

**LegCo Panel on Administration of Justice and Legal Services
Special Meeting on 15 July 2009**

Incident concerning the bodyguards of Miss Bona Mugabe

In her letter of 25 June 2009 to the Secretary for Justice, the Clerk to the Panel advised that at its meeting on 15 July 2009 the Panel wishes to discuss issues related to the decision not to institute a prosecution of the suspects in an incident of alleged assault on 13 February 2009 outside a house in Tai Po occupied by Miss Bona Mugabe, the daughter of the President of the Republic of Zimbabwe, in which two journalists were the complainants.

(i) The principles of prosecution

2. Article 63 of the Basic Law provides that the Department of Justice shall control criminal prosecutions, free from any interference.

3. The Department of Justice is not responsible for the investigation of cases. That responsibility lies with the law enforcement agencies, which operate separately. Once a law enforcement agency has investigated a criminal matter, legal advice may be sought. When that happens, the evidence that has been assembled is assessed. A strict separation of functions exists between those who investigate cases and those who advise on and prosecute cases.

4. Before the Department of Justice can institute a prosecution, strict criteria must be applied. Paragraph 7.1 of *The Statement of Prosecution Policy and Practice* (2009) (*'The Statement'*) stipulates :

The prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued? That policy is consistent with the policies applied by prosecution agencies throughout the common law world.

5. As is explained in para. 7.3 of *The Statement*, it is ‘*not in the interests of public justice, nor indeed of the public purse, that weak, or borderline cases should be prosecuted*’ (per Michael Thomas QC, Attorney General).

6. In the process of evaluating the suitability of a case for prosecution, all relevant matters have to be considered. These include matters which implicate a suspect as well as matters which exculpate him or her. As para. 8.2 of *The Statement* explains :

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the accused. The prosecutor should also consider any defences which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction. In a matter as vital as the liberty of the citizen the prosecutor will wish, in the event of uncertainty, to err on the side of caution.

7. It is established policy in Hong Kong not to give detailed reasons for prosecution decisions. This policy has been formulated to protect the interests of those suspected of crime but not charged with any offence. It recognises that the only proper forum for the determination of questions of guilt or innocence is the court, where the suspect has the right to a fair trial and the necessary safeguards are in place to protect his or her interests. In exceptional cases, however, such as this, it is sometimes necessary to reveal rather more about the basis of a prosecution decision, but even then there are strict limits.

8. Once it is decided not to prosecute a suspect, it is important not to parade in public all the evidence that would have been made available if a prosecution had been instituted. The rights to privacy have to be respected, and the rights of the suspect must not be sacrificed in a public debate over issues that will not be tested at court. In this case, we recognise that there has been much publicity, part of the evidence has been placed in the public domain, and concerns have been generated.

The provision on this occasion of more detail as to the basis of the decision ought not to be regarded as a precedent for other such cases in the future.

(ii) **The decision not to prosecute the complainees**

9. After the complainants, a journalist and a photographer, alleged that they were assaulted outside a house in an enclosed residential complex in Tai Po by the complainees, who were, respectively, a police officer and an intelligence officer in the employ of the Government of the Republic of Zimbabwe, and who were about to escort Miss Mugabe from the house to her car for travel to the university, the police conducted a full investigation into their complaints.

10. Although the complainants said they were at the scene for wholly innocent purposes, involving the delivery of an envelope to the house, it became apparent once the case was reviewed that the complainees were genuinely concerned for the safety of Miss Mugabe. They appeared to have believed they were acting properly in intercepting the complainants who suddenly appeared at the house just as Miss Mugabe was about to leave. They regarded the complainants as trespassers, and it transpired that the complainants had not registered at the guard post when entering the complex as required of visitors by the management. Although it was fully recognised that some aspects of the complainees' conduct might have caused the complainants to believe that disproportionate force had been used, it was decided that the correct approach was to assess what happened in the round.

11. The decision not to prosecute was reached after full consideration was given to the statements of the complainants and to their allegations that they were manhandled as innocent journalists and that a camera was improperly removed, and also to the contents of a sound recording. In accordance with standard prosecution policy criteria, regard was also had to the statements of the complainees and to their concerns for the safety of Miss Mugabe, who was waiting to depart as the events outside unfolded, but whose trip had to be aborted because of what occurred. The statements of four witnesses at the scene and in the house which indicated the complainees pushed the complainants away from the house where Miss Mugabe was waiting were also considered, and their evidence helped to place all that occurred in full context.

12. In assessing the case, due weight was given to the evidence which supported the allegations of assault, but it was ultimately decided, on balance, that a prosecution could not be justified. Since the evidence showed that the complainees were apprehensive for the immediate safety of Miss Mugabe as she was about to depart, regard needed to be had to the difficulty they faced in weighing to a nicety each and every action they took to ensure her safety from any danger, actual or perceived. They felt that they could not take any possible chances with the safety of Miss Mugabe, and it was in that context that their actions needed to be viewed.

13. The assessment of the evidence showed that the complainees wished to conceal the Mugabe connection to the house, and they refused to accept the letter carried by the complainants, which they told them to post. They were suspicious of the bona fides of the complainants, who initially said they wanted to deliver the letter but later said they wanted to talk to people in the house but had made no appointment. The complainants moved to the doorstep of the house, the door to which was open with Miss Mugabe waiting inside. The complainees wanted the police to be called, and insisted that the complainants remain until they arrived.

14. In applying the law to the evidence, it was borne in mind that a person is entitled to use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of another. The evidence showed that the complainees had a genuine concern for the safety of Miss Mugabe in the circumstances which confronted them. It would not have been realistic to have expected them, in that context, to have simply suspended judgment, stood back, allowed a potential danger to materialise and to have left Miss Mugabe to look after herself.

15. Out of an abundance of caution, a Senior Counsel at the private Bar who specialises in the criminal law was instructed to provide an independent outside assessment of the case. Having separately reviewed the case, he concluded that it was '*borderline*' or '*marginal*' and that, in all the circumstances, the public interest did not require a prosecution.

16. After the complaint of assault was advised upon, a question concerning the work status of the complainees was received from the head of a security company through a journalist, and this has been

referred to the police for investigation. Once that investigation is complete, it will be decided if a prosecution is appropriate. Although the outcome of that investigation cannot be prejudged, even if a work related offence were to be established, it would have no bearing on the assessment made of the complaint of alleged assault.

17. If a prosecution of the complainers for assault had been justified, it would have been instituted. On balance, and with the benefit of independent outside legal advice, it was decided it was not. A prosecution can only ever legitimately proceed on the basis of proper legal criteria.

Department of Justice
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