

Antony Leung : No prosecution the right decision

The Director of Public Prosecutions, Grenville Cross SC, explains why the former Financial Secretary will not be prosecuted

No principle of criminal justice is more hallowed than that which dictates that a person should only be prosecuted if the evidence is sufficient. No one should ever be prosecuted simply because he may have committed an offence. The threshold test for prosecution is that there must exist at least a reasonable prospect of conviction.

After the ICAC investigated complaints that former Financial Secretary Anthony Leung deliberately avoided First Registration Tax (FRT) by purchasing a Lexus saloon in January in advance of the Budget, a Senior Counsel at the Bar provided an independent opinion. Thereafter, a Queen's Counsel in London provided a second such opinion. Each advised against prosecution on the totality of the evidence.

Had the evidence established, as the law requires, that Mr Leung '*wilfully and intentionally*' used confidential information acquired in his official capacity for personal benefit, a prosecution for misconduct in public office would have been open. Senior Counsel advised that objectively Mr Leung should have realised what the effect of the car purchase would be, and that there was a case for him to answer based on inference. However, he added that the test for prosecution was higher than that, and in determining whether to prosecute regard must be had to lines of defence which were plainly open to Mr Leung or had been indicated by him.

After FRT became an issue of concern in March 2003, Mr Leung repeatedly protested his innocence. Whilst accepting he had been negligent in failing to connect his official work and private life, he insisted his mistake was not intentional. He acknowledged he should have avoided any perceived conflict of interest, but maintained that it had never been his intention to save FRT.

In determining Mr Leung's motive in purchasing the Lexus, Senior Counsel concluded that an inference of guilt was not the only one to be drawn from the circumstances. It was at least reasonably possible that as an older man with a young wife having their first child another inference to be drawn was that his dominant purpose was to satisfy her desire for the car before the birth. Mr Leung had also taken no steps to conceal the purchase. As it could not with certainty be established that in purchasing the car Mr Leung subjectively intended to save himself FRT, there were some, but only speculative prospects of securing a conviction for the offence of misconduct in public office.

Senior Counsel also considered Mr Leung's failure to make a declaration of conflict of interest after Dr E K Yeoh had done so as the meeting of the Executive Council concluded on 5 March 2003. Mr Leung, of course, did himself no favours on that occasion by keeping quiet, although he has explained that as the meeting wound down his mind was focused on the Budget he was about to deliver and the press conferences which would follow. Senior Counsel advised that although a prosecution for failure to declare a conflict of interest was open, it was not on the facts of the case in the public interest to prosecute. As it could not be proved that the car purchase was motivated by a desire to save FRT, the failure to declare was in a much less serious category than would otherwise have been the case. That, however, was not the end of the matter.

Senior Counsel was required to examine the evidence in its entirety. He considered whether a prosecution was viable on the basis of a continuous course of dishonest conduct linking the car purchase and the failure to declare to the wilful and deliberate intention to save FRT. Senior Counsel concluded that the chances of success were affected by precisely the same considerations as had influenced the assessment of guilt as regards the car purchase. As the purchase itself could not be characterised as criminal, the case for prosecution fell away, grave suspicion notwithstanding.

Queen's Counsel in London advised that if it were possible to allege that Mr Leung had used his knowledge of the imminent tax increase to take advantage of it in his private capacity, it would be necessary also to establish that because of that knowledge he did something he would not have done. It was simply not possible for the prosecution to prove that without the inside knowledge he would not have made the purchase when he did. If the car purchase was not criminal, it did not become criminal as a result of a subsequent failure to disclose it. Although Mr Leung might have been politically unwise in making the purchase when he did and not disclosing it, it could not be established that he was guilty of a criminal offence.

After I had considered the evidence and the opinions of the two legal experts, I concluded that criminality could not be established to the required standard on the evidence as a whole. The prosecution could not prove that Mr Leung purchased the car in order to avoid tax. The failure subsequently to declare was not misconduct of sufficient seriousness to justify prosecution as it appeared on the evidence to be due to nothing more sinister than a desire to avoid personal embarrassment. In these circumstances my duty to stop the case was plain.

It has never been the position in this jurisdiction that those suspected of crime must automatically face prosecution. There must be adequate evidence. A bare chance of conviction, sometimes called a *prima facie* case, falls short of the required standard. As stipulated in *The Statement of Prosecution Policy and Practice* (2002) :

'When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction.'

Prosecutors are sometimes tempted to take the easy way out. It is the simplest thing to leave it to the court to decide. That approach, however, represents an abdication of responsibility by those whose duty it is properly to vet cases. As gatekeepers, prosecutors ensure that only legitimate cases are prosecuted. Mr Leung was as entitled as any other suspect to have his case properly processed.