Prosecutors also have rights

Every accused is entitled to a fair trial. But what about every prosecutor? The Director of Public Prosecutions contends that what is sauce for the goose must also be sauce for the gander

The right of an accused to a fair trial is fundamental. It is the yardstick by which any system of criminal justice is judged. The right to a fair trial is guaranteed by Article 87 of the Basic Law, as well as by Article 11 of the Hong Kong Bill of Rights. But it is not just those who are accused of crime who require a fair deal at court.

The public prosecutor is entitled to be justly treated in the course of criminal proceedings. A trial in which the prosecutor is denied the right to be heard, to present his evidence or to have his case objectively assessed cannot be described as fair. The position of the prosecutor, however, is not constitutionally underpinned. It is to the common law, therefore, that the prosecutor must turn for redress if, as occasionally happens, proceedings miscarry to his detriment. That occurs invariably when a court seeks to prejudge the strength of the prosecution case.

Courts of appeal have sometimes had to consider situations in which prosecutors have been denied a full and fair hearing of their case. In *Attorney General v Wong Kwok-hip* [1987] 3 HKC 432, a court ruled '*no case*' before it had heard all the prosecution witnesses. In *Attorney General v Hung Kam-lung* MA 761 of 1987, a magistrate who felt the case lacked merit told the accused not to bother to cross-examine the prosecution witnesses. In *Attorney General v Lau Chi-yung* [1993] 2 HKCLR 98, a court stopped the prosecutor from calling his evidence. In *Attorney General v Wong Chi-fai* [1988] HKC 858, the prosecutor was even threatened with costs if he insisted to call his witnesses. When confronted with situations of this type, the prosecutor, acting in good faith, must be prepared to defend his position.

The rights of the prosecutor are generally recognised. In *R v*

Lee Yung-chi MA 1004 of 1986, Roberts CJ said it was '*improper for a court to reach a decision as to whether or not there is a case to answer until it has heard the whole of the evidence which the prosecution wishes to put before it*'. The duty of the tryer of fact is to keep an open mind until the prosecutor has closed his case. Until that point is reached, the '*decision whether to continue or not must be that of the prosecution*' (*R v Grafton* (1993) 96 Cr App R 156 at 161). In *R v Swansea Justices ex p DPP* 154 JP 709 at 712, Mustill LJ said :

> *The public has an interest in ensuring that properly brought prosecutions are properly conducted in court just as much as the defendant has an obvious interest in being allowed to present his case to the fullest advantage.*

If the stage is reached in a trial where it is no longer in the public interest for the prosecution to continue, the prosecutor should take steps to stop it. However, except in those rare situations where a prosecution is oppressive or vexatious or an abuse of the process of the court, the prosecutor has the right to present his case in its entirety (*Attorney General's Reference (No. 2 of 2000)* [2001] 1 Cr App R 503 at 507). That it is for the prosecutor to decide which witnesses to call in order to establish his case has been described by the High Court of Australia as a '*fundamental proposition*' (*Richards v R* (1974) 3 ALR 115 at 118). It is the right of the prosecutor to adduce all such evidence as is admissible in support of his case. Evidence is admissible if it is '*relevant to the matters in issue*' (*Kuruma v R* [1955] AC 197 at 203).

The common law recognises a right in a court to acquit an accused at any time after the prosecutor has closed his case (*Attorney General's Reference No. 2 of 1986* [1987] HKLR 1104 at 1110). There is no such right prior to that point being reached. If an accused submits at the close of the prosecution case that there is no case to answer, the court can properly resolve the question at that juncture along established lines (*R v Galbraith* [1981] 1 WLR 1039). That issue, however, must not be prejudged (*Attorney General v Lam Yuk-chuen* MA 178 of 1987). If justice delayed is justice denied, so also is justice hurried.

The instances in which it will ever be appropriate for a court to intervene at an early stage with a prosecution which is under way will be few and far between. Such intervention, most commonly, will take the form of a stay of proceedings. A court, however, has no responsibility for the institution of proceedings. Nor has it any power to stop a case just because it considers that '*as a matter of policy, it ought not to have been brought*' (*DPP v Humphreys* [1977] AC 1 at 46). A court cannot simply decline to try a case it dislikes (*Ex p Downes* [1954] 1 QB 1 at 6). In *R v Sang* [1980] AC 402 at 455, Lord Scarman, having emphasised that a court's control of the criminal process begins and ends with trial, said :

> *It follows that the prosecution has rights that the judge may not override. The right to prosecute and the right to lead admissible evidence are not subject to judicial control. Of course when the prosecutor reaches court, he becomes subject to the directions as to the conduct of the trial by the judge, whose duty it is to see that the accused has a fair trial.*

The Court of Appeal was recently confronted with a situation in which a prosecutor was prevented at trial from calling his last witness (*Secretary for Justice v Fan Kin-chung* [2003] 2 HKC 551). It took the opportunity to affirm three principles of crucial importance to those involved in public prosecutions. First, unless a prosecutor is abusing the process of the court or is seeking to introduce irrelevant or inadmissible evidence, it is improper for a court prematurely to make up its mind as to whether there is a case to answer before the whole of the evidence has been heard. Second, in a criminal trial, fairness applies just as much to the prosecution as to the defence. Third, it is for the prosecutor, not the judge, to decide which witnesses should be called, subject always to relevance, admissibility and to the prosecutor not abusing the process of the court.

The governing principles in this area are now quite well-established. The prosecutor, nonetheless, cannot afford to be complacent. His position, particularly in busy trial courts, may not always receive the degree of deference and understanding it deserves. It is incumbent upon the prosecutor who is acting legitimately in the public interest to be vigilant

in defence of his rights. That is an integral part of prosecutorial responsibility.