

Traditional Legal Ethics for Prosecutors
A Speech by DPP to New Government Counsel
and Legal Trainees on the Criminal Advocacy Course
31 October 1998

1. Standards

The highest ethical and professional standards are required of prosecutors. The approach of a prosecutor must always demonstrate fairness and integrity. A prosecutor is in an immensely powerful and privileged position. That carries with it important responsibilities. At the advice stage, it is vital that you consider the implications of a prosecution upon an accused. How will it affect his or her job, family etc. Consider the ramifications of the decision to be taken. Remember the ordeal involved in a trial, and the trauma that can result even if there is ultimately an acquittal. Always stand back and ask yourself if a prosecution is really necessary.

2. To prosecute or not: public pressure

You must make your decisions upon prosecutions by faithfully applying the prosecution policy, and by bringing to bear your own judgment and common sense. Sometimes you will be criticised for prosecuting, and at other times you will be criticised for not prosecuting; that is inevitable. But do not worry about that: so long as you have faithfully discharged your duties, and have conscientiously decided the matter, then there is no need for you to be upset by criticism from whatever quarter it may come. You must always do what you believe to be right: even if you think that inevitably your decision, be it to prosecute or not, will attract a hostile response. You must never allow public or media criticism to force you into a course which you do not believe to be right.

3. Reference to accused person

Another matter, small in itself, but symbolic. Often in criminal proceedings you will see the person on trial referred to as 'the defendant'. This, in my view, is to be avoided as it rather suggests that there may be a duty on a person to defend himself. There is not. The person on trial does not have to prove or establish anything - only the prosecution does. It is for that reason that I suggest you adopt the practice of referring to the person charged as 'the accused', rather than as 'the defendant'.

4. Position of prosecutor

Always remember who you, as the prosecutor, represent. The HKSAR. Not the government. We are not controlled by the government or any law enforcement agency. This is clearly spelt out in Article 63 of the Basic Law. We are as independent as is the judiciary. That has certain important consequences : you must see yourself as ministers of justice : your role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and to the dictates of fairness.

A prosecutor should not act as if representing private interests in litigation. You have no 'client' in the conventional sense - you act independently, yet in the public interest. The defence lawyer is an advocate who has a private duty : he will do everything he honourably can do to protect the interests of his client : he is entitled to 'fight for a verdict'. You, on the other hand, have the function to assist the court in arriving at the truth : you must not advance arguments which you do not believe in, or try to conceal or suppress any legal evidence that could assist the accused. It is not your duty to obtain a 'conviction at all costs'; it is simply to lay before the court the facts which comprise your case,

and to explain these intelligently and convincingly to the court. You have no interest in securing a conviction as such : your sole interest is that the right person should be convicted and that the truth should be known. It is a fundamental duty of prosecutors to comply with the principle stated by Mr. Justice Sutherland for the United States Supreme Court in 1935 : the interest of their office *'is not that it shall win a case, but that justice shall be done'*.

Your advocacy must be conducted temperately and with restraint, bearing in mind that the primary function is to aid the court in the arrival at the truth and the attainment of justice by fair means: do not seek to rely on inadmissible evidence. Remember, prosecutors do not 'win' or 'lose' cases, although, of course, incompetent prosecutors may 'blow' a case. If the accused is acquitted, then, although you may be personally disappointed, provided you have done your best the proper view for you to take is that justice has been done.

Nothing I have said is to be taken as suggesting that you must not be vigorous and determined in the presentation of your case. You operate in an adversarial structure. Stand up for your position. Seek by all proper means to convince the court of the rightness of your case. Firmly and vigorously press your argument and, if necessary, to get to the heart of the matter, attack that of the accused. A weak advocate will rarely get at the truth, and, if he does not, it may well be that the truth will not come out at all. In that eventuality, the purpose of the trial will have been frustrated.

When you advise on a case, do not overload the indictment or charge sheet. Whilst the charges laid must be truly representative of the criminality of the accused, keep a sense of proportion for excessive charging sews confusion and promotes an inability to focus by all parties. So, where possible, keep things simple. Also, never go ahead with more charges than are necessary with a view to encouraging an accused to plead guilty to a few. In the same way,

do not lay a more serious charge just to encourage the accused to plead guilty to a less serious one.

5. Terminating a Case

What happens if the stage is reached in a prosecution when you lose faith in your case? That is, you feel that it would be improper to proceed? That may arise, for example, because evidence has been ruled inadmissible or because a witness has turned hostile. Your duty is clear : you must pull the plug on the case. You should tell the court that you will not be calling further evidence; that is because the defendant will be entitled to his acquittal without further ado - it is his right to have his ordeal brought to an end.

But do not allow yourselves to be intimidated by the defence, or pushed into a course of action you deem to be inappropriate by the judge. Do not be a soft touch. Always listen to what the defence request, and to what the court advises, give those matters full respect, but do not take a course of action unless you yourself are convinced that it is the proper one.

