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“CHALLENGES IN CRIME IN THE 21ST CENTURY”

CHALLENGES TO PROSECUTORIAL DISCRETION

Table of Contents

- A. Introduction**
- B. The Prosecutorial Discretion**
- C. The Office of the DPP (Mauritius)**
- D. The decision to prosecute and its relative challenges**
- E. The Purdy Case**
- F. Conclusion**

Introduction

The Director of Public Prosecutions (DPP) in Mauritius, like many of his counterparts in the Commonwealth is a public officer. Again like many of his counterparts in the Commonwealth, he enjoys constitutional guarantees from the direction or control of any person or authority and is vested with wide discretionary powers to carry out his functions. The reason for of having such wide discretionary powers is precisely to enable the prosecutor to reach an appropriate decision especially that each case must be decided on its own facts and merits. Discretion allows for flexibility and enables the prosecutor to adapt his decision to existing circumstances.

But it is also a fact, as may be seen from the experience of several jurisdictions, that prosecutorial discretion may be the subject of abuse or very often exercised to suit the political agenda of a governing regime. The need for more visibility and accountability in the manner the prosecutor exercises his discretion cannot therefore be understated if the public is expected to have confidence in the criminal justice system. In many jurisdictions, guidelines have been promulgated to ensure consistency and to bring transparency in the decision-making process but as cases of assisted suicide in the UK have demonstrated, the court would not hesitate to go to another level in appropriate cases and impose a legal duty on the DPP to state his policy in no uncertain terms to enable the public affected by the law in question to foresee how and in what circumstances the prosecutor will or will not exercise his discretion to prosecute.

For the purposes of this paper, I shall look at two cases: the first one is the Mauritian case **Jeewan Mohit v DPP**, which defines the scope of judicial review in relation to prosecutorial decisions. As a background to the case, an overview of the Office of the DPP in Mauritius is offered. The second case is the well known English case of **R (Purdy) v DPP** where the House of Lords concluded the DPP had a duty to clarify his policy when prosecuting offenders in relation to offences under section 2(1) offenders under the Suicide Act (encouraging or assisting suicide (attempted)) of a

person) and in particular, to promulgate the features tending towards or against prosecution. The Judges in Purdy were of the view that the Code for Crown Prosecutors was not sufficiently clear on the legal position of assisted suicide to allow prospective offenders to foresee whether their contemplated act constituted an offence or not.

The consequence of the Purdy Judgment is already being felt. In a letter addressed to the Times newspaper on 15 February 2012, following the arrests of nine journalists of the Sun newspaper and their informants on suspicion of breaching the Prevention of Corruption Act, Geoffrey Robertson QC, relying on the decision in Purdy invited the “...current deus ex machina Keir Starmer- who produced acceptable guidelines for the right to die – doing the same for the media’s right to make necessary payments to expose malfeasance’. A good starting point would be to look at the definition of prosecutorial discretion given that it lies at the core of the prosecutor’s duty.

B. Prosecutorial Discretion

The term “*prosecutorial discretion*” refers to the prosecution’s power to choose whether or not to bring criminal charges, and what charges to bring, in cases where the evidence would justify charges.

This concept is well established in the Commonwealth and is in line with what was stated as far back as 1951 by Sir Hartley Shawcross KC, then Attorney-General of England and Wales, to the House of Commons:

“It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should prosecute, amongst other cases: ‘wherever it appears that the offence or the circumstances of its commission is or are of such a character that prosecution in respect thereof is required in the public interest’. That is still the dominant consideration.”

The process of prosecution requires the prosecutor to engage in a series of tasks. First the prosecutor has to decide whether a particular act or omission by a defendant might reasonably be said to fall within the ambit of the criminal law. The prosecutor will have to consider amongst other things the evidence on file and assess the reliability of such evidence in court, the credibility of witnesses who will be called by the prosecution and the persuasiveness of any potential lines of defence likely to be raised on behalf of the defendant. The evidentiary test here as one former DPP in England, Sir Norman Skelhorn puts it “*our acid test was whether, on the evidence before us, if that evidence stood up in court and was not eroded, there was in our considered opinion a likelihood that a conviction would result*”.

