ANNEX 5

LIST OF AUTHORITIES[1]

This is a set of internet links for authorities cited in the application and (where links are not already provided) in Annexes 3 and 4.

Also attached are hard copies of authorities which are not available on the internet.

I. Africa

Botswana –

Article 14 of the Code of Criminal Procedure and Evidence
http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61337/92022/F805974928/BWA61337.pdf.

Ethiopia –

Article 44(2) of the Criminal Procedure Code of Ethiopia 1961
http://www.refworld.org/pdfid/492163ac2.pdf.

Kenya –

H. Ct. Cr. Revision No. of 1983 Richard Kimani & S. M. Maina v. Nathan Kahara, citing Section 88 of the Criminal Procedure Code

http://kenyalaw.org/caselaw/cases/view/8510/.

C.K. (a child) through Ripples International as her guardian and Next friend) & 11 others v Commissioner Of Police/Inspector General Of The National Police Service & 3 others, (2013) K.L.R. (H.C.K.) (Kenya).

http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf

Mauritius –

Mohit v Director of Public Prosecutions of Mauritius (2006) 1 WLR 3343

http://www.saflii.org/mu/cases/UKPC/2006/20.html

[1] Internet links provided last visited on 30 July 2015.

Nambia –

Article 7 of Criminal Procedure Act 51 of 1977
https://www.unodc.org/tldb/pdf/Namibia_Code_of_Penal_Procedure.pdf.

Nigeria –

Section 174(3) of the Nigerian Constitution

http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#PublicServiceOfTheFederation.

Rwanda –

Article 2 of the Code of Criminal Procedure

http://www.refworld.org/docid/46c306492.html.

South Africa –

Article 7 of Criminal Procedure Act 51 of 1977

http://www.justice.gov.za/legislation/acts/1977-051.pdf.

South Sudan –

Article 24 of the Criminal Procedure Code

http://www.icla.up.ac.za/images/un/use-of-force/africa/South%20Sudan/Criminal%20Procedure%20Code%20South%20Sudan%202008.pdf.

Tanzania –

Article 24 of the Criminal Procedure Code

http://www.icla.up.ac.za/images/un/use-of-force/africa/South%20Sudan/Criminal%20Procedure%20Code%20South%20Sudan%202008.pdf.

Tunisia –

Article 36 of the Penal Procedure Code

http://www.wipo.int/wipolex/en/text.jsp?file_id=201854.

Zambia –

Article 90(6) and (7) of the Criminal Procedure Code Act http://www.parliament.gov.zm/sites/default/files/documents/acts/Criminal%20Procedure%20Code%20Act.pdf.

Zimbabwe –

Article 13 of the Criminal Procedure and Evidence Act http://www.wipo.int/wipolex/en/text.jsp?file_id=313975.

Goba v ZIMRA and another [2015] ZWHHC 159 (which relies upon In *Re (Bhatt Murphy) v Secretary of State for the Home Department* [2008] EWCA Civ 755) http://www.zimlii.org/zw/judgment/harare-high-court/2015/159

II. Asia-Pacific

Burma –

Art. 494 of the Code of Criminal Procedure of Burma http://www.vertic.org/media/National%20Legislation/Myanmar/MM_Code_Criminal_Procedure.pdf.

Cambodia –

Arts. 5, 6, 41, 139, and 140 of the Criminal Procedure Code of the Kingdom of Cambodia http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814242.pdf.

China –

Arts. 176 and 177 of the Criminal Procedure Law of The People's Republic of China http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Criminal-Procedure-Law-2012.pdf.

East Timor –

Section 25.2 of UN Transitional Administration in East Timor Regulation No 2000/30 on Transitional Rules of Criminal Procedure http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/reg200030.pdf.

Japan –

KEISOHO [Code of Criminal Procedure], art. 262

http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf

Kazakhstan –

Art. 38(5) of the Criminal Procedural Code of Kazakhstan

http://adilet.zan.kz/eng/docs/Z970000206_.

Laos –

Arts. 29(8) and 29(9) of the Amended Law on Criminal Procedure of Laos

http://www.no-trafficking.org/reports_docs/lao/laws/AmendedLawCriminalProcedure2004-ENG.pdf.

Mongolia –

Article 24.4 of the Criminal Procedure Law of Mongolia

http://www.oecd.org/site/adboecdanti-corruptioninitiative/46816723.pdf.

Philippines –

Dungog v. The Honorable Court of Appeals, Provincial Fiscal Enrique B. Initing of Bohol, and Pantaleon U. Del Rosario, G.R. No. 77850-51 (1988)
http://www.lawphil.net/judjuris/juri1988/mar1988/gr_77850_51_1988.html

Fuentes v. Sandiganbayan and the People of the Philippines, G.R. No. 139618 (2006)

http://sc.judiciary.gov.ph/jurisprudence/2006/july2006/G.R.%20No.%20139618.htm

Guiao v. Firuerao, 50 O.G. 4828 (1954)

http://philippinelaw.info/jurisprudence/grl6481-guiao-v-figueroa.html

Castro v. Castaneda, G.R. No. L-15139 (1961)

http://www.lawphil.net/judjuris/juri1961/apr1961/gr_l-15139_1961.html

Singapore –

Law Society of Singapore v. Tan Guat Neo Phyllis, (2008) 2 SLR (R) at 149 (citing Chng Suan Tze v. Minister for Home Affairs (1998) 2 SLR (R) 525),

http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/13383-law-society-of-singapore-v-tan-guat-neo-phyllis-2008-2-slr-239-2007-sghc-207.

South Korea –

Article 68(1) of the Korean Constitutional Court Act
http://ri.ccourt.go.kr/eng/ccourt/files/docs/news/The_Constitutional_Court_Act.pdf.

Thailand –

Ch. 1, § 28 of the Criminal Procedure Code of Thailand
http://en.wikisource.org/wiki/Criminal_Procedure_Code_of_Thailand/Provisions.

Ch. 1, § 34 of the Criminal Procedure Code of Thailand
http://en.wikisource.org/wiki/Criminal_Procedure_Code_of_Thailand/Provisions.

Ch. 1, § 45 of the Criminal Procedure Code of Thailand
http://en.wikisource.org/wiki/Criminal_Procedure_Code_of_Thailand/Provisions.

Uzbekistan –

Art. 27 of the Criminal Procedure Code of Uzbekistan
http://www.uncjin.org/tldb/pdf/Uzbekistan_Criminal_Procedure_Code_Full_text.pdf.

Art. 55 of the Criminal Procedure Code of Uzbekistan
http://www.uncjin.org/tldb/pdf/Uzbekistan_Criminal_Procedure_Code_Full_text.pdf.

III. Middle East

Bahrain –

Art. 79 of the Legislative Decree No. 46 of the Year 2002 With Respect to Promulgating the Code of Criminal Procedures

http://www.icla.up.ac.za/images/un/use-of-force/asia-pacific/Bahrain/Criminal%20Procedure%20Code%20Azerbaijan%202002.pdf.

Iraq –

Anan Abdelrazek Alhashemi, *Criminal Trial Procedures as a Tool to Serve Litigants, Protect Human Rights, and Activate the Judicial Activity*, 2004

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fgjpi.org%2Fwp-content%2Fuploads%2F2009%2F01%2Fjudicial-systems-criminal-trial-procedures-10-04-1.doc&ei=j751Vej-BIrGogS8tYHwAg&usg=AFQjCNGHT3oUQ9J5p34wCwAdF7sTL30vWA&bvm=bv.95039771,d.aWw&cad=rja.

Israel –

Article 64 of Criminal Procedure Law 1982

http://nolegalfrontiers.org/israeli-domestic-legislation/criminal-procedure/criminal01?lang=en.

Oman –

Article 126 of the Penal Procedure Law of 1999
file:///H:/ICC%20Discretion/Penal%20Procedure%20Law%20Oman%201999.pdf.

Qatar –

Article 146 of Law No. 23 of 2004 (Criminal Procedure Code)
http://www.qfiu.gov.qa/files/Law%2023%20for%20the%20year2004-E.pdf.

Saudi Arabia –

Article 124 of the Law of Criminal Procedure of 2001

https://www.saudiembassy.net/about/country-information/laws/CriminalProcedures2001-2of3.aspx.

Turkey –

Art. 173(1) of the Criminal Penal Code

file:///C:/Users/QEN/Downloads/Turkey_CPC_2009_en.pdf.

United Arab Emirates –
Article 133 of the Criminal Procedure Law (Federal Law 35 of 1992)
https://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=BD9384973C63A83FC12576B2003ADACB&action=openDocument&xp_countrySelected=AE&xp_topicSelected=GVAL-992BU6&from=state (in Arabic).

IV. Eastern Europe

Albania –

Article 58(3) Criminal Procedure Code of the Republic of Albania
http://www.legislationline.org/download/action/download/id/5165/file/Albania_CPC_am2013_en.pdf.

Armenia –

Article 59 Criminal Procedure Code of the Republic of Armenia
http://www.legislationline.org/download/action/download/id/5309/file/Armenia_CPC_am_2013_en.pdf.

Bosnia and Herzegovina –

Article 216(4) Criminal Procedure Code of Bosnia and Herzegovina ("CPCBH")

Article 224(3) CPCBH
http://www.legislationline.org/download/action/download/id/4833/file/BiH_CPC_am2013_en.pdf.

Bulgaria –

Article 75(1) Penal Procedure Code of the Republic of Bulgaria
http://www.legislationline.org/download/action/download/id/4152/file/PENAL_PROCEDURE_CODE_am2011_en.pdf.

Croatia –

Article 47 (10), (12) Criminal Procedure Code of the Republic of Croatia
http://www.legislationline.org/download/action/download/id/4284/file/Croatia_Criminal_proc_code_am2009_en.pdf.

Latvia –

Section 98(7) Criminal Procedure Law of the Republic of Latvia
http://www.legislationline.org/download/action/download/id/4779/file/Latvia_Criminal_Procedure_Law_am2013_en.pdf

Russia –

Article 19 Criminal Procedural Code of the Russian Federation
http://www.legislationline.org/download/action/download/id/4248/file/RF_CPC_2001_am03.2012_en.pdf.

Serbia –

Article 50(6) Criminal Procedure Code of the Republic of Serbia
http://www.legislationline.org/download/action/download/id/3560/file/Serbia_2011%20CPC%20English_.pdf.

V. Latin America and the Caribbean

Brazil –

Arts. 5, 19, 29 and 30 of the Codigo de Processo Penal
http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm.

Chile –

Katherine Kauffman, *Chile's Revamped Criminal Justice System*, Geo. J. Int'l Law 621, 623 (2010)
https://www.law.georgetown.edu/academics/law-journals/gjil/upload/5-KauffmanFIXED.pdf.

Jamaica –

Leonie Marshall v Director of Public Prosecutions (2007) WL 2866; [2007] UKPC 4.
http://www.bailii.org/uk/cases/UKPC/2007/4.html

Trinidad and Tobago –

Sharma v Brown-Antoine (2007) 1 WLR 780.
http://www.bailii.org/uk/cases/UKPC/2006/57.html

VI. Western Europe and Others

Belgium –

Cour d'Arbitrage, Judgment Nr 62, 23 March 2005

http://www.const-court.be/cgi/arrets_popup.php?lang=en&ArrestID=1931.

France –

Article 40(3), 175(1) and 186 Criminal Procedure Code of the French Republic
http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview.

Ireland –

PDFs of the following are attached:

The State (McCormack) v. Curran and others [1987] ILRM 225

Eviston v. Director of Public Prosecutions [2002] IESC 43

H v. Director of Public Prosecutions [1994] 2 IR 589.