6. Conduct in Court

Always be courteous to all : to the judge, to the defence, to the accused, to the witnesses, and the officer in charge of the case. Remember that the prosecutor may strike hard blows but “is not at liberty to strike foul ones”. Prosecutors, therefore, have responsibilities to present the case fairly, to address rather than conceal points for the defence, and, above all, to exercise their considerable powers with a sense of proportion. Prosecutors normally take these duties seriously. By and large, they do not adopt as their role model Attorney-General Coke who, in the 1603 trial of Sir Walter Raleigh for high treason, told the unfortunate defendant : *“I will prove you the notorious traitor that ever came to the*

Bar. Thou art a monster.” You must not in cross-examination make statements or ask questions which are merely scandalous or intended or calculated only to vilify or annoy a witness or some other person. It is unethical to ask a question, knowing that it will be objected to and ruled inadmissible, purely in order to implant an impression on the Court or on the witness.

Always be fair. Always have a mastery of your brief and of the issues. Anticipate what they might be. Do not be left with your mouth hanging open. If you achieve that, you will find that you are trusted and respected both by the bench and by the Bar, and that will assist you enormously in your career as an advocate. To be trusted in the profession is a great thing. Scrupulous fairness is essential : Has your witness got a criminal record? Check and, if so, tell the defence. Have you material which may assist the defence? Check and, if so, disclose it. Whilst it is no part of your role to do the job of the defence for them if you are aware of an authority which may damage your case you, as a minister of justice, should advise the court of it; do not suppress it. As the representative of the public interest you are obliged to guard against the conviction of the innocent. Properly understood, the primary goal of a prosecution is to convict the guilty but not the innocent. In the eyes of the public, a criminal trial is a contest in which both sides are seeking to ‘win’. Seen from this perspective, a prosecution is successful only if the accused is convicted. The prosecutor’s obligation to see that justice is done, regardless of the outcome of the case, is easily forgotten when emotions have been aroused by a heinous or scandalous crime. To weather these occasional storms, you as prosecutors must provide a consistent level of dedicated and competent service.

7. Familiarity with Brief

Always master the legal and factual issues in your brief. The public perception of the efficacy of a prosecution will be adversely affected if the

prosecutor displays poor case management or advocacy skills, irrespective of the outcome in the case. If the prosecution stumbles and fails to tender important available evidence, if the judge has to become involved in the questioning of witnesses because relevant testimony is not being adduced, or if the prosecutor is inaccurate in summarising the evidence, the public will question whether the prosecution is being properly conducted. Also, always know your law : if the defence rely on outdated authorities, or make submissions contrary to the authorities, you should be in a position to correct them. If the judge in directing on the law makes an error, you must be in a position to correct him at the end of the summing-up by drawing attention to any apparent mistakes or omissions of fact or law. This is in line with the notion of prosecutors as ministers of justice. All these things you can only do if you keep yourselves bang up to date with the latest developments in criminal law. If you do not do these things, then there may have to be appeals, or reviews of sentence, and you will thereby have contributed to the expense and time which any such appellate proceeding involves. What then if there is an appeal?

8. Appeal

If there is an appeal against conviction, you must objectively consider the grounds of appeal and decide whether or not they are meritorious. Normally you will seek to uphold the conviction, and you will marshal the submissions and the authorities accordingly. What if, having read the grounds of appeal, you agree with the defence that the appeal should be allowed? An appeal cannot be decided on the basis that both sides have agreed between themselves that the appeal should succeed. What you must not do is to advance arguments in which you have little confidence; you should advise the court of the view you have formed and explain the reasons for it. If the court disagrees with you, you are still entitled to adhere to your view and you are not obliged to conduct the appeal in a way which conflicts with your own judgment. At the same time it remains your

duty to give assistance to the court if requested to do so. In addition, if the defence and the court overlook a key ground of appeal, you should let them know: that is part of your role as a minister of justice.

9. Promotion

Before finishing, let me say a few words about promotion. After you have been here for a while you will hope to be promoted. That is entirely natural. Sometimes you may see people promoted whom you feel are less deserving than yourselves. What I say is this: work hard, be professional, and do your best and things will turn out right in due course. It is so important that you remain true to yourselves : always treat your superiors with respect, but do not fawn on them : the way to advancement is not through ingratiating yourselves with your superiors but by doing the best possible job of which you are capable - and it will be noticed. Do not let hope for promotion develop into an obsession : if that happens, it can corrupt your personality, corrode your judgment and leave you a profoundly unhappy person. So I repeat : be true to yourselves, perform to the highest standards, and you will find that things have a way of working themselves out for the best.

10. Conclusion

It is a tremendous honour to be a prosecutor. But it carries with it awesome responsibilities. Dedication, professionalism and assiduity are what are required of you. To play a role in the criminal justice system, at whatever level, is a privilege, and it is your responsibility to ensure that you are never found to be wanting. The community, which you serve, is entitled to expect that of you. All that having been said, the work of a prosecutor is challenging, fulfilling and edifying - so as you discharge your duties to the community, keep a sense of

balance, keep a twinkle in your eye, keep a bounce in your step, maintain a sense of humour and try also to enjoy yourselves at the same time.

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