Once this exercise is over, the Prosecutor has to decide whether to prosecute or not or the case may be more appropriately dealt with by means of a caution or by taking no further action at all. An example used very often where a caution would be

justified is in the case of the old absent minded lady who commits a shoplifting. The same decision would not be appropriate in the case of a season criminal committing the same offence.

The Prosecutor wields considerable discretion at this pre-trial stage and he will take into account a number of factors before coming to a final decision. In essence, he will have to consider the surrounding circumstances of the offence, its seriousness, whether there exists any extenuating circumstances, whether the defendant has a clean criminal record, whether the prosecution would serve as a deterrent and whether the consequences of prosecution would be out of all proportion to the seriousness of the offence or the penalty a court would be likely to impose. There may be other considerations in deciding whether or not to prosecute for instance, where a defendant is a foreign national covered by an immunity or subject-matter of a request for extradition.

The discretionary exercise of power by the prosecutor does not stop at the pre-trial stage. It carries on even after trial has started. He has to present his case in a form that is both comprehensible and capable of being persuasive beyond reasonable doubt if the prosecution is to result into a conviction. He will be expected to make critical decisions as to what evidence to lead, what witnesses to call, what questions to ask and what objections to make. He may also have to decide whether to drop some of the counts on the charge sheet and whether to accept a guilty plea in return for a lesser offence. In many instances he has to decide whether to enter a *nolle prosequi*. He has at the end of the day the responsibility to ensure that the exercise of that discretion is just, fair, reasonable and within constitutional limits, having regard to the surrounding circumstances of the case. He has little room for error. It therefore stands to reason that in common law jurisdictions the nature of the discretionary power is provided for in statutes or like in the case of Mauritius in the Constitution itself with a guarantee of independence to the DPP in the exercise of his powers.

C. The Office of Director of Public Prosecutions (Mauritius)

Section 72 of the Mauritian Constitution provides as follows:

- (1) *There shall be a Director of Public Prosecutions whose Office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission.*
- (2) *No person shall be qualified to hold or act in the Office of the Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.*
- (3) *The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –*
 - (a) *to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);*
 - (b) *to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and*
 - (c) *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.”*

Section 72(5) of the Constitution provides that “*The powers conferred upon the Director of Public Prosecutions by subsection (3) (b) and (c) shall be vested in him to the exclusion of any other person or authority*”. Section 72(6) of the Constitution guarantees the independence of the DPP by providing that “*In the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority*”.

The Office was first established in the 1964 Constitution, as part of the second stage of constitutional developments in Mauritius (as spelled out in the *Text of Agreed Final Communiqué of the Mauritius Constitutional Review Conference of 1961*)¹. With provision being made for the post of Attorney-General to be filled by a Minister, it was felt necessary to create a new official post of the Director of Public Prosecutions who would be responsible for and would exercise control over the conduct of prosecutions, and would in this respect be **independent of the Office of the Attorney-General**.

In his 1964 Report as Constitutional Commissioner (following his visit to Mauritius from 20 July to 10 August 1964) Professor S. A. De Smith considered the Director of Public Prosecutions should be given the judicial security of tenure which he enjoys under a number of other constitutions.²

At the 1965 Mauritius Constitutional Conference (September 1965, Lancaster House, London), where a constitutional framework for self-government and independence was devised, the parties further agreed that a person will not be qualified to be or act as Director unless he is qualified for appointment as a Supreme Court Judge; the Director would be appointed by the Judicial and Legal Service Commission; his security of tenure would be similar to that of a Judge.³ Moreover, his salary and conditions of service [as well as those of Judges of the Supreme Court, Members of Service Commissions, the Chief of Police, the Electoral Commissioner and the Ombudsman] would be protected.⁴

As pointed out by Professor S.A. De Smith, the independent constitutional status of the DPP stemmed from the need ***“to safeguard the stream of criminal justice***

¹ Mauritius Legislative Council, Sessional Paper No. 5 of 1961 - Constitutional Development in Mauritius. It was agreed at that conference that should provision be made for the post of Attorney-General to be filled by a Minister, who would not be a public officer, “it would be necessary to create a new official post of Director of Public Prosecutions who would be solely responsible in his discretion for the initiation, conduct and discontinuance of prosecutions and would in this respect be independent of the Attorney-General”.