Germany –

StPO, §§ 170-175 Criminal Procedure Code of the Federal Republic of Germany

http://www.legislationline.org/download/action/download/id/3238/file/Germany_CPC_1950_amended_2008_en.pdf.

Norway –

Act of Criminal Procedure 1981, para. 59a

http://www.legislationline.org/download/action/download/id/3524/file/Norway_Criminal_Procedure_Act_1981_amended2006-eng.pdf.

Switzerland –

Article 322 Criminal Procedure Code of the Swiss Confederation

https://www.admin.ch/ch/e/rs/312_0/a322.html.

United Kingdom –

Re Hammel's Application [2008] NIQB 73

https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2008/2008%20NIQB%2073/j_j_WEAH4848Final.htm.

PDFs of the following are attached:

R (on the application of Bermingham) v Director of the Serious Fraud Office

R (on the application of Dennis) v DPP

R (on the application of Joseph) v DPP

R v DPP Ex p Chaudhary

R v DPP Ex p Jones (Timothy)

R v DPP Ex p Manning

United States –

United States v. Batchelder, 442 U.S. 114, 125 (1979)
https://supreme.justia.com/cases/federal/us/442/114/case.html.

VII. European Court of Human Rights

Loizidou v. Turkey, Application No. 15318/89, Judgment, ECtHR, 23 March 1995

http://hudoc.echr.coe.int/eng?i=001-57920

Soering v. The United Kingdom, Application No. 14038/88, Judgment, ECtHR, 7 July 1989

http://hudoc.echr.coe.int/eng?i=001-57619

VIII. United Nations

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/147

United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions

https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1989/ECOSOC/Resolution_1989-65.pdf

United Nations Human Rights Committee, General Comment No. 20 on the ICCPR

https://www1.umn.edu/humanrts/gencomm/hrcom20.htm

Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions ("Minnesota Protocol")

http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html

IX. International Court of Justice

Namibia Advisory Opinion (Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970))

http://www.icj-cij.org/docket/files/53/5595.pdf

United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), Judgment, 24 May 1980

http://www.icj-cij.org/docket/files/64/6291.pdf

X. Council of Europe

Interim Resolution CM/ResDH (2007) 73 'Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases)'

http://hudoc.echr.coe.int/fre?i=001-68470#{"itemid":["001-68470"]}

XI. Other

Final report of Kenya's Truth, Justice and Reconciliation Commission, May 2013

http://www.kenyamoja.com/tjrc-report/

Report of the Commission of Enquiry into Post-Election Violence:

http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf, page 6.

Dictionary of the Spanish Language, *Real Academia Española*: http://lema.rae.es/drae

Larousse French Dictionary: http://www.larousse.com/en/dictionaries/french

Court of Appeal of Alberta

Kostuch v. Alberta
Date: 19950926
Docket: 14672

By "the Court: Dr: Martha Kostuch appeals from the dismissal of her application for an order setting aside the intervention and the entry of a stay of proceedings, on March 23, 1993, by the Attorney General of Alberta, on an information sworn by Dr. Kostuch, on July 28, 1992 alleging that Her Majesty the Queen in Right of Alberta and others involved in the construction of the Oldman River Dam had breached the provisions of ss. 35(1) and 40(1)(b) of the Fisheries Act, R.S.C. 1985, c. F-14, by carrying on a work or undertaking which was harmful to fish habitat.

1995 CanLII 6244 (AB CA)

Issues:

Several issues arise in this matter:

1. Whether the intervention and the entering of a stay of proceedings by the Attorney General in a prosecution commenced by the appellant breach the appellant's rights under s. 7 of the

Canadian Charter of Rights and Freedoms.

2. The circumstances in which a court will review the discretion exercised by the Attorney General to intervene and stay a prosecution commenced by a private informant.

3. Whether the learned chambers judge erred in finding that the appellant had failed to establish flagrant impropriety on the part of the Attorney General of Alberta in intervening in and/or staying the prosecution.

Position Of The Appellant

The appellant claims that s. 7 of the Charter protects her right to carry on a private prosecution and that the Attorney General's intervention and stay of proceedings breached her rights under s. 7 of the Charter. The appellant further submits that the power of the court to review the exercise of the prosecutorial discretion by the Attorney General is not limited to cases of flagrant impropriety. She submits that the court can consider the

reasonableness of the decision. The appellant also says that the learned Chambers judge erred in not finding flagrant impropriety on the part of the Attorney General of Alberta.

Facts:

It is not necessary to review the facts in detail. They are fully and accurately set out in the judgment of the learned Chambers judge. (Kostuch v. Alberta (Attorney General), [1993] 8 W.W.R. 693; 12 Alta L.R.(3d) 257; 143 A.R. 161; 12 C.E.L.R. (NS) 123 (Q.B.).

1995 CanLII 6244 (AB CA)

This matter involves the construction of the Oldman River Dam by the Province of Alberta. The information in question was the last in a series of eight informations sworn by Dr. Martha Kostuch against those involved in the construction of this dam. With some minor differences, each of the informations alleged that either the Government of Alberta, its ministers, or the Crown in Right of Alberta and various construction companies breached the Fisheries Act by constructing and operating river diversion channels at the dam site which interfered with fish habitat, without the required authorization of the Federal Minister of Fisheries and Oceans. The first of these informations had been sworn by the appellant on August 2, 1988. The first seven informations were stayed by the Attorney General or were otherwise disposed of by the courts for a variety of reasons, none of which have any relevance here.

Following the laying of the first information, the Attorney General intervened. On his instructions, the R.C.M.P. commenced an investigation. Inspector Duncan was responsible for this investigation. In referring the matter to the R.C.M.P., the Attorney General's department, being concerned about conflicts of interest, advised the R.C.M.P. to seek instructions regarding the investigation and prosecution from the Federal Department of Justice.

In the course of the investigation, Inspector Duncan interviewed the appellant on at least two occasions, and obtained from her a statement of facts, as well as a summary of her position on the matter. Dr. Kostuch advised Duncan that she believed that the dam construction interfered with fish habitat, that the construction had never been approved by the Minister of Fisheries, and that any delegation of administrative authority under the Fisheries Act to the Province of Alberta was unconstitutional. The prosecution was one of many legal avenues

being pursued by the group called the Friends of the Oldman River Society in its efforts to stop the construction of the Oldman River Dam.

Following an initial investigation, Duncan concluded that while it appeared that the construction of the dam had interfered or would interfere with fish habitat, serious questions of the availability of a defence under s. 35(2) of the Fisheries Act also had to be addressed.

In December, 1988, Duncan forwarded a brief to the Federal Department of Justice requesting a legal opinion on various issues, including the effect and validity of arrangements between the Government of Alberta and the Government of Canada transferring the administrative responsibility for fisheries to the Province of Alberta. In the course of his investigation, Duncan obtained documents from the Deputy Minister of the Environment setting out the understanding of the parties.

Duncan submitted his final report on April 24, 1990. He had interviewed officials of the Alberta Fish and Wildlife Department, who informed him of the investigations undertaken by them, of the approval of the project by the appropriate Alberta government departments, and of the projects planned upstream from the dam to enhance fish population with objectives of ensuring that there would be no net loss of fish. While formal permission had not been obtained from the Federal Minister of Fisheries, the evidence (accepted by the learned Chambers judge) disclosed that Federal authorities had been consulted in the planning of the project, and were aware of the construction of the dam, and of its effect on fish. The then Minister of Fisheries, Tom Siddons, indicated that he was satisfied with the investigations of provincial officials and their consultations with his department in a letter dated, August 25, 1987.

> "In view of the long standing administrative arrangements that are in place for the management of fisheries in Alberta, and the fact that the potential problems associated with the dam are being addressed, I do not intend to intervene."

Earlier correspondence from Federal Ministers of Fisheries and Environment Canada, as well as publications of that department, disclosed the understanding of federal government officials that administrative responsibility for the provisions of the Fisheries Act related to the protection of fish habitat had been transferred to the Province of Alberta. Alberta Fisheries officials consulted with their federal counterparts, but did not seek authorization.

1995 CanLII 8244 (AB CA)

Following the laying of the information in question, the Attorney General of Alberta decided to intervene in the prosecution, and asked the Manitoba Attorney General to review the file and the Alberta prosecution guidelines. He authorized agents of the Attorney General of Manitoba to decide whether prosecution was warranted. The Federal Department of Justice had earlier declined to prosecute. The matter was again referred to the Federal Department of Justice, Edmonton Regional Office, in the event they now wished to intervene. The Federal Department of Justice again refused to do so.

1995 CanLII 8244 (AB CA)

The prosecution policy established by the Attorney General of Alberta contains a two-fold test: (1) the evidence must be such that there is a reasonable likelihood of conviction when the evidence as a whole is considered; (2) whether the public interest requires prosecution. Matthew Britton and Jeremy Dangerfield, senior agents of the Attorney General of Manitoba, reviewed the file and concluded that prosecution was not warranted because there was no real chance of a successful prosecution. On March 22, 1993, Dangerfield, who was also appointed by the Attorney General of Alberta as his agent, appeared before the Provincial Court of Alberta. After giving a detailed outline of his reasons, Dangerfield advised the court that, in his opinion, there was no real chance of a successful prosecution and directed that a stay of proceedings be entered.

By Notice of Motion dated March 22, 1993, the appellant brought an application for an order setting aside the intervention and the stay of proceedings of the Attorney General and prohibiting the Attorney General from again intervening in the prosecution. The application was dismissed and the appellant appeals to this court.

Decision Of The Chambers Judge

The learned Chambers judge reviewed the agreements between federal and provincial departments, correspondence between departments responsible for fisheries and the environment, and statements by federal ministers in correspondence with others regarding the transfer of jurisdiction to the Province of Alberta. He concluded:

> "From the statement contained in the letter of the Minister, one could conclude that the Minister authorized the project under s. 35(2) of the Fisheries Act."

The learned Chambers judge found that the Provincial officials had carried out a complete investigation of the effect of the dam on fish habitat, and they were satisfied that adequate plans had been put in place to protect fish. Therefore no net loss of fish would result from the

project. In 1977/78, the Federal Minister of Fisheries and Oceans and the Minister of the Environment confirmed their understanding that Alberta had authority to deal with matters involving fish habitat in Alberta. The Province of Alberta and the Government of Canada entered into another agreement in 1987, confirming Alberta's assumption of responsibility for enforcement of the Fisheries Act. Alberta did not thereafter seek permission from the Federal Minister with respect to projects located in this province. Federal officials were aware of the plans for the Oldman River Dam, the investigations by the Provincial authorities and the plans which had been put into place to protect fish and the environment, and voiced no objections to the construction of the dam. Federal Ministers of Fisheries and Oceans, had expressly declined to intervene, and the Agents of the Federal Department of Justice refused to prosecute.

1995 CanLII 8244 (AB CA)

The learned Chambers judge found that the Alberta Government had acted in good faith in approving the construction of the dam. On this ground, the Crown in the Right of Alberta and the corporate defendants who acted on the authorization had a complete defence to any prosecution. These findings were supported by the evidence.

Fisheries Act Provisions And The Federal Provincial Agreement

Section 35 of the Fisheries Act provides:

> "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> "No person contravenes subsection (1) by causing the alteration, disruption, or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this act."

