

To prosecute or not to prosecute?

The Director of Public Prosecutions, Mr. Grenville Cross SC, examines the role of public interest in the context of public prosecutions.

The decision whether or not to prosecute is the most crucial step in the prosecution process. In every case great care must be taken on behalf of all concerned to ensure that the correct decision is made. A wrong decision to prosecute, or, conversely, a wrong decision not to prosecute both tend to undermine the confidence of the community in the criminal justice system.

Article 63 of the Basic Law provides that the Department of Justice controls prosecutions, free from any interference. The Department therefore decides whether a prosecution should be initiated, pursued or terminated. As prosecutors we approach these tasks in accordance with an established and announced prosecution policy.

It has never been the position that those suspected of criminal offences must automatically face prosecution. A prosecution is only ever appropriate when the offence or the circumstances of its commission is or are of such a character that it can truly be said that such a course is justified in the public interest. The consequences of a trial upon an accused can be traumatic, even if, ultimately, he is acquitted. The prosecution process is not lightly to be invoked.

So it is that the essential question is whether the prosecution is required in the public interest. One cannot state any one general all-embracing principle upon which difficult decisions have to be made. One has to look at all the facts and circumstances of each case. There must, however, be some general considerations to be taken into account in making a decision, while guarding against those becoming too inflexible. In deciding whether a prosecution is really appropriate, such factors as the seriousness of the offence and its consequences will be duly examined. So also will the age and health of the suspect. It may

not be in the public interest to go through the whole process of the criminal law if only a nominal penalty will result. It may be sensible not to prosecute a suspect if a prosecution will give him the opportunity he seeks to pose as a martyr or to turn the trial into a propaganda exercise. The decision whether to prosecute depends ultimately upon a broad view of the interests of justice.

Take, for example, young offenders. Wherever possible, our aim is to divert youngsters away from the courts. The stigma of a conviction can cause irreparable harm to the future prospects of a young adult. That is why we give careful consideration to dealing with such people by means of a caution. In 1999, whereas 8,646 young offenders (7-17) were arrested, 3,216, or 37.2%, were given a warning as an alternative to prosecution.

It is often far easier for the prosecutor to decide to prosecute than it is to decide not to prosecute. In a matter so vital as the liberty of the subject, however, the prosecutor must have the courage of his convictions. He cannot avoid his duty by simply saying '*let the court decide*'. No one should be subjected to a criminal trial unless it is necessary.

Prosecutors must also consider if the continuation of a prosecution is in the public interest. When new material comes to light, they should review the case. Constant monitoring of that type is vital. It has nothing to do with '*favouritism*', as some have suggested. It has everything to do with the obligation of the prosecutor to remain '*hands-on*'.

In the '*Guatemala Passport*' case, earlier this year, for example, we terminated the trial of a businessman from Taiwan after we became aware of matters which suggested that a travel document might not have been unlawfully obtained, as originally thought. Again, no evidence was offered earlier this month against the Assistant Director of the Housing Department who was accused of theft and assault. That was after two eminent psychiatrists advised us that his conduct was attributable to a psychiatric disorder, and that he was not responsible for his actions. No legitimate interest would have been served by continuing to prosecute such a person and, when advised of our decision, the Principal Magistrate approved it. We are, after all, prosecutors, not persecutors.

The Department of Justice must at all times avoid any appearance of bias. When, therefore, a young man of good character, who was charged with possession of a small quantity of ‘*ecstasy*’, made representations to us through his lawyer as to the propriety of pursuing his prosecution, we proceeded with great caution. That was so because the father of the young man is himself a former prosecutor and is prominent in the law. An independent legal advice was obtained from an experienced barrister in the private sector.

The barrister considered all aspects of the case, including the age of the accused, his clear record, his circumstances and the nature of the offence. He concluded that the consequences of a prosecution would be out of proportion to the seriousness of the offence or to the penalty a court would be likely to impose. He advised that the interests of justice did not require the case to be pursued further, and that the justice of the situation would be met if the accused were to be bound over to be of good behaviour. In so advising, the barrister wisely made the point that although the parentage of the accused ‘*should not be a factor in his favour, equally it should not act against him*’. In light of that advice, the case was stopped.

A week prior to that case, another young man had, by coincidence, been dealt with in exactly the same way for an identical offence at the same magistracy. Curiously, the media made no mention of it. Perhaps that accused’s father was not sufficiently important to warrant their attention. But in both cases the prosecutions were discontinued after new information indicated that it was not in the interests of justice to pursue them.

It is regrettable that some seek to sensationalise the conduct of these types of case. They should clearly understand, however, that we apply prosecution policy without fear or favour. The record speaks for itself.

Last month, for example, the Deputy Director of the Regional Services Department was convicted of 33 offences of theft. Last week, the Deputy Commissioner of the Inland Revenue Department, and her husband, also a senior civil servant, was convicted of using a document with intent to deceive. Next month, several immigration officers face trial in the District Court for offences allegedly committed against a young woman from the mainland.

No two cases are alike. Factors may arise in one case which have no relevance in another. That does not mean that the taking into account of such factors somehow contravenes the principle of equality before the law. If that were right, it would never be proper to decide not to prosecute a suspect because he was very young, or very old, or seriously ill, or badly stressed, since that would involve the giving of preferential treatment to that person over others. Equality before the law does not require that every case be treated in exactly the same way, irrespective of the personal situation of the suspect, or the circumstances of the case, or the merits of the prosecution.

A prosecution will usually take place unless the public interest factors clearly outweigh those in favour of prosecution. In deciding where exactly the interests of justice may be said to lie in any particular situation, the prosecutor must bring to bear his experience and judgment. He must also apply good, old-fashioned common sense.
