

Prosecutorial ethics : the modern prosecutor at work

The prosecutor occupies a position in society which is as powerful as it is privileged. He or she is entrusted with awesome responsibilities. The decisions he takes can profoundly affect the lives of others. There is little margin of error. The ramifications of a prosecutorial decision require the most careful of consideration. They require the prosecutor to pause and consider if in any particular case a prosecution is in fact appropriate. A decision to prosecute must be taken with the keenest appreciation of the ordeal which is involved in a trial, and of the trauma and the stigma that can result to the accused and his or her family, even if ultimately there is an acquittal. That said, difficult decisions cannot be sidestepped. The prosecutor needs to possess judgment and commonsense in abundance. He must also have the courage of his convictions.

It is vital that the prosecutor be fearless. He will sometimes be criticised for prosecuting, and at other times castigated for not prosecuting. That is inevitable. Prosecutorial decisions are inherently controversial. But provided the prosecutor has conscientiously discharged his duties, he must have the strength of character to resist criticism from whatever quarter, no matter how strident it may be. He, not the law enforcement agency, must decide what is the proper course. Never must he allow his judgment to be overborne by political, media or public criticism. Let it be remembered that prosecuting is the art of the possible. No one must ever be prosecuted because he may have committed a crime, or even because he has probably committed a crime. The issue of prosecution does not even arise until the threshold test of whether there is a reasonable prospect of securing a conviction has been met. So at times of controversy the prosecutor must display resolution and not allow the suspect unjustifiably to be charged. Just as the judge must scrupulously protect the rights of the accused who stands trial, so must the prosecutor determinedly safeguard the rights of the suspect who does not. The integrity of the criminal justice system must at each stage be protected.

When at court the prosecutor represents the Hong Kong Special Administrative Region. He does not represent the government, the police, or any other agency. He is as independent as is the judge. He has no 'client' in the conventional sense, but acts impartially and objectively, yet in the public interest. His role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and to the dictates of fairness. The prosecutor has vast resources at his disposal, and the power this gives him must be exercised with a sense of proportion. He must not advance submissions in which he does not believe, nor must he conceal material that may assist the

accused. It is no part of the prosecutor's function to seek a 'conviction at all costs'. No more can be expected than that he should present his case to the court fairly, intelligently and persuasively. His sole interest is that the right person be convicted and that the truth be known. The prosecutor might feel disappointed at the outcome of a trial in which he has expended great energy. Any such chagrin must however yield to an appreciation that as the representative of the public interest he is obliged to guard against the conviction of the innocent. As Justice Sutherland explained in 1935 in the Supreme Court of the United States of America, the interest of the office of the prosecutor is 'not that it shall win a case, but that justice has been done'.

Fairness by the prosecutor does not make him a 'soft touch'. He must be as vigorous and determined as he is courteous in the presentation of his case. Whilst he is at liberty to strike hard blows, he 'is not at liberty to strike foul ones'. He will be wise not to take as his role model Attorney General Coke who, at the trial in 1605 of Sir Walter Raleigh for high treason, told the accused that 'I will prove you the notorious traitor that ever came to the bar. Thou art a monster.' The prosecutor should seek by all proper means to convince the court of the rightness of his position. If that requires him firmly and resolutely to press his argument, and strenuously to assail the position of the accused, then so be it. That is the essence of the adversarial system. The weak prosecutor will rarely get to the heart of the matter and, if he does not, the truth may not emerge. In that event, the purpose of the trial will have been frustrated. The prosecutor who combines integrity with firmness will command the respect of the Bench and the trust of the profession. But the one who commands neither will indeed be handicapped in the discharge of his duties.

The prosecutor must bear in mind that when he prosecutes a case he is himself on trial. The public perception of the efficacy of a prosecution may be affected if the prosecutor displays discourtesy, bad case management or poor advocacy skill. If in any way the prosecutor is found to be wanting that may dent public confidence in the system of criminal justice. To be a prosecutor is a tremendous honour. It is also immensely satisfying. Yet dedication, professionalism and assiduity are required of those who take up this onerous task. To play a pivotal role in the justice system is a privilege, but it is also a challenge not lightly to be undertaken. The community looks to its prosecutors for sound judgment, complete independence and scrupulous fairness at all times. Those who fail to measure up will attract little sympathy. For the modern prosecutor standards must be everything.