On January 9, 1987, Her Majesty the Queen in Right of Canada, represented by the Minister of Fisheries and Oceans, and her Majesty the Queen in Right of Alberta, represented by the Minister of Forestry, Lands and Wildlife, entered into the Canada Fisheries Agreement whereby "subject to constitutional and statutory constraints", certain administrative responsibilities under the Fisheries Act were transferred to the Province of Alberta. The effect of the agreement, as understood by the parties, is conveniently set out in a press release issued by them as follows:

> "The Canada/Alberta Fisheries Agreement reaffirms assignment of fisheries administrative responsibilities from Canada to Alberta and establishes a framework to address issues related to fish habitat management, aquaculture, and fish health,

> sport fisheries development, commercial fisheries development, fish inspection and small craft harbours." (A.B. Vol. 2, p. 398)

The jurisdiction of Alberta to deal with fish dates back to the Natural Resources Transfer Act, S.A. 1930, c. 21.

Section 7 Of The Charter

The appellant claims that her rights under s. 7 of the Charter have been breached in that "she has not been able to have a court adjudicate on a matter of concern to her" thus causing her emotional stress.

In other words, the appellant claims that she has a right to prosecute another person, that s. 7 of the Charter protects that right, and that the Attorney General cannot interfere with a private prosecution without according the informant an opportunity of examining the reports on the investigation conducted, and giving her an opportunity to address those facts before an impartial person.

Section 7 of the Charter provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In Reference Re Section 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486; 63 N.R. 266; 48 C.R.(3d) 289; 23 C.C.C.(3d) 289; [1986] 1 W.W.R. 481, the Supreme Court of Canada established a two-stage test for the application of s. 7. First, the appellant must demonstrate a deprivation of her right to life, liberty and security of the person; and secondly, she must demonstrate this deprivation occurred in a manner not consistent with principles of fundamental justice. (See also R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, at 401; 88 N.R. 205; 71 Sask.R. 1; 45 C.C.C.(3d) 57; [1989] 1 W.W.R. 97; 66 C.R.(3d) 97).

In my view, the appellant has failed. Counsel for the appellant cites the decision of the Supreme Court of Canada in Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123; 109 N.R. 81; 68 Man.R.(2d) 1; 56 C.C.C.(3d) 65; 77 C.R.(3d) 1; [1990] 4 W.W.R. 481, in support of her submission that "security of the person" includes the right to protection from state imposed psychological stress. Counsel for the appellant submits that the interference by the Attorney General in the prosecution she has commenced causes her stress by interfering with her right to have a wrong redressed.

1995 CanLII 8244 (AB CA)

However broadly the right to "liberty and security of the person" in s. 7 of the Charter may come to be interpreted, it is my view that it will not and cannot include the unrestricted right on the part of a private prosecutor to continue a criminal prosecution in the face of an intervention by the Attorney General. The criminal process is not the preserve of the private individual. The fundamental consideration in any decision regarding prosecutions must be the public interest. The function of protecting the public interest in prosecution matters has been granted by Parliament to the Attorney General of a province, and in some cases to the Federal Minister of Justice.

1995 CanLII 8244 (AB CA)

In deciding whether to prosecute, the Attorney General must have regard not only to the interests of the person laying the charges, but also to the rights of the person charged with an offence, and to the public interest. By the provisions of the Criminal Code, the Attorney General is given a discretionary power to intervene in private prosecutions. The Attorney General of a province is a member of the Executive who is charged with responsibility for the administration of justice in the province. He or she is answerable to the Legislature and finally to the electorate, for decisions made. The courts have understandably been very hesitant to intervene in the exercise of that discretion.

In R. v. Power (E.), [1994] 1 S.C.R. 601; 165 N.R. 241; 117 Nfld. & P.E.I.R. 269; 365 A.P.R. 269; 89 C.C.C.(3d) 1, Madam Justice L'Heureux-Dubé discussed the nature of the prosecutorial discretion and the possibility of the review of such discretion by the courts. She stated at p. 15 (C.C.C.):

> "That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case-law. They have been so as a matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review."

The right, if any, of a private prosecutor to prosecute another person is very limited and is clearly restricted by the provisions of the Criminal Code to cases where the Attorney General opts not to intervene.

In Osiowy v. Linn, P.C.J. (1989), 77 Sask.R. 1; 50 C.C.C.(3d) 189 at 191 (C.A.), Vancise, J.A., described that right as follows:

> "It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney General has the right to intervene and take control of a private

> prosecution. Included in the right to intervene and take control is the power to direct a stay pursuant to s. 508. It follows, then, that a private informant has the right to initiate proceedings, but that right does not give him the liberty to continue the proceedings should the Attorney General decide to intervene and invoke s. 508(1) and direct the entry of a stay of proceedings. Once the Attorney General or counsel on his behalf intervenes and assumes control of the prosecution, that counsel's rights are paramount to the private person's or his counsel's rights. The discretion of the Attorney General to enter a stay is not reviewable in the absence of some flagrant impropriety on the part of the Crown officers. No such impropriety has been suggested here."

In any event, it appears to us that the appellant was afforded ample opportunity to state her position in the interviews conducted by Inspector Duncan. The various concerns were included in his report, and undoubtedly considered by Britton and Dangerfield, whose conclusions supported the opinion of Inspector Duncan that a prosecution would not be successful because a strong defence had been disclosed to him. There is no obligation on the part of the Attorney General or the Agent of the Attorney General who makes the decision, to discuss the evidence and the issues with the informant.

The Extent Of The Power Of Review

Assuming that the court has power to review prosecutorial discretion, that power will be exercised only in cases where there has been flagrant impropriety in the exercise of the prosecutorial discretion. This rule has been clearly established by the courts, and we accept it as correct. In Balderstone v. R. and Manitoba (Attorney General); Play-All Ltd., Nellis and Bricker v. Penner, Manitoba (Attorney General) and R. (1983), 23 Man.R.(2d) 125; 8 C.C.C.(3d) 532 at 539 (C.A.), (leave to appeal refused, [1983] 2 S.C.R. V; 52 N.R. 72; 27 Man. R.(2d) 240;) Monnin, C.J.M., stated as follows:

> "The judicial and executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney General — barring flagrant impropriety — he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General or his officers. That a judge must not do."

See also R. v. Moore et al. (1986), 39 Man.R.(2d) 315; 26 C.C.C.(3d) 474 (C.A.); Campbell v. Ontario (Attorney General) (1987), 31 C.C.C.(3d) 289 (Ont. H.C.J.); (1988), 35 C.C.C.(3d) 480; 60 O.R.(2d) 617 (Ont. C.A.) (leave to appeal refused, 83 N.R. 24; 23 O.A.C. 317; 60 O.R.(2d) 618; 35 C.C.C.(3d) 480 (S.C.C.)).

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We agree with the statement of Miller, A.C.J., in Kostuch v. Alberta et al. (1991), 121 A.R. 219; 81 Alta. L.R.(2d) 214; 66 C.C.C.(3d) 201 (Q.B.), that flagrant impropriety can only be established by proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.

The appellant relies on the decision of the Quebec Court of Appeal in Chartrand c. Québec (Procureur général) et Machabée (1987), 14 Q.A.C. 81; 40 C.C.C.(3d) 270; 59 C.R.(3d) 388 (C.A.), leave to appeal refused (1988), 87 N.R. 400; 19 Q.A.C. 160; 41 C.C.C.(3d) vi (S.C.C.) and submits that this decision has altered the test.

Beauregarde, J.A., giving one of the judgments of the court, stated at p. 389-390:

> "Malgré la séparation étanche entre les tâches du tribunal et celles du Procureur général (celui-là seul statue sur les procès que le Procureur général seul décide de faire), j'accepte que le tribunal a le pouvoir d'annuler un nolle prosequi si on démontre qu'en le déposant le Procureur général a enfreint la loi ou a abusé, par corruption en faveur de l'accusé, par préjugé défavorable contre la victime ou contre la disposition de la Loi qui a crée l'infraction, ou enfin par une décision carrément déraisonnable."

Having given careful consideration to this passage, I am of the view that Beauregarde, J.A., did not set forth any different test for review of prosecutorial discretion, but merely detailed some instances where flagrant impropriety might be found. However, we doubt whether a patently or obviously unreasonable decision would constitute flagrant impropriety.

Vallerand, J.A. (Nichols, J.A., concurring), adopted the flagrant impropriety test set forth by the Manitoba Court of Appeal in Balderstone.

The test for review of prosecutorial discretion remains that of flagrant impropriety, and is not unreasonableness as suggested by counsel for the appellant.

Flagrant Impropriety

The appellant in paragraph 18 of her factum alleges improper interference in the investigation by the Federal Department of Justice. She asks this court to infer that the Department so directed the investigation as to predetermine the result, referring to such action as an abuse of power. There is no evidence to support any such suggestion. The appellant asks that an inference of impropriety be drawn from the fact that after the

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submission of the initial report, the investigation changed direction and focused on issues of mitigation and due diligence. The appellant appears to suggest that the police investigation and the prosecutors' concerns must be limited to evidence supporting the charge, and the possibilities of valid defences ought not to be explored by the investigator or the prosecutors in arriving at their decision. Needless to say, this argument is rejected as completely unfounded in law and on the evidence.

The appellant also suggests that the Attorney General was guilty of flagrant impropriety in deciding to intervene in a case in which the Province had an interest, prior to the receipt of the opinion from the independent prosecutors. For reasons more fully stated in the analysis of the argument on bias, we agree with the finding of the learned Chambers judge that the Attorney General for Alberta acted appropriately in this case.

Bias

Faced with possible allegations of conflict of interest, the Attorney General of Alberta instructed that the file be directed to the Federal Department of Justice, in the event that Department wished to exercise its discretion and take over the prosecution. He also directed that the file be referred to the Manitoba Attorney General's Department for decision. The Manitoba Attorney General's Department had authority to decide whether to prosecute or to stay proceedings. Counsel for the appellant suggests that the Alberta Attorney General should have waited for the decision of the Manitoba Attorney General's Department before deciding to intervene in the prosecution, and alternatively that the decision by the Manitoba Department is tainted because of its association with the Attorney General of Alberta.

The Attorney General of Alberta acted appropriately in referring the decision on the prosecution to experienced prosecutors from another province. There is no suggestion that those prosecutors were influenced in any manner by the Attorney General of Alberta or by his agents in this province. In fact, such a suggestion would be contrary to the clear indication by Mr. Dangerfield, as an officer of the court, that he and another prosecutor from Manitoba had reviewed the file and formed their own opinions.

Further, the appellant does not suggest that the authorization and approval by the Alberta Fish and Wildlife officials was granted otherwise than in good faith. The appellant merely suggests that the delegation of authority to the province is unconstitutional. The

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overwhelming evidence presented which establishes that over a period of time commencing with the agreement in 1930, correspondence in 1977-78 and ending with the agreement in 1987, the Federal Minister of Fisheries and Oceans and the Minister of the Environment were consistent in the position that jurisdiction for enforcement of the Fisheries Act had been transferred to the province. It is difficult to see how one could conclude otherwise than that Alberta acted in good faith in authorizing the construction in question..

Flagrant impropriety has not been established.

The appeal is dismissed.

Appeal dismissed.