² Mauritius Legislative Assembly, Sessional Paper No. 2 of 1965 – Report of the Constitutional Commissioner, Professor S.A. De Smith (November 1964).

³ Mauritius Legislative Assembly, Sessional Paper No. 6 of 1965 – Report of the Mauritius Constitutional Conference (September 1965), Annex D, para. 27.

⁴ *Ibid.*, at para. 42.

from being polluted by the inflow of noxious political contamination ... to segregate the process of prosecution entirely from general political considerations.⁵

For administrative convenience and also due to the fact that the newly created Office of the DPP was small, it operated within the Attorney General's Office. This administrative arrangement lasted until 2009, when the two Offices were separated following the recommendations in the Mackay Report. Lord Mackay at first felt that at an initial phase, *"those who support the Director of Public Prosecutions in the State Law Office should constitute a separate department reporting to and managed by the Director of Public Prosecutions and with no responsibilities except those relating to prosecution"*.

In his updated Report submitted to the Government of Mauritius in September 2006, he revised his initial recommendation and was of the opinion that in the light of the judgment of ***Jeewan Mohit v the DPP*** (Privy Council Appeal No 31 of 2005), the Office of the DPP should be established as a separate Office distinct from that of the Attorney General's Office, the more so since the Attorney General is a member of the political executive. The Law Reform Commission in its Issue Paper on the *"Office of the DPP and the Constitutional Requirement for its Operational Autonomy"* went further and saw this cohabitation as falling foul of the Constitution when it wrote *"the current practice since independence of law officers working at Attorney General's Office appearing for or advising DPP falls foul of the principles underlying the setting-up in the Constitution of distinct offices of Attorney General and DPP. The arrangement is unconstitutional and should be brought to an end"*.

The Office has now its own budget and its own establishment. It is served by a team of dedicated, professional and hardworking staff. It is responsible at a national level for offering prosecution services. Its main aim is to bring offenders to justice and to ensure that their rights are safeguarded. It is committed to deliver a public service of

⁵ S.A. De Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964), at pp. 144-145.

high quality and ensure that a positive impact is made on people's lives by making their communities safer.

D. The Discretion to Prosecute and its Relative Challenges

The exercise of the discretion to prosecute offenders is at the heart of its decision-making. Under the present guidelines, law officers proceed to exercise that discretion by first asking whether there is enough evidence to provide a realistic prospect of success in each case and then go on to decide whether the prosecution is in the public interest. The second limb of the test enables officers to decide cases on public interest grounds.

In the case of *Mohit v DPP*, the appellant, a private citizen, expressed concerns at what he has called the rising tide of crimes and the breakdown of law and order in Mauritius. In October 2001, he initiated a private prosecution against the then leader of prosecution charging him with harbouring a criminal based on the statement of one Mohammad Bissessur who had confessed being involved in a series of serious crimes. In his statement Bissessur had stated that at one stage fearing for life he was given money by the leader of opposition to leave Mauritius. The case was set aside on the ground of jurisdiction. He initiated another private prosecution but this was short lived since the DPP entered a *nolle prosequi* without giving reasons. He was undeterred and entered two successive private prosecutions which suffered the same fate. He then applied to the Supreme Court for a judicial review of the decision of the DPP and he was not successful. The case eventually reached the Privy Council.

The central issue in the case was whether the decision of the DPP to discontinue a private prosecution was subject to judicial review. The Supreme Court of Mauritius relying on a decision of the High Court of Australia, *Maxwell v R*⁶ held that as in the Maxwell case that certain decisions involved in the prosecution process are, of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute. A similar decision was reached by the Hong Kong Court of Appeal earlier in the case of *Keung Siu Wah v Attorney General*⁷. In reply to the DPP's

⁶ (1996) 1 LRC 299

⁷ (1991) LRC 744

contentions, their Lordships in the Privy Council referred to the case of **Matalulu v DPP**⁸, and quoted with approval the following passage:

“It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.”

