutions; in 1997, there were six; in 1998, there were six; in 1999, there were two; in 2000 there were six. These thirty prosecutions in turn generated sixty five summonses. In one instance only has it been necessary for the Secretary for Justice to intervene and terminate a private prosecution. That was after a thorough police investigation and an independent legal opinion revealed that the prosecution in question was misconceived, had no prospect whatsoever of success and constituted an abuse of the prosecution process.

That the system of privately instituted prosecutions is both alive and well is a healthy sign. Properly deployed, it has as much utility today as it had in the earliest days of our legal system. The right of the individual to prosecute, though open to abuse, remains a vital one.