[ScanLII Collection]

1995 CanLII 8244 (AB CA)

Divisional Court
21 February 2006

R. (on the application of Bermingham) v Director of the Serious Fraud Office

Case Analysis

Where Reported

[2006] EWHC 200 (Admin); [2007] Q.B. 727; [2007] 2 W.L.R. 635; [2006] 3 All E.R. 239; [2006] U.K.H.R.R. 450; [2006] Extradition L.R. 52; [2006] A.C.D. 55; Times, February 24, 2006Official Transcript

Case Digest

Subject: Extradition

Keywords: Allocation of jurisdiction; Extradition offences; Investigatory powers; Serious Fraud Office

Summary: The Criminal Justice Act 1987 s.1(3) imposed only a power, and not a positive obligation, on the director of the Serious Fraud Office to investigate a suspected offence. Where an offence was triable either in the United Kingdom or abroad, the director was not under any obligation to embark on an investigation so that he might pre empt the potential trial venue in favour of the UK.

Abstract: The appellants (B) appealed against decisions of a district judge and an order of the secretary of state for B's extradition to the United States following a request by US federal authorities, and also applied for judicial review of the refusal by the Director of the Serious Fraud Office to institute a criminal investigation against them under the Criminal Justice Act 1987 s.1(3). The US prosecuting authorities sought B's extradition in connection with the affairs of the US company, Enron. B were British citizens who had been employed by a United Kingdom bank. They had been part of a team responsible for a number of the bank's clients, including Enron in the US. The case against B was that they and Enron's chief financial officer and its managing director had devised and executed a scheme to defraud B's employer. The essence of the alleged scheme was that, by misrepresentations, omissions, and deceit, the co schemers had caused the bank to sell its interest in a limited partnership for USD 1 million to an entity that the co schemers secretly controlled when

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the co schemers knew that the bank's interest in the partnership was worth well in excess of USD 1 million. It was alleged that B received approximately USD 2.4 million each for their participation in the scheme and that each had recommended that the bank sell its interest for USD 1 million, without disclosing that the interest in the partnership was worth far more and that they were investing in the entity that was buying that same interest. B denied any fraud on their employer. The Financial Services Authority considered that any fraud was clearly in an overseas jurisdiction and was more properly the concern of the regulators in that jurisdiction. The Enron employees had pleaded guilty to conspiracy in Texas and had given evidence that led to the US court indicting B on charges of wire fraud and aiding and abetting wire fraud. The US authorities accordingly sought B's extradition. B invited the Serious Fraud Office to conduct an investigation as to whether a prosecution should be brought against them in the UK. The district judge held that B could be extradited under the Extradition Act 2003 and the secretary of state ordered their extradition. B submitted that they should not have to face trial in the US and that, if they were to be tried at all, it should be in England and that a contrary decision infringed their rights under the Human Rights Act 1998, and that the US authorities were acting in bad faith in seeking to extradite and prosecute B for the ulterior purpose of obtaining evidence against others involved in the collapse of Enron.

Held, dismissing the appeal, that (1) the decision of the Serious Fraud Office not to investigate was not Wednesbury unreasonable. Section 1(3) of the 1987 Act only conferred a power to investigate. The section did not impose on the Serious Fraud Office an obligation to embark upon an investigation to pre empt the potential trial venue in favour of UK jurisdiction by proceeding to prosecute if it appeared that the Convention rights of a suspected person might be violated by trial elsewhere. The Extradition Act 2003 s.21 and s.87 imposed on the district judge an express obligation to decide whether the relevant person's extradition would be compatible with his Convention rights, and to order his

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discharge if he concluded that it would not. Thus Parliament had distinctly allocated the task of determining complaints under the Convention to the courts. The question of forum was relevant to the decision of the Serious Fraud Office but not as a means of protecting the defendant's Convention rights. The application for judicial review was dismissed. (2) The relevant alleged conduct substantially took place in the category 2 territory, the US, as well as in the UK. Section 137(2)(a) of the 2003 Act was accordingly satisfied, and the district judge was right so to hold. It would not be unjust under s.82 of the 2003 Act to extradite B by reason of the passage of time. Under the 2003 Act the secretary of state had no statutory discretion to refuse extradition. In cases under Part II cases where the category 2 territory had (like the US) been designated for the purpose of s.84, the prosecutor was not required to establish a prima facie case on the evidence. Although the judge conducting an extradition hearing under the 2003 Act possessed an implied jurisdiction to hold that the prosecutor was abusing the process of the court, no finding of abuse could be justified (in a case where the category 2 territory had been designated for the purpose of s.84 by the prosecutor's refusal or failure to disclose evidential material beyond what was contained in the extradition request, since under the statutory scheme the prosecutor did not have to establish a case to answer. The prosecutor had to act in good faith but no ulterior motive had been shown nor had the extradition request been deliberately delayed until the 2003 Act was in force. A trial in Texas would not violate B's rights under Sch.1 Part I Art.6 nor was the interference with their Sch.1 Part I Art.8 rights disproportionate, Launder v United Kingdom (27279/95) (1998) 25 E.H.R.R. CD67 and R. (on the application of Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 A.C. 323 considered. The case against B had very substantial connections with the US and was perfectly properly triable there. The secretary of state had correctly concluded that the requirements of s.95(3) of the 2003 Act were satisfied. There was nothing to show that the way B would be indicted or sentenced would breach the specialty rule.

Judge: Laws LJ; Ouseley J

Counsel: For the claimants: Alun Jones QC, James HinesFor the respondent Director of the Serious Fraud Office: Ian Burnett QC, David PerryFor the first interested party: Hugo KeithFor the second interested party: Khawar QureshiFor the respondent USA: John Hardy, Mark Summers

Solicitor: For the claimants: Jeffrey Green RussellFor the respondent Director of the Serious Fraud Office, the first and second interested parties: Treasury SolicitorFor the respondent USA: CPS

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Extradition requests; Fraud; United States.
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2006 WL 316111

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Divisional Court
29 December 2006

R. (on the application of Dennis) v DPP

Case Analysis

Where Reported

[2006] EWHC 3211 (Admin); [2006] Po. L.R. 343; (2007) 104(4) L.S.G. 35; (2007) 157 N.L.J. 143; Official Transcript

Case Digest

Subject: Health and safety at work

Keywords: Crown Prosecution Service; Manslaughter by gross negligence; Fatal accidents; Decisions to prosecute

Summary: It was appropriate for the Crown Prosecution Service to reconsider its decision not to prosecute individuals for gross negligence manslaughter after an employee had fallen through a roof light to his death; it was seriously arguable that a different decision might be reached if account were to be taken of the seriousness of an employer's failure to give proper instruction to an employee as to the dangers of working at heights or on roofs.

Abstract: The claimant (P) applied for judicial review of a decision of the Crown Prosecution Service not to bring prosecutions for gross negligence manslaughter arising out of the death of his son (D) in an industrial accident.

D, who was 17 years old, had fallen through a roof light to his death in his second week of work as a labourer with his employer (C). P maintained that C had instructed D to go onto the roof even though he had had no previous experience of working at heights or on roofs. At the time of the accident, D had offered to climb onto the roof in search of timber. One of D's colleagues (J) had told D not to bother but D had continued and had fallen to his death. At an inquest the jury returned a unanimous verdict of unlawful killing. The CPS considered whether various individuals should be prosecuted for gross negligence manslaughter but concluded that although individuals including C were in breach of duty of care to D, the degree of negligence exhibited was not such as to amount to criminal negligence. The CPS had relied on various factors including the

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suggestion that D had some experience in the building trade; that D's colleagues had told D not to go near skylights; that there was no reason for D to have gone onto the roof; that D had been specifically told by J not to go onto the roof.

P submitted that the CPS had failed to appreciate that C had exposed D to the risk of death by instructing him to work on the roof without any training, particularly without training in relation to the danger of roof lights and had also totally failed to assess the seriousness of that risk.

Held, granting the application, that the CPS had not dealt with the real thrust of any case that might be brought against C. There was evidence of a reason why D might have gone onto the roof; he had been instructed to do so as part of his duties as an employee, without any training or induction course, or any serious warning about roof lights and had not been told not to do so prior to receiving that induction course. There was force in the point that by focusing on the particular moment before the accident, the CPS had failed to take account of the seriousness of a failure to give proper instruction not to go on the roof prior to induction or proper instruction in relation to working on a roof and particularly a roof with roof lights. It could not be said that the CPS had provided clear reasons as to why the verdict of the inquest jury should not have led to a prosecution. Consequently, it was appropriate to refer the matter back to the CPS.

Judge: Waller LJ; Lloyd Jones J

Counsel: For the claimant: Richard HermerFor the defendant: Milwyn Jarman QC

Solicitor: For the claimant: ThompsonsFor the defendant: CPS (Gwent)

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R. v DPP Ex p. Manning
[2001] Q.B. 330; [2000] 3 W.L.R. 463; [2001] H.R.L.R. 3; [2000] Inquest L.R. 133; [2000] Po. L.R. 172; Times, May 19, 2000; Independent, June 6, 2000; Official Transcript
QBD (Admin)

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R. v Adomako (John Asare)
[1995] 1 A.C. 171; [1994] 3 W.L.R. 288; [1994] 3 All E.R. 79; (1994) 99 Cr. App. R. 362; (1994) 158 J.P. 653; [1994] 5 Med. L.R. 277; [1994] Crim. L.R. 757; (1994) 158 J.P.N. 507; (1994) 144 N.L.J. 936; Times, July 4, 1994; Independent, July 1, 1994
HL

R. v DPP Ex p. Chaudhary
[1995] 1 Cr. App. R. 136; (1995) 159 J.P. 227; (1995) 7 Admin. L.R. 385; [1994] C.O.D. 375; (1995) 159 J.P.N. 214; Times, March 7, 1994
QBD

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[2013] EWHC 945 (Admin); Official Transcript
DC

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Management of Health and Safety at Work Regulations 1998 (c.37) reg.19(1)

2006 WL 3880392

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Divisional Court
21 December 2000

R. (on the application of Joseph) v DPP

Case Analysis

Where Reported

[2001] Crim. L.R. 489; Official Transcript

Case Digest

Subject: Criminal procedure

Keywords: Assault; Crown Prosecution Service; Evidence; Prosecutions; Self-defence

Summary: J challenged a decision of the DPP to discontinue the prosecution of two individuals who, J alleged, had assaulted him. The CPS had decided not to proceed with the prosecution on the basis that there was insufficient evidence to enable it to overcome a probable defence of self defence. The court held that the CPS had failed to properly consider the evidence and ordered the DPP to review its decision not to continue with the prosecution.

Abstract: J challenged a decision of the DPP to discontinue the prosecution of two individuals who, J alleged, had assaulted him. The CPS had decided not to proceed with the prosecution on the basis that there was insufficient evidence to enable it to overcome a probable defence of self defence.

Held, granting the application for judicial review and ordering the DPP to review its decision not to continue with the prosecution, that the CPS had failed to properly consider the evidence, in particular that relating to the issue of self defence.

