

**For information
7 December 2007**

LEGCO PANEL ON WELFARE SERVICES

Subcommittee on Strategy and Measures to Tackle Family Violence

Prosecution of Abusers in cases involving Domestic Violence

Introduction

At the meeting on 8 October 2007, the Administration was requested to submit (a) some case examples to illustrate the application of the principles set out in paragraphs 29 to 32 of The Policy for Prosecuting Cases involving Domestic Violence (“the DV Policy”), and (b) to respond to the Honourable Mr Alan Leong’s proposal of initiating prosecution action against a suspect who had a previous history of domestic violence unless the suspect could prove otherwise.

Examples to illustrate the application of paragraphs 29 to 32 of the DV Policy

Case example 1:-

2. The accused and his wife (victim)’s marital relationship had turned sour several years ago. The victim had repeatedly asked him to divorce her but the accused wanted to maintain the relationship. At the material time, the victim was sleeping at the matrimonial home when the accused grabbed a chopper from the kitchen and attacked her. The attack was witnessed by the couple’s sons (aged 9 and 10). The victim sustained serious cut wounds on her head and hands. She was rushed to hospital for medical treatment.

3. Upon his arrest and under caution, the accused admitted the attack. He claimed that the victim no longer loved the family because she repeatedly asked him to divorce her. At the material time, the accused said that he felt like dying with the victim. However, after attacking the

victim for a while he heard the victim telling him that she had forgiven him, so he calmed down and stopped attacking her as he did not want his wife to die. He also told his son to call the police.

4. The accused was initially charged with one count of Wounding with intent. Upon legal advice, the defendant was charged with one count of Attempted Murder at the Court of First Instance with an alternative charge of Wounding with Intent under section 17 of Cap. 212.

5. The victim, accompanied by her lawyer went to the police to tell them that she would not testify against the accused. The victim confirmed that she had forgiven the accused and she wanted their family to stay together. The victim further elaborated in various statements to the police how the family's relationship had improved since the matter was reported, with the assistance of social services. The sons also indicated that they wanted to reunite with the accused and for the family to stay together.

6. Despite the victim withdrawing her support for the prosecution, the case against the accused proceeded in view of the serious injuries sustained by the victim and on the basis of the accused's admissions under caution.

7. The accused later pleaded guilty to the alternative charge of Wounding with Intent at the Court of First Instance.

8. In sentencing the accused, the court was provided with statistics of domestic violence offences in Tuen Mun area. The court expressed the serious nature of the offence and that a deterrence sentence was necessary. A starting point of 7 years imprisonment was considered but was reduced to 6 years in view of the mitigation put forward by the accused's lawyer and because of what was said by the victim and the sons. The sentence was then discounted by one-third for the accused's guilty plea. The accused received a final sentence of 4 years imprisonment.

9. The sentence of 4 years imprisonment was upheld by the Court of Appeal after the accused appealed against his sentence.

Case example 2:-

10. The accused (wife) and the victim (husband) had a minor dispute on the phone after the victim refused to return home at the accused's request. In the heat of the dispute the accused threatened to throw their

two children from a height and then to commit suicide. A report was made to the police.

11. The accused was found to be in an emotional state when the police arrived. The two children were safe. Under caution, the accused denied threatening the victim.

12. Based on the victim's evidence the accused was charged with one count of Criminal Intimidation at the Magistrates court. She pleaded not guilty to the charge and a trial date was fixed.

13. While the case was awaiting trial lawyers representing the accused and the victim wrote to the prosecution requesting that the case not to proceed against the accused. The request was initially turned down by the prosecution. However, on the trial day the victim approached the prosecution again, to express that he would not testify against the accused in court. By section 57 of the Criminal Procedure Ordinance, Cap. 221, the victim was compellable and competent to testify although the victim had a right to request the court to exempt him from testifying under section 57A of Cap. 221, and this was explained to the victim. In the end, the victim reiterated that he would not testify against the accused, even if he was compelled to do so by the prosecution, he would ask the court to exempt him under section 57A of Cap. 221. The victim stated that all he would like to do was to ask the court to bind over the accused.

14. Having considered the attitude of the victim, the fact that it was highly likely that the victim's request to be exempted from giving evidence in court would be granted by the court, there was no other evidence to support the charge apart from the victim's evidence, that the accused had been detained for almost 2 weeks, the prosecution reluctantly agreed to offer no evidence against the accused if the accused admitted the facts of the case and agreed to be bind over by the court if the court considered this was an appropriate course in the circumstances of the case.

15. In the end, the court decided to bind over the accused in the sum of \$1,000 for a period of 18 months, on condition that the accused should not commit or attempt to commit any criminal act involving the use of violence or threat of violence against any other person.

Reply to Honourable Mr Alan Leong's proposal

16. The presumption of innocence, that is frequently referred to as the golden thread of the criminal law requires the prosecution to prove the prisoner's guilt (*Woolmington v DPP* [1935] AC 462 at 481). The right to be presumed innocent is protected under Article 11(1) of the Hong Kong Bill of Rights ("HKBOR") which incorporates Article 14(2) of the International Covenant on Civil and Political Rights into our domestic law. Article 11(1) provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The presumption is also recognised in Article 87(2) of the Basic Law ("BL") which provides that "anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs." Article 11(1) of the HKBOR and BL87(2) reflect the fundamental aim of protecting the innocent against wrongful conviction and deprivation of liberty which may undermine the public's confidence in the criminal justice system.

17. The presumption of innocence is closely associated with another fundamental presumption, namely that in interpreting an offence provision, a mental element is an essential ingredient of the offence unless a contrary intention is shown either expressly or by way of necessary implication. This was emphasised by the Court of Final Appeal in the recent case of *HKSAR v LAM Kwong-wai & another* [2006] 3 HKLRD 808, at paragraph 41 where the Court of Final Appeal held that the statutory provision (being section 20(3)(c) of the Firearms and Ammunition Ordinance) derogates from the presumption of innocence.

18. Where a derogation is established, the court would apply the proportionality test as formulated by the Court of Final Appeal in *LEUNG Kwok-hung & others v HKSAR* (2005) 8 HKCFAR 229 at 253I, to determine whether the restriction of the constitutional right is justified. The test contains two limbs:-

- (a) is the derogation rationally connected with the pursuit of a legitimate societal aim; and
- (b) are the means employed, namely, the imposition of the reverse persuasive onus, no more than is necessary to achieve that legitimate aim?

19. The proposal put forward by Honourable Mr Alan Leong would result in placing the onus of proving an important element of a violence related offence, in the domestic context, on an accused. This reverse onus proposal would not withstand a constitutional challenge unless it can be justified on the proportionality test. “Reference to the prevalence and severity of certain crime does not add anything new or special to the balancing exercise” (see Sachs J’s comment in *State v Coetzee* [1997] 2 LRC 593 at 677). Neither would the need to punish and deter assist, as that consideration equally applies to all other crimes. Nor would the difficulty in bringing domestic violence cases through our criminal justice system if the victim is unwilling to give evidence against the accused help, as this is a phenomenon which is also applicable to other crimes.

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