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Fiji Constitution. The Court observed that springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It was held that a purported exercise of power would be reviewable if it were made:

1. *In excess of the DPP's constitutional or statutory grants of power— such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).*
2. *Contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.*
3. *In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.*
4. *In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*

⁸ (2003) 4 LRC 712

5. *Where the DPP has fettered his or her discretion by a rigid policy— e.g. one that precludes prosecution of a specific class of offences.*

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

The Board held that the establishment in the Constitution of the Office of the DPP and the assignment to him and him alone of the powers listed in section 72(3) of the (Mauritian) Constitution ; the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account and , in some cases, the difficulty or undesirability of explaining his decisions : these factors mean that the threshold of a successful challenge is a *high one*. It is, however “ *one thing to conclude that the courts must be very sparing in their grant of relief to those seeking to challenge the DPP’s decisions not to prosecute or to discontinue a prosecution , and quite another to hold that such decisions are immune from any review at all..*”. Following this the House of Lords also pronounced itself on the issue of prosecutorial discretion in the Purdy case.

E. The Purdy Case

Background

Ms Purdy, 45, was diagnosed with multiple sclerosis in 1995 and has been confined to a wheelchair since 2001. Her barrister, David Pannick, QC, stated that despite it being illegal to assist a suicide, (the act of suicide itself is no longer criminal in England under the Suicide Act 1961) cases where terminally ill people were helped to die by friends or relatives were rarely prosecuted. This, he said, has led to the law becoming both confused and uncertain.

As the current law stands in England, section 2(1) of the Act states that a person who “aids and abets, counsels or procures the suicide of another, or an attempt by another to commit suicide” may be convicted and imprisoned for up to 14 years. However, the consent of the Director of Public Prosecutions is required under Section 2(4) of the Act for proceedings to be brought. Ms Purdy seeks reassurance from the DPP that once her condition deteriorates to a sufficient extent, her husband may accompany her to Switzerland to die in comfort without the risk of him facing prosecution in England for having done so. Switzerland (along with the state of Oregon in the United States of America) has legislated to permit assist suicide. Dignitas, in the Swiss clinic, has released figures stating that over 100 people from the United Kingdom have used their facilities to end their own lives.

On 18 December 2007, Ms Purdy wrote to the DPP requesting for the publication of any policy not to prosecute that he may have in place relevant to her circumstances. Alternatively, Ms Purdy suggested that if no such policy existed, then the DPP should promulgate one setting out the criteria for the exercise of the discretion in deciding whether to prosecute under the Suicide Act 1961 in particular, relevant to her case since her husband had proposed to assist her to travel to Switzerland where assisted suicide is not a criminal offence.

The DPP declined Ms Purdy's invitation to issue guidelines. She was told in a letter of the 14 January 2008:

"There is no such policy, and indeed, as you will be aware from the judgment of the House of Lords in the Dianne Pretty case, any such policy – which would amount to a proleptic grant of immunity-, would be unlawful.

As Lord Bingham said; 'It would have been a gross dereliction of the Director's duty and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead prosecution'.

Was the Director's failure to formalise his policy of non-prosecution in compassionate assistance cases in breach of standards of fair warning and consistency in the law?

The House of Lords had in fact addressed itself to this question in ***R v DPP, ex parte Pretty***. Diane Pretty suffered from a degenerative disease that was rendering her increasingly debilitated. She sought confirmation from the DPP that that if her husband were to assist her to commit suicide by accompanying her to the Swiss clinic, he would not be prosecuted under section 2(1) of the UK Suicide Act. The Director refused to commit himself to any non-prosecution. The judges found that the prosecutor must apply the law as it is stated in statutes and interpreted by the judiciary, and 'must consider all cases referred to him on the basis of what the law is, and not upon what he thinks the law should be (or even what it will probably be, at some time in the future).'⁹ This means that he must be prepared in principle at least to *consider* prosecuting any activity which is criminal under the substantive law.

Thus, it was felt that the prosecutor's office, technically and based on the above arguments, can never adopt a policy or guideline which for instance says that for certain crimes like in the example of the old lady who commits shoplifting for an negligible shall not be prosecuted. Despite the fact that prosecutors do practically exercise such discretion but same cannot be made part of policy or guideline to

⁹ Jonathan Rogers, *Restructuring the exercise of prosecutorial discretion in England*, Oxford Journal of Legal Studies, 2006, pp. 786

which they would be bound as it will go against the principle of rule of law and separation of powers. The decision in Purdy case a new dimension to the prosecutorial discretion duty in that it imposes a duty on the DPP to promulgate in cases of that nature, where there is a need to add certainty and foreseeability to the law, the features by way of policy guidelines tending towards or against prosecution. The UK CPS reacting to the pronouncement of the Judges issued its policy guidelines in February 2010. It provided in a carefully drafted text that in essence prosecution is not likely to take place in circumstances where the victim had reached a voluntary, clear, settled and informed decision to commit suicide and the suspect had acted out of compassion.¹⁰

It is nevertheless difficult to reconcile the duty imposed on the DPP by the courts with the warning issued by Lord Bingham in that it would amount to a serious *'dereliction of duty on the part of the Director and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead prosecution'*.