Judge: Waller LJ; Sir Edwin Jowitt

Counsel: For J: Hugh Southey. For the DPP: John McGuinness. For the intervener: Julian Knowles

Solicitor: For J: Deighton Guedalla. For the DPP: CPS. For the intervener: Julian Knowles

Cases Citing This Case

R. (on the application of Privacy International) v Revenue and Customs Commissioners
[2014] EWHC 1475 (Admin)

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QBD (Admin)

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Prosecution: Crown Prosecution Service discontinuing case.
Actual bodily harm; Criminal evidence; Prosecutions; Self defence.
Crim. L.R. 2001, Jun, 489-491

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Archbold Criminal Pleading Evidence and Practice 2015 Ed.
Chapter: Chapter 1 - The Indictment

Documents: 1-336 Prosecution of Offences Act 1985, s.10

2000 WL 33122472

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R. v DPP Ex p. Chaudhary

Also known as:

R. v DPP Ex p. C
Queen's Bench Division
18 February 1994

Case Analysis

Where Reported

[1995] 1 Cr. App. R. 136; (1995) 159 J.P. 227; (1995) 7 Admin. L.R. 385; [1994] C.O.D. 375; (1995) 159 J.P.N. 214; Times, March 7, 1994

Case Digest

Subject: Criminal procedure

Keywords: Buggery; Crown Prosecution Service; Judicial review; Prosecutions

Summary: Crown Prosecution Service; decision not to prosecute; test to be applied by prosecutor; test to be applied by High Court

Abstract: The court can interfere with a decision not to prosecute where the prosecutor fails to follow the settled policy set out in the Code for Crown Prosecutions. The applicant sought judicial review of the DPP's decision not to prosecute her husband, a police officer, for the repeated offence of buggery against her. To the doctors examining her the applicant made it clear that the anal penetration had taken place without her consent but she was not wholly consistent as to its frequency. There was evidence adduced that the officer in the DPP's office had adopted an unlawful policy and the applicant contended that the decision not to prosecute was perverse having regard to the apparent credibility of the complainant.

Held, allowing the application, that the Divisional Court had the power to review a decision of the DPP not to prosecute but the authorities also showed that the power was to be sparingly exercised. The court could act in the present circumstance if and only if it demonstrated that the respondent arrived at the decision not to prosecute because of some unlawful policy, or because the DPP failed to act in accordance with the settled policy as set out in the Code or because the decision was perverse. The issue was not approached in accordance with the settled

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policy of the DPP as set out in the Code. The officer had looked to conviction on a less serious offence and failed to bring his mind to bear on the question of whether the evidential sufficiency criteria were satisfied in relation to the more serious offence. Counsel's contention that the failure to take into account a material consideration would contribute to the decision being unreasonable. However, the primary element of unreasonableness on these facts was a patent failure to act in accordance with the settled policy (Raymond v Attorney General [1982] Q.B. 839 considered).

Judge: Kennedy LJ; Scott Baker J

Counsel: For C: Michael Supperstone Q.C. and Amir Sultan. For the DPP: James Dennis. For the husband: Michael Egan

Solicitor: For C: David Shine & Kharbanda (Southall). For the DPP: CPS. For the husband: Russell Jones & Walker

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R. v Bush (William James)
(1989) 11 Cr. App. R. (S.) 295; [1990] Crim. L.R. 65
CA (Crim Div)

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[1991] C.O.D. 92
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R. v Race Relations Board Ex p. Selvarajan

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[1975] 1 W.L.R. 1686; [1976] 1 All E.R. 12; [1975] I.R.L.R. 281; (1975) 119 S.J. 644
CA (Civ Div)

R. v Courtie (Thomas)
[1984] A.C. 463; [1984] 2 W.L.R. 330; [1984] 1 All E.R. 740; (1984) 78 Cr. App. R. 292; (1984) 148 J.P. 502; [1984] Crim. L.R. 366
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DC

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[1991] 1 Q.B. 212; [1990] 3 W.L.R. 323; [1990] 3 All E.R. 137; (1990) 2 Admin. L.R. 711; (1990) 87(24) L.S.G. 44
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R. v Inland Revenue Commissioners Ex p. Mead
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[1997] C.O.D. 169
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[2001] N.I. 1
CA (NI)

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(2002) 35 E.H.R.R. 23; Times, June 3, 2002
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QBD

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[2002] EWHC 3050 (QB); Official Transcript
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PC (Jam)

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DC

R. (on the application of Corner House Research) v Director of the Serious Fraud Office
[2008] UKHL 60; [2009] 1 A.C. 756; [2008] 3 W.L.R. 568; [2008] 4 All E.R. 927; [2008] Lloyd's Rep. F.C. 537; [2009] Crim. L.R. 46; (2008) 158 N.L.J. 1149; (2008) 152(32) S.J.L.B. 29; Times, July 31, 2008; Official Transcript
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DC

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[2015] EWHC 263 (QB); [2015] Lloyd's Rep. F.C. 223; Official Transcript
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[2001] UKHL 61; [2002] 1 A.C. 800; [2001] 3 W.L.R. 1598; [2002] 1 All E.R. 1; [2002] 2 Cr. App. R. 1; [2002] 1 F.L.R. 268; [2002] 1 F.C.R. 1; [2002] H.R.L.R. 10; [2002] U.K.H.R.R. 97; 11 B.H.R.C. 589; (2002) 63 B.M.L.R. 1; [2002] A.C.D. 41; [2002] Fam. Law 170; (2001) 151 N.L.J. 1819; Times, December 5, 2001; Daily Telegraph, December 6, 2001; Official Transcript
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PC (Trin)

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[2000] 1 W.L.R. 55; [1999] 2 All E.R. 873; (2000) 2 L.G.L.R. 278; (1999) 11 Admin. L.R. 611; [1999] C.O.D. 216; Times, April 21, 1999
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[2008] EWHC 666 (Admin); [2008] Extradition L.R. 207; Official Transcript
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[2009] EWHC 594 (Admin); [2009] 2 Cr. App. R. 26; (2009) 173 J.P. 511; [2009] Crim. L.R. 730; Official Transcript
DC

R. v DPP Ex p. Manning
[2001] Q.B. 330; [2000] 3 W.L.R. 463; [2001] H.R.L.R. 3; [2000] Inquest L.R. 133; [2000] Po. L.R. 172; Times, May 19, 2000; Independent, June 6, 2000; Official Transcript
QBD (Admin)

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[2011] EWCA Crim 1608; [2012] 1 Cr. App. R. 10; Official Transcript
CA (Crim Div)

R. (on the application of F) v DPP
[2013] EWHC 945 (Admin); Official Transcript
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QBD (NI)

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(2003) 37 E.H.R.R. 2; 11 B.H.R.C. 1; [2001] Inquest L.R. 101; Times, May 18, 2001

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R. v DPP Ex p. Kebilene
(1999) 28 E.H.R.R. CD1; Official Transcript
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[2004] NIQB 20; [2004] N.I. 367
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[2015] EWHC 631 (QB)
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[2012] EWCA Crim 83
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[1999] 1 A.C. 54; [1998] 3 W.L.R. 1; (1998) 142 S.J.L.B. 167
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[2009] EWHC 57 (Admin); [2009] U.K.C.L.R. 255; [2009] A.C.D. 41; Official Transcript
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67 T.C. 580; Independent, August 14, 1995; Official Transcript
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R. (on the application of Dennis) v DPP
[2006] EWHC 3211 (Admin); [2006] Po. L.R. 343; (2007) 104(4) L.S.G. 35; (2007) 157 N.L.J. 143; Official Transcript
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[2006] EWHC 200 (Admin); [2007] Q.B. 727; [2007] 2 W.L.R. 635; [2006] 3 All E.R. 239; [2006] U.K.H.R.R. 450; [2006] Extradition L.R. 52; [2006] A.C.D. 55; Times, February 24, 2006; Official Transcript
DC

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R. (on the application of Grout) v Financial Conduct Authority
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R. (on the application of Pullen) v Health and Safety Executive
[2003] EWHC 2934 (Admin); Official Transcript
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[2004] EWHC 798 (Admin); [2004] Imm. A.R. 549; [2004] I.N.L.R. 638; [2004] A.C.D. 47; Times, May 21, 2004; Official Transcript
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PC (Trin)

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Section 12 of the Sexual Offences Act 1956

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1994 WL 1060752

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Divisional Court
23 March 2000

R. v DPP Ex p. Jones (Timothy)

Case Analysis

Where Reported

[2000] I.R.L.R. 373; [2000] Crim. L.R. 858; Official Transcript

Case Digest

Subject: Criminal law

Keywords: Corporate crime; Manslaughter; Mens rea

Summary: J challenged the DPP's decision not to proceed with a charge of negligent manslaughter against the employer of his deceased brother. It was argued that the DPP had been entitled to conclude that there was no realistic prospect of securing a conviction. It was held that the DPP had (1) misapplied the law by relying on the employer's lack of subjective recklessness instead of applying an objective test; (2) failed to give sufficient reasons for concluding that a conviction was unlikely, and (3) failed adequately to deal with the question whether the relevant hazard was sufficiently obvious.

Abstract: SJ was employed as a labourer by a company, E. On his first day at work he was engaged in an operation to unload bags of cobblestones from the hold of a ship using a crane possessing a grab bucket adapted for the purpose by the addition of two chains. He was decapitated when the grab bucket under which he was standing closed unexpectedly. The Director of Public Prosecutions, DPP, decided not to prosecute E or its managing director, M, for manslaughter. SJ's brother, TJ, sought judicial review of DPP's decision. DPP maintained that there was insufficient evidence to satisfy a jury that the objective test for negligent manslaughter had been satisfied, R. v Adomako (John Asare) [1995] 1 A.C. 171 cited. It was accepted that the requirements of duty, breach and causation had been fulfilled, the issue being whether the breach amounted to a sufficiently gross act of negligence to warrant criminal sanctions.

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Held, granting the application for judicial review, that (1) the correct test for establishing gross negligent manslaughter was an objective one as set out in Adomako. Subjective recklessness was a factor which might be taken into account by the jury as being indicative of culpability, but negligence would still be criminal in the absence of subjective recklessness if the test in Adomako was satisfied. Although DPP had correctly stated the test, it appeared clear from his conclusions as to M's concerns about safety that his decision had in fact been based upon M's personal perceptions, and that it had therefore been M's lack of subjective recklessness which had been the determining factor in taking the decision not to prosecute; (2) DPP had not addressed any other factors which, in the absence of subjective recklessness, would tend to run counter to the prospects of a successful conviction. DPP's reference to having taken a general view of the case had not been sufficient, and (3) there was no adequate explanation for the decision that the grab bucket procedure had not posed an obvious danger. DPP had not explained why he had preferred the evidence of a service engineer employed by the manufacturer of the crane to that of the manufacturer's service manager. To reach a conclusion that the danger had not been sufficiently obvious had therefore been irrational.

