

## TO BIND OVER, OR NOT?

*Binding over orders have recently attracted public attention. What is their function? When are they used? The Director of Public Prosecutions examines the approach of the criminal justice system to the use of the bind over.*

Last December controversy was sparked in some quarters after I decided to stop two prosecutions which were before the courts. That was after each of the defendants agreed to be bound over to be of good behaviour. After the reasons for those decisions were placed in the public domain, informed opinion by and large accepted the propriety of binding over the defendants. However, some queried whether other defendants who are similarly placed receive similar treatment. They do. Suggestions to the contrary are groundless.

I terminated the prosecution of the Assistant Director of the Housing Department after medical reports demonstrated that he was suffering from a psychiatric disorder at the time of the theft and assault offences with which he was charged, and was not responsible for his actions. The prosecution of a student, whose father happened to be prominent in society, and who was charged with possession of two Ecstasy tablets, was likewise terminated after it was concluded, on the basis of independent legal advice, that its continuation would bring disproportionate consequences to the defendant.

Although some sought to sensationalise the conduct of the two cases, the use of the bind over arrangement in such circumstances is in fact a familiar feature of the system of criminal justice in this jurisdiction. Even though 95 other cases of shop theft, and seven other cases of drugs possession, were also disposed of in 2000 by means of bind overs, the critics did not so much as bat an eyelid in relation to those other cases. Nor could they, for all those cases, as with the two to which they reacted, were dealt with in accordance with an established pattern of prosecutorial conduct.

The bind over procedure is as old as the common law itself. It is tried and tested and has served Hong Kong well for many years. It is quite wrong to regard it as being in any way a let-off. It is a vital aspect of preventive justice. It operates as a rehabilitative measure in its own right, which serves to keep the defendant on the straight and narrow. The defendant knows that if he is guilty of further misconduct during the operational period, he will stand to lose his recognisance. It must also be remembered that the bind over as a means of disposal can only be deployed, after no evidence has been offered, if the court itself agrees that such a course is in fact appropriate.

Once a prosecution has begun, the public prosecutor must remain hands on. He has a duty to superintend the progress of all prosecutions. That means that when new material comes to light, the propriety of allowing a prosecution to proceed must be reviewed. Constant monitoring of that type is an important aspect of our work.

Representations are regularly made by defence lawyers to the prosecution to offer no evidence against defendants if they agree to being bound over. Although many such representations are rejected as unmeritorious or inappropriate, each case of substance is examined by the Senior Court Prosecutor in charge of the magistracy, or by the specialist team of lawyers which handles magistracy cases, or by both. If the offence is serious or prevalent, as with drugs possession and shop theft, there will have to exist strong reasons indeed for departing from the normal policy of prosecuting offenders.

When representations are made to the prosecution, we bear in mind that a court will usually only agree to this if the alleged offence is not in the most serious category. A decision whether to seek a bind over is taken after a careful consideration of the facts of the individual case, the circumstances of the parties, and after due regard has been had to whether the community interest really requires the prosecution to proceed. It may not be appropriate to pursue the prosecution if the consequences to the accused will be out of all proportion to the gravity of the offence. Other factors which, when taken in conjunction with others, might be relevant, will be found in the likely penalty in the event of a conviction, the age of the defendant, his record and character, his mental state, the circumstances of the offence, the view of the victim, if any, and the attitude of the

accused himself. This approach is applied consistently to every such case, irrespective of the status of the offender, and without fear or favour. It is the approach adopted throughout the common law world.

No one pretends that the decisions which prosecutors have to take are easy. Decisions of whether or not to prosecute are inherently controversial. The exercise of prosecutorial discretion is not an exact science. The public prosecutor must at all times bring to bear his judgment, wisdom and experience and decide where the interests of public justice may truly be said to lie. It would be wrong to pursue every case without regard to the justice of the situation. No matter how great the criticism from outside commentators, the public prosecutor must always do that which he believes to be right. The pressure of those who seek to influence the due operation of our processes must at all costs be resisted. The public prosecutor must uphold the integrity of the criminal justice system at all stages, and to that the independence of the prosecutorial function is the key.

Any defendant who feels his prosecution should be disposed of by a binding over arrangement has the right to make representations to that effect. Thousands exercise that right each year. All such representations are carefully considered, and some are acceded to. Although one or two of the defendants dealt with in that way may enjoy some prominence in society, most are ordinary members of the public. No matter what the status of the defendant, all are treated at all times with absolute equality and fairness by the prosecuting authority.