The decision of the Prosecutor will not be subject to the policy guidelines issued by the DPP and in exercising his discretion henceforth he will have to be absolutely certain that in cases of assisted suicide the suspect has acted on compassionate grounds and more importantly where the victim has reached a voluntary, clear, settled and informed decision. The issue is even more complex in the case of the

¹⁰ Paragraph 45 of the CPS guidelines provided for a list of other circumstances to be taken into consideration in suicide cases as follows:

'A prosecution is less likely to be required if:

- 1. the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;*
- 2. the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;*
- 3. the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;*
- 4. the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.'*

journalists who concede having to pay informants and keep the anonymity of their sources to be able to function as journalists. The rationale being that if the source of the information is disclosed, no person would come forward to denounce malpractice. Should that rationale suffice to prompt the prosecutor to decide in the public interest not to prosecute an offender even though there is evidence establishing a breach of the Prevention of the Corruption Act?

F. Conclusion

Prosecutors must be consistent, fair, independent and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion, victim or any witness influence their decision. Neither must prosecutors be affected by improper or undue pressure from any source as the prosecutor acts in the public interest, not just in the interests of any one individual.

The prosecutor plays a pivotal role in the administration of justice. To the extent that the prosecutor is the lawyer of the state, his client is not the police department or the individual victim of a crime, but the society itself. As a practical matter, the prosecutor is moreover not merely the advocate who represents society's interest in court, but also the public official whose job is to decide, as a substantive matter, the extent of society's interest in seeking punishment. The DPP is ultimately the guardian of the public interest. However, the exercise of prosecutorial discretion calls for accountability. Prosecutors should be willing, in appropriate cases, to state publicly reasons for taking particular decisions.

The decision in Purdy centered on the nature of the DPP's discretion to grant or refuse his consent to criminal proceedings under section 2 of the Suicide Act. It was a case which raised important social, moral, ethical and religious considerations. It was concerned with the sanctity of life. Lord Bingham in the Dianne Pretty case was quite adamant that the DPP had no power to undertake in advance not to bring criminal proceedings in respect of a contemplated course of action. However, he qualified his answer as follows : "*The fact that there is a duty under section 10 of the Prosecution of Offences Act 1985 on the DPP to issue a general code for Crown Prosecutors does not necessarily mean that he may not ever, in his absolute discretion, give guidance as to how the discretion will be exercised in regard to particular offences. It is important to bear in mind what is under consideration, viz the width of the powers of the DPP. One should not be over prescriptive on this subject. An example from Scotland was given of the Crown Agent stating that no proceedings for a contravention of section 6(1)(a) of the Road Traffic Act 1972 would be instituted on the basis of a breath alcohol reading of less than 40 micrograms.*"

But I envisage that the occasions on which such statements would be appropriate and serve the public interest would be rare. Subject to this narrow qualification, I would accept as sound the policy of the DPP never to announce in advance, whether he will or will not bring criminal proceedings. Certainly, it is beyond his power to indicate, before the commission of a particular crime, that he will or will not prosecute".

The risk, however, is that in the process, the DPP may be dragged unwillingly into disputed areas of social policy where the statutes have left gaps rendering the law inadequate and uncertain in dealing with specific cases. It is the role of neither the DPP nor the courts to develop policies to fill the gaps left by legislation. These issues of broad social and moral policy should be left to be determined by Parliament. Should the DPP decides to refuse consent to a prosecution where the statute vests in him discretionary powers to that effect, there is always a possibility of remedial action by way of judicial review. In respect of matters referred to the court for prosecution, the best safeguards will be the courts themselves.

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Director of Public Prosecutions - Mauritius

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