Judge: Buxton LJ; Moses J

Counsel: For J: P O'Connor Q.C. and K Markus. For DPP: J Turner Q.C. For the Health and Safety Executive: M Fortune. For the interested parties: T Petts

Solicitor: For J: Christian Fisher. For DPP: Treasury Solicitor. For the Health and Safety Executive: Solicitor's Office, Health and Safety Executive. For the interested parties: Davies Lavery (Maidstone)

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Times, July 4, 1994; Independent, July 1, 1994
HL

R. v Stone (John Edward)
[1977] Q.B. 354; [1977] 2 W.L.R. 169; [1977] 2 All E.R. 341; (1977) 64 Cr. App. R. 186; [1977] Crim. L.R. 166; (1977) 121 S.J. 83; Times, December 22, 1976
CA (Crim Div)

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Applied
R. (on the application of Rowley) v DPP
[2003] EWHC 693 (Admin); [2003] Inquest L.R. 96; Official Transcript
DC

Mohit v DPP of Mauritius
[2006] UKPC 20; [2006] 1 W.L.R. 3343; Official Transcript
PC (Mau)

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[2004] EWCA Crim 2490; Official Transcript
CA (Crim Div)

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Corporate liability; Manslaughter; Prosecutions.
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Corporate liability; Manslaughter; Prosecutions.
Emp. Law. 2000, 43, 16-17

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Corporate liability; Criminal liability; Manslaughter.
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Corporate liability; Manslaughter; Prosecutions.
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Corporate liability; Manslaughter; Prosecutions.
H. & S.B. 2000, 288, 1

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2000 WL 331129

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Queen's Bench Division (Administrative Court)
17 May 2000

R. v DPP Ex p. Manning

Case Analysis

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[2001] Q.B. 330; [2000] 3 W.L.R. 463; [2001] H.R.L.R. 3; [2000] Inquest L.R. 133; [2000] Po. L.R. 172; Times, May 19, 2000Independent, June 6, 2000Official Transcript

Case Digest

Subject: Criminal procedure

Keywords: Crown Prosecution Service; Death; Prison officers; Prisoners; Prosecutions

Summary: prosecutions; Crown Prosecution Service; reasons for non prosecution; test for bringing prosecution; death in custody

Abstract: The sisters of AM, who had died of asphyxia whilst being restrained by prison officers, applied for judicial review of the decision of the DPP not to prosecute any of the officers involved. A coroner's inquest, having found that the asphyxia had been attributable to the way in which AM had been held by one of the prison officers, returned a verdict of unlawful killing. Following police investigations into the incident the papers were passed on to a special casework lawyer of the CPS who concluded that there was insufficient evidence to create a realistic prospect of conviction. A senior CPS caseworker assigned to review the decision not to prosecute determined that the responses of the prison officers during cross examination at the coroner's inquest tended to support the allegation that excessive force had been used. However, whilst able to establish the officer responsible for causing the asphyxiation, the caseworker concluded that insufficient evidence existed to support a criminal prosecution and accordingly that the case did not have a realistic prospect of success. His decision was subsequently communicated to the solicitors acting for AM's sisters by a letter and a press release issued by the DPP the following day. It was contended that (1) while no general duty existed for the CPS to give reasons for a decision not to

prosecute, the circumstances of the instant case imposed an obligation to supply coherent and sensible reasons for their decision, and (2) the caseworker had erred in his application of the Code for Crown Prosecutors.

Held, allowing the application, that (1) while the DPP was not under a general duty to give reasons for a decision not to prosecute, it was reasonable where no compelling grounds existed otherwise, that in circumstances where an individual had died whilst in the custody of the State and a properly directed inquest had reached a verdict that the killing had been unlawful, reasons be given for a decision not to prosecute. The right to life was a fundamental human right which could only be denied in extremely limited circumstances. The coroner's verdict had created an ordinary expectation that a prosecution would result. Accordingly, it was desirable that the DPP in deciding to go against such an expectation should provide grounds for that decision, and (2) the caseworker had failed to take into account certain critical evidential matters and had applied, in considering the prospect of success, a higher test than was required under the provisions of the Code. The Code required that a prosecution if brought would "more likely than not" result in a conviction. The CPS was not required to establish an equivalent standard of proof as that of jury or magistrates court when considering whether or not to bring a conviction.

Judge: Lord Bingham of Cornhill; Morison J

Counsel: For the applicant: Nicholas Blake QC, Dexter DiasFor the respondents: James Turner QC, Richard Barton

Solicitor: For the applicants: Bhatt MurphyFor the respondents: Treasury Solicitor

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Kai Ambos[1]

The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports[2]

1. PRELIMINARY REMARKS

This paper intends to give a comparative overview of the status, role and accountability of the Prosecutor (General)[3] based on 33 national reports. These reports have been prepared for the international workshop on 'The Independence and Accountability of the Prosecutor of a Permanent International Criminal Court'[4] on the basis of a questionnaire which was later revised and reduced to eight questions. The paper is structured along these questions and finishes with eight conclusions.

Pursuing a structural approach the paper distinguishes between three main criminal procedure systems. It is acknowledged that not all national systems fit clearly within one or the other of the proposed categories, but for comparative purposes they have been divided as follows (countries in alphabetical order):

– Common Law (this group includes common law countries and other countries with

1. Kai Ambos, Max-Planck-Institute for Foreign and International Criminal Law, Freiburg i. Br. I am very grateful to *Holger Barth* and *Thomas Richter* (both Max-Planck-Institute for Foreign and International Criminal Law), *Juan-Luis Gómez Colomer* (Spain), *Nico Keijzer* (Netherlands), *Chris Staker* (Office of the Prosecutor), *Andrew Sanders* (UK) and *Steve Thaman* (USA) for invaluable comments.
2. The national reports as well as a paper by the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (M. Bergsmo, C. Cissé, Ch. Staker) on 'The Prosecutors of the International Tribunals' are published in the volume *The Prosecutor of a Permanent International Criminal Court* (L. Arbour, A. Eser, K. Ambos, A. Sanders, eds) (Freiburg i. Br. 2000) in English, French and Spanish.
3. *See also* K. Ambos, 'The Role of the Prosecutor of an ICC from a Comparative Perspective', *The Review (International Commission of Jurists)*, pp. 58–59 (December 1997), at pp. 45–56 analyzing Articles 23, 26 and 27 of the ILC Draft Statute 1994 from a comparative perspective.
4. The workshop was jointly organised by the Office of the Prosecutor of the ICTY and ICTR and the Max-Planck-Institute for Foreign and International Criminal Law. It was generously supported by the governments of the Netherlands, Norway and Germany as well as the Open Society Fund.

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an adversarial procedure): Canada, England and Wales, Israel, Japan/South-Korea,[5] Mauritius, Nigeria, Pakistan, Singapore, South Africa, United States of America.[6]

- Civil Law (this group includes countries whose procedure historically evolved from the inquisitorial system and is based on the French Code d'Instruction Criminelle of 1808), distinguishing between
  - countries with an examining judge (*juge d'instruction*) based on the *French model*: Belgium, France, Egypt, Mali, the Netherlands, Rwanda, Senegal and Spain,[7]
  - countries with a *prosecutorial* system:[8] Austria, Argentina, Brazil, Chile, Colombia, Costa Rica, the Czech Republic, Finland,[9] Georgia, Germany, Hungary, Italy, and Russia.[10]
- *Sui Generis*: People's Republic of China.[11]

2. QUESTIONS

2.1. Who is the chief prosecutor (a judicial officer, a member of the government, a public servant, an independent office-holder, etc.) and on which organs does the prosecutor depend (executive, judge)? How is the chief prosecutor appointed? How can he/she be removed from office?

The question apparently gave rise to some difficulty since the concept of chief prosecutor does not translate clearly into all systems.

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5. The traditional inquisitorial Japanese system was converted in a rather adversarial procedure after the 2nd World War. The Japanese system has been adopted in (South)-Korea.
6. *See* the reports by Patrick Healy, Andrew Sanders, Kenneth Mann, Koji Takuchi, Yang-Kyun Shin, Hungyu Lee, Eddy Bolancy, A.O. Adekunle, S.M. Zafar, Sowaran Singh, Jan de Olivera, John Michelich and Donald C. Smaltz (on the independent counsel in the US system) in L. Arbour, A. Eser, K. Ambos and A. Sanders, eds, *op. cit.*, note 2.
7. *See* the reports by *Benoît Dejemeppe, Jean Cédras, Adel Omar Sherif, Modibo Konate, Nico Keijzer, Simeon Rwagasore, Cherkh Faye and Juan-Luis Gómez Colomer*, in L. Arbour, A. Eser, K. Ambos and A. Sanders, eds, *op. cit.*, note 2.
8. Although some of these systems (e.g. Austria, Argentina) provide for an examining judge they have to be classified as prosecutorial systems since this judge only controls the results of the investigation carried by the prosecutor and the police, i.e. he is rather a controlling judge (thus, in the Chilean draft bill he is called *juez de control de la instrucción*).
9. The Finnish system is quite peculiar: historically it goes back to the traditional Russian procedure but nowadays it has various elements of the adversarial procedure.
10. *See* the reports by *Otto Triffterer, Gustavo Bruzzone, Ana Sofia Schmidt de Oliveira, Claudio Uribe Diaz, Eduardo Montealegre Lynett, Daniel González Alvarez, Miroslav Říčka, Dan Frände, Alexandre Shushanashvili, Georgi Gloni, Peter Morré, Giulio Illuminati, Kálmán György* and *Ludmila Obidina*, in L. Arbour, A. Eser, K. Ambosand A. Sanders, eds, *op. cit.*, note 2. Regarding Russia it has so be noted, however, that the introduction of the jury in 1993 entailed a reform of the Criminal Procedure Code which strengthens adversarial tendencies.
11. *See* the report by *Feng Ye* (with further information by *Thomas Richter*), in L. Arbour, A. Eser, K. Ambos and A. Sanders, eds, *op. cit.*, note 2.

2.1.1. Common Law

According to some reports the chief prosecutor is generally the Attorney-General (USA, Canada, Israel, Singapore; less clear Nigeria, see below). However, he or she rarely actively prosecutes a case since he is normally a member of government and the head of the Ministry of Justice.

In Canada he is also an elected member of Parliament. In South Africa, there are still 11 Attorneys-General (for each Province) who – since the Attorney-General Act 1992 – are independent office holders; the same applies to the professional assistants with respect to their prosecutorial tasks. The new Constitution, however, intends to adopt the British model converting the Attorneys General in Directors of Public Prosecution. In Pakistan, though the concept of chief prosecutor is unknown, the prosecution of federal offences lies in the hands of the Attorney-General and his prosecutors; they are 'government servants'. The ambivalent status of the Attorney-General between the executive and the judicial branch appears to be most adequately described in the Israel report where it is pointed out that he or she is considered to be a 'quasi judicial officer' (the same applies to the Prosecutor General in Japan and Korea).

Other reports (England and Wales, Mauritius) indicate that the chief prosecutor is the Director of Public Prosecutions (DPP), an independent office holder and public servant (who can be a solicitor or barrister). According to the British model the DPP is head of the Crown Prosecution Service (CPS) and appointed by and accountable to the Attorney-General.[12] Thus, systems with a CPS and a DPP possess also an Attorney-General (only a barrister) as the superior administrative official; he is always a member of the government.

However, as was already stated, the concept of 'chief prosecutor' is far from clear. This is most obvious in the report on Nigeria since it understands the Attorney-General as the chief prosecutor although the actual prosecution lies, as in the British model, in the hand of a DPP. In Pakistan the concept of the chief prosecutor does not even exist.

Depending on the administrative structure of the State concerned, the Attorney-General has unlimited or limited national jurisdiction. The latter case applies in Federal systems (like the US and Canada but also in Pakistan and Nigeria) where the federal jurisdiction is limited to the federal offences (approved by the national parliament) and the state or provincial jurisdiction deals with the (ordinary) provincial offences. In South Africa there are 11 Attorneys General for each provincial division of the High Court and no nationwide Attorney-General. The British CPS is also organized at a regional and local level.

Apart from his prosecutorial task the Attorney-General operates as the chief advisor of the government and may represent it in proceedings with international reference, for example, extradition proceedings (see, e.g. Canada, Israel and Mauritius).

12. The former British DPP, Dame Barbara Mills, had to retire because of criticism that a 1993 reorganization of the CPS was 'a mistake' since the organization had become 'too centralized and bureaucratic' (*Guardian Weekly*, 7.6.1998-4).

The institution of the Attorney-General is hierarchically organized. The Attorney-General is, in the case of the US, assisted by Deputy Attorneys-General and the 94 US Attorneys of the Districts who direct the work of the Assistant Attorneys. In most US states prosecutors are elected officials and are independent of the State Attorney-General, also usually an elected official.

The US system provides further for specific *independent counsel* with a limited jurisdiction to investigate allegations of criminal wrongdoing against high-level officials.

The Attorney-General is *appointed* by the head of the executive, i.e. President or Prime Minister (USA, Canada, England and Wales, Mauritius, Nigeria, Pakistan, Singapore, Japan and Korea) or the cabinet as a whole (Israel). However, it is generally said that this does not affect his independence in prosecutorial matters since the Cabinet cannot direct him as to how to proceed in any cases or class of cases. Be that as it may the executive exerts, starting with the appointment and – in most cases – ending with the removal, a certain influence over the institution. Although there may be no formal mechanisms of removal (Canada) it can be triggered by the initiative of the Prime Minister or President.

In Nigeria, this presidential power follows explicitly from a legal provision. In Pakistan, the 'prosecutor generally depend[s] on the executive'. In Israel he simply can be removed from office by the government, in Singapore by the President (on the advice of the Prime Minister).

The DPP of England and Wales is, as already mentioned, appointed by and accountable to the Attorney-General. He can be removed from office as any other senior civil servant, i.e. only with prior notice according to his employment contract. In Canada his removal is only possible in exceptional cases: for mental or physical inability to fulfil the functions of his office. Either the parliament or a tribunal may play a part in this procedure.

In South Africa the (11) provincial Attorneys General are also appointed by the President.[13] Until 1992 they were accountable to the *national* Minister of Justice (so-called 'control regime'). The Attorney General Act (1992) made them directly accountable to Parliament (apart from the 4 'Homeland' Attorneys-General). Thus, today the role of the Minister of Justice is that of a coordinator of the activities of the Attorneys-General. Removal from office can only be effected by an address to both Houses of Parliament (impeachment).

Similarly, in Japan and Korea, the prosecutor general is appointed by the executive and can be removed after a special impeachment procedure for disciplinary reasons. Clearly, the appointment by the executive is in contradiction to his presumed status as quasi-judicial officer.

The *independent counsel* of the US is appointed by a three-judge panel of the US Court of Appeals for the District of Columbia Circuit (commonly referred to as the 'Special Division') on the basis of an application by the Attorney-General. Such an application is made if the Attorney-General considers that 'there are reasonable grounds

13. On the basis of a shortlist by the Ministry of Justice or of general applications from inside and outside the public sector.

to believe further investigation' in a certain case by an independent counsel is warranted. The Special Division defines the prosecutorial jurisdiction of the independent counsel. He may only be removed from office if he is convicted of a crime or impeached or by personal action of the Attorney-General for good cause, physical disability, etc. He may terminate his office if he has completed the investigation.

2.1.2. *Civil Law (French Model)*

As chief prosecutor one may consider the *Procureur Général* or *Procureur du Roi* (France, Belgium) or the *Fiscal General del Estado* (Spain) since his function is to investigate and prosecute offences. In France there are 22 Procureurs Généraux and about 175 Prosecutors of the Republic. In Belgium, there are five Procureurs Généraux. In the Netherlands there is a Council, consisting of five attorneys general. In the – comparatively more centralized – African states there is normally one Prosecutor General before the Supreme Court.

The Minister of Justice, like the Attorney-General in *some* (not all!) common law countries (e.g. in the US), is politically responsible for criminal prosecution but does not himself prosecute.

The *Procureurs* normally belongs to the judicial branch and, therefore, enjoy a similar independence as judges. However, their position differs in some respects from that of judges, for example, they are not appointed for life (in the Netherlands). In Spain the prosecutor is *funcionario público especial*.

The Prosecutors General depend on and are accountable to the executive (Minister of Justice). The Belgian Crown Prosecutor is – like the French Prosecutors of the Republic – subordinate to the Prosecutors General. The same applies in Rwanda and Mali with regard to the relationship between Prosecutor General and Prosecutor of the Republic.

A Prosecutor General is *appointed* by the executive (President and government or Minister of Justice) and is, in principle, irremovable. However, he can be removed from office for disciplinary reasons or suspended with regard to a certain case by the government (Minister of Justice). In Egypt, he may be removed for disciplinary reasons by the Discipline Council for Judges whose decision is enforced by a presidential decree (sic!). In the other African countries examined a removal seems to be possible for other reasons, too.

In France a reform provides for a stronger role of the *Conseil Supérieur de la Magistrature* in this process. In the future its advice shall bind the government or minister.

2.1.3. *Civil Law (Prosecutorial System)*

The chief prosecutor is the Prosecutor General of the Nation (*Fiscal or Procurador General de la Nación*). He only exists in centralized states like those of Latin America, the former socialist states of Hungary, the Czech Republic, Georgia, and Russia or in smaller states like Finland. In other, federal nations there are (also) regional state

prosecutors (*Generalstaatsanwälte*; the *Procuratore Generale*) which are assigned to the highest state or regional court (Superior Court of Appeals) and direct the regional office of the prosecutor. In these states a national Prosecutor General (*Generalbundesanwalt; Procuratore Generale*) may exist but he does not control the state prosecutors and – in some cases – does not even have investigative and prosecutorial functions. The latter case reminds us of the traditional *Procureur Général* of France which – as part of the *Ministère Public* – represents the financial interests of the state and of the law in general (Italy, Colombia).[14]

Prosecutors normally have the same career as judges and are civil/public servants (Austria, Germany, Brazil, Finland) or quasi judicial officers (Italy, Colombia, Costa Rica) or a mixture of both (*funcionario público independiente* – Argentina, Chile according to the reform bill). In the former socialist countries the prosecutor general is either an independent office holder (Hungary, Georgia, Russia) or a public servant related to the executive (Czech Republic). The final classification is sometimes unclear and appears formalistic given that it does not entail full material independence.

The *independence* is related to the status of the Prosecutor. If he is a civil servant he depends on the executive (normally Minister of Justice). He is appointed by the executive for life and can only be removed – in a very formal procedure – for disciplinary reasons.

In Austria and Germany the prosecutors are considered 'political officials' who have to agree with the government's basic political views and aims.

If he is an independent public servant (Argentina, Brazil, Chile, Finland, Hungary, Georgia and Russia) he is normally appointed by the President with participation of the Senate and the Supreme Court or by the legislative upon recommendation of the President (Hungary, Georgia and Russia). The removal procedure is similar (e.g. in Hungary and Georgia upon recommendation of the President in a kind of impeachment procedure for specific reasons provided for in the law).[15] In Chile, a head prosecutor can be removed by the Supreme Court upon request of the President. In Finland, he is treated as an ordinary civil servant and removed under ordinary circumstances. In Argentina, an impeachment (political process) is necessary. In a strict prosecutorial system the prosecutor general always has a say when a prosecutor shall be removed.

If the prosecutor has a position similar to a judge as 'judicial officer' (Italy, Colombia, Costa Rica) he is independent of the executive (like a judge) and appointed as well as removed by a special judicial organ (e.g. the *Consiglio Superiore della Magistratura*) or the Supreme Court only for disciplinary reasons. In Colombia he may be impeached for disciplinary reasons by the senate.

In Italy, however, the unity between judge and prosecutor which entails the prosecutor's status as judicial officer is under discussion.

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14. Cf. R. Merle, *Traité de Droit Criminel. Procédure Pénale*, 4th ed. (1987) pp. 232–233; *see also* W. Wohlers, *Entstehung und Funktion der Staatsanwaltschaft* (Berlin 1994) pp. 63–65; *see also* p. 66 (about the German 'Fiskalat').
15. In case of incompatibility because of another function; for conviction of a crime.

2.1.4. China

In China there is a strong Prosecutor General with centralized power. He is considered as an independent office holder. His tenure in office is linked to the legislative sessions. He serves no more than two executive terms.

The Prosecutor General is appointed and removed by the legislature. The Prosecutor General normally participates in the appointment and removal of the Head or ordinary prosecutors.

The chief prosecutors are appointed and removed on a national level and on different regional (provincial, local) levels. They must fulfil certain requirements, *inter alia*, have a 'good political and professional quality'. A removal is possible, *inter alia*, if a prosecutor no longer satisfies the basic requirements for the post or has 'proved incompetent'.

2.2. Do any organs (executive, legislative or judicial) exercise any general control or direction over the manner in which the prosecutor performs his or her functions? In particular, can such organs require the prosecutor to initiate proceedings in a particular case, or to refrain from prosecuting a particular case?

2.2.1. Common Law

A distinction between control over individual cases and by a general prosecutorial policy and legislation has to be made.

As chief prosecutor and member of government the Attorney-General is, as far as prosecutorial matters are concerned, virtually absolutely independent. The same applies to the Deputy Attorney and other prosecutors with regard to *individual cases*: they only have to obey instructions of their superiors within the Office of the Prosecutor (principle of hierarchy) but cannot be directed by other institutions or individuals. This prosecutorial independence is demonstrated by the almost unlimited discretion of prosecutors in the common law system. On the basis of the evidence presented by the police the prosecutor decides if he initiates proceedings or refrains therefrom. The principle of procedural legality (mandatory prosecution) is unknown in common law systems. As a result, with regard to individual cases there exist only the normal judicial controls in the course of the proceedings until the final sentence or with regard to compulsory powers (see question 6).

These controls are apparently more pronounced in Israel where the High Court, at least theoretically, can review prosecutorial decisions of the Attorney-General and compel him to prosecute or not.[16] A Minister or politician may draw the attention to a certain matter but the decision to intervene or not is left to the Attorney-General or the DPP. Also in cases of private prosecutions – if they are admitted at all – the prosecutor has the right to intervene and take over the case (especially if the victim's participation is limited to the initiation of the proceedings).

16. In practice, the High Court compelled the Attorney-General only in four cases to prosecute and has never compelled not to prosecute.

In Nigeria, citizens are entitled to challenge the prosecutorial decision not to prosecute.

In Japan and Korea, the Minister can never directly interfere in the investigation of a particular case; he has to do it by means of the Prosecutor General. There is only a direct internal control: the substitution of one prosecutor by another upon request of the General Prosecutor is possible.

Apart from the appointment and removal question (1), one may identify a certain control as far as the general prosecutorial *policy* or *procedure* is concerned.

In England and Wales the executive prepares the 'Attorney-General's Guidelines'. The DPP prepares the Code for Crown Prosecutors on this basis and the Code is presented to the Parliament. The executive may enforce a certain policy by way of directives, the legislative by procedural or administrative laws. Although this general control or – better – correctional intervention is quite normal in a democratic state with three separate powers and does not affect individual cases it is worthwhile noting that it exists.

In the US, the legislative branch (Congress, state legislatures) can exercise some influence by withholding funds from prosecutors if they disagree on matters of public policy. Further, Congress can conduct oversight hearings and require periodic reports from the Attorney-General. Ultimately, prosecutors are accountable to the general public. Regarding the *independent counsel* the Attorney-General determines whether his appointment is warranted. The Attorney-General may also expand his jurisdiction. Once appointed, an independent counsel has wide discretion to initiate or refrain from proceedings.

Against this background it is not convincing when one report (Mauritius) states that 'no organ, whether executive, legislative or judicial, [can] exercise *any* control or direction over the manner in which the DPP performs his or her functions' (emphasis added).

It is also clear that the apparently clear-cut distinction between an individual case and prosecutorial policy loses much of its persuasiveness in a different political framework. The point is convincingly made in the Nigeria report:

> 'Because of the political nature of the office, and the fact that the Attorney-General is the Government legal adviser, it is not always possible to resist pressure or interference particularly from the executive arm of Government in the discharge of the Attorney-General's responsibilities. Such pressure may be quite pronounced in a dictatorial regime which is currently operative in Nigeria. Past and serving Attorneys-General have often been confronted with how to reconcile the public interest with that of justice, and invariably the question becomes how far the public interest approximates to the interests of the regime or Government in power ... However, where a matter commands strong public attention, is of serious national consequence, or otherwise could entail political consequences, the Attorney-General is usually asked by the Government to take a personal or close control of the case.'[17]

17. However, even under these conditions 'interference as to the initiation or discontinuance of proceedings is rare' (*ibid.*).

Similarly, given the direct relationship between the Attorney-General and the executive and the status of prosecutors as 'government servants' (Pakistan) it is not surprising that a prosecutor 'may sometimes be influenced by the executive'.

2.2.2. *Civil Law (French Model)*

There exists a certain political control over the prosecutors by the Minister of Justice. He may issue general guidelines or orders when and how to prosecute (*droit d'injonction positif*) but he is not able to order not to prosecute (*droit d'injonction négatif*).[18] This general influence can even extend – exceptionally – to individual cases.

According to the new Dutch legislation (Bill 25392 of 11 June 1997) the position of the Minister of Justice will be strengthened: he can give directives of a general and specific nature, in a positive and negative sense, and even interfere in the way the prosecution is conducted. However, such directives have to be made public and known to the competent court. In Spain, the Prosecutor General is accountable to the Parliament.

Obviously, the prosecutors are subject to the hierarchy within the institution. In cases of professional misconduct disciplinary sanctions are possible.

Extensive judicial *scrutiny* is provided for in the Netherlands: a person who receives a *dagvaarding* (kind of indictment) can object to it before court; the decision to prosecute can also be challenged during trial. The decision not to prosecute can be challenged by a complaint of interested persons or bodies before the Appeals Court.

2.2.3. *Civil Law (Prosecutorial System)*

If the prosecutor is a judicial officer there is no superior *external* organ to control him. This is true for Italy, Costa Rica and Colombia. The same should apply if he is a special (independent) civil servant. Thus, this is the case, in Hungary, Georgia, Russia and also in the Czech Republic (despite his appointment by the executive). The same applies to Brazil, where the prosecutor, though appointed by the executive, maintains a formal autonomy. In Argentina, however, the executive may 'suggest' that the Prosecutor General issue general instructions.

If the prosecutor depends on the executive he is also controlled by it, either by general guidelines or/and by instructions for individual cases. Normally, only the former is possible and the Minister can never directly interfere (except in Austria) in the investigation of a particular case; he has to do it by means of the (Federal) State Prosecutor General (Germany). In the former socialist countries only the Prosecutor General – not the Minister – can legally issue general guidelines. He may also instruct the subordinate prosecutors in specific cases.

The Prosecutor General may be accountable to the Parliament (Hungary, Russia). In this case he has to report regularly (annually). He is normally empowered to

18. However, at least in France, such orders are given in practice.

instruct a subordinate prosecutor whether or not to prosecute a certain case. In Finland, the prosecutor is subject to a control of legality by the Chancellor of Justice and the Ombudsman. In Germany ministerial directives are converted into internal directions by the head of the regional prosecution authority. As far as the internal control mechanisms are concerned the substitution of one prosecutor by another upon request of the General Prosecutor is possible (also Argentina, Costa Rica).

Apart from control by the executive there is, in some states, a strong *judicial control* during the pre-trial phase. This may especially be relevant in systems where the prosecutor belongs to the judiciary and thereby is subject to its internal mechanisms of control; he may, at least, be subject to the internal review of the own institution. There is no judicial control over initiation of proceedings in the former socialist countries.

In Argentina, the prosecutor may even be substituted by another who follows the court's opinion by way of the so-called *control jurisdiccional*. In Chile, according to the draft reform bill, a *juez de control de la investigación* not only protects the rights of the suspect but may also ask the prosecutor to initiate proceedings or to refrain from a certain prosecution.

2.2.4. China

There is an internal hierarchy and the Prosecutor General can instruct the State Prosecutors and so on. Further, there is judicial control by the People's Courts which evaluate the performance of the prosecutors.

2.3. Is the prosecutor under an obligation to bring proceedings in all cases where there is sufficient evidence, or does the prosecutor have discretion? If the prosecutor is under an obligation, can this be legally enforced, and if so, by whom? Can the prosecutor (independently decide to close an investigation or to) withdraw a prosecution during the course of judicial proceedings? Do such actions require the approval of a judge?

2.3.1. Common Law

The common law system is characterized by the almost unlimited discretion of the prosecutor to initiate or refrain from proceedings during the *pre-trial* phase. The prosecutor can also decide to close an investigation already initiated. He may do so for lack of evidence or because he considers that the offence is not significant enough to merit prosecution (lack of public interest). A case may also be (partially) closed because of a plea agreement or plea bargain.

In England and Wales discretion is structured in the Code for Crown Prosecutors: although judicial review exists it is limited to completely unreasonable decisions and the substantive merits of the case are not examined (so-called 'Wednesbury' principles). In Japan and Korea, the prosecutor can close a case on the basis of the undesirability or inappropriateness of prosecution.

Although this statement is generally valid for all common law systems analyzed here some differentiation is necessary. Some systems provide for judicial review (Israel, England and Wales), while others do not (US apart from the guilty plea which has to be entered before a judge).

In England and Wales, the actual investigation lies in the hands of the police. When the CPS takes over the case the investigation is closed, thus, no more control is possible. In Canada, certain offences require an authorisation of the Attorney-General. It is also worthwhile mentioning that in Nigeria a distinction between the North and the South has to be made. In the North, governed by the Criminal Procedure Code, judicial supervision is more pronounced than in the South, governed by the Criminal Procedure Act.[19] In Pakistan, the prosecutor is obliged to initiate proceedings if there is sufficient evidence, however, this obligation cannot be enforced.

The decision to stop proceedings does not require the approval of a judge if the trial has not yet started. Thus, the crucial point is whether a plea has already been entered or not. In the former case the trial has started and the withdrawal requires the approval of the court. Thus, as a general rule it follows that a judicial approval for withdrawal is needed if the case already reached the competence of the court. This also applies with regard to the dropping of charges (e.g. by a guilty plea). A judicial approval is, in practice, rarely denied.

A formal withdrawal may also require the consent of the Attorney-General (South Africa). In England and Wales, a distinction is made between the discontinuance of proceedings (later revival is possible) and an acquittal (no revival possible).

In most US jurisdictions the prosecutor may dismiss charges at the trial stage. Also, in Japan and Korea the prosecutor may at any stage of the proceedings drop or withdraw the case. This shows the adversarial tendency of this procedure: the prosecutor is considered a party which may handle the case without considering the search for the truth.

An *independent counsel* has the full authority to dismiss matters within his jurisdiction without conducting any investigation. These actions do not require the approval of any judge.

2.3.2. *Civil Law (French Model)*

The prosecution (*poursuite*) is governed by the principle of *opportunity* (expediency). Thus, the Prosecutor is under no obligation to bring proceedings even in cases where there is sufficient evidence but has a wide discretion (in France around 80% of all cases are not prosecuted). This does not apply to Spain where the principle of mandatory prosecution rules. Further, discretion may not exist (a) when the Minister or the Prosecutor General gives him an order to prosecute or (b) when general guidelines require a prosecution or, finally, (c) when a victim chooses to bring an 'action civile' and becomes a 'partie civile' before the examining judge (*juge d'instruction*)[20] or

19. *See* more detailed Nigeria report, pp. 425 *et seq.*
20. According to the French model the pre-trial phase is divided into two phases (*poursuite* and *instruction*): the *juge d'instruction* investigates in cases of more serious offences (see 'role of the prosecutor', *op. cit.*, note 3, pp. 7–8).

the Appeals Court (Netherlands), i.e. pursues the restitution of his damages in the criminal proceedings.

One has to distinguish between the police investigation under direction of the prosecutor and the judicial investigation in the hands of the examining judge or – later – the court. In the first case the Prosecutor of the Republic may close an investigation, only subject to the (internal) review of the Prosecutor General. If the examining judge has taken over the case (*instruction*) the prosecutor may only suggest the closure. If the trial has even begun (the court has assumed jurisdiction) only a judgement may terminate the proceedings.

As a general rule it can be stated that the prosecutorial control over the case ends with the jurisdiction of the court.

2.3.3. *Civil Law (Prosecutorial System)*

In most prosecutorial systems the principle of *mandatory prosecution* (procedural legality) rules: the prosecutor has to prosecute if there is sufficient evidence. However, this principle has many exceptions according to the 'expediency principle' ('principle of opportunity'). It gives the prosecutor discretion to close an investigation in certain minor cases and under certain conditions (Austria, Germany, Finland, Brazil, Chile, Costa Rica).

In Brazil, in 1995 a kind of plea bargaining procedure was introduced which enables the prosecutor to stop proceedings. The new Chilean Draft Law on Criminal Procedure contains a rule on opportunity (expediency principle). The Czech procedure allows a conditional stopping of proceedings and a settlement. The new Hungarian procedure (in force in the year 2000) allows in specific cases the closing of the investigation (discretion, principle of opportunity). It also introduces some rights of review against procedural decisions, especially for the victim (complaint against decision not to prosecute, private accusation).

Even in stricter systems of mandatory prosecution (Italy, Argentina, Georgia, Russia) there exist mechanisms of factual discretion because the prosecutors are not able to prosecute every minor offence in the adequate time. In any case, it does not appear very realistic to provide for mandatory prosecution in all criminal justice systems. A quite drastic example is Colombia where, despite a strict concept of mandatory prosecution, failure to prosecute for factual reasons (*Impunidad*) is known worldwide. In such a situation the maintenance of the principle of mandatory prosecution – against the daily reality of the criminal justice system – appears rather hypocritical. As far as Italy is concerned the report states convincingly:

> '... it is impossible to investigate and prosecute all the offences which have been committed. So, the reality is that of a prosecutor who may decide at his discretion which offences shall be prosecuted and which offences can be disregarded.'

Again, one has to distinguish between the pre-trial and the trial phase. During the former, before the judge assumes jurisdiction, the prosecutor has a certain discretion

to stop proceedings (*archivo fiscal*). One might even argue that he has to close his investigation – a reverse consequence of the mandatory principle – if there is not sufficient evidence or no legal basis to proceed. This might also follow from the principle that the prosecutor has to investigate in both directions, in favour and against the suspect.

In Italy, however, the doctrine and practice draws the opposite conclusion from the mandatory principle: that the prosecutor cannot terminate proceedings on his own. This position is understandable against the background that no exception to mandatory prosecution is allowed. In Colombia the prosecutor has to plead for acquittal and may not close the investigation if the evidence does not justify conviction.

In systems with an earlier judicial control already at the pre-trial stage the closing of proceedings requires judicial consent (e.g. Argentina). Also in cases of discontinuance by virtue of the expediency principle (opportunity) judicial consent is normally required.

If a court has assumed jurisdiction (opened the trial) the prosecutor can not normally withdraw the prosecution (on his own). However, the court can decide to close (provisionally) the proceedings or the parties may reach an agreement (Italy).

In the Czech Republic, Hungary, and Russia the prosecutor may also drop charges during the trial. In Finland, the prosecutor can only stop proceedings upon request by the police (which, in this sense, has a similar strong position as in England and Wales). During trial, however, he may drop charges and stop the trial without consent of the court.

2.3.4. China

Generally the principle of *mandatory prosecution* (procedural legality) rules. The new Chinese procedure (in force since 1 January 1997) allows in specific cases the closing of the investigation (discretion, principle of opportunity).

Since the Criminal Procedure Act provides for a strict distinction between accusation (by the prosecutor) and trial (by the court), the prosecutor cannot withdraw the prosecution if the court has assumed jurisdiction.

2.4. How is the accountability of the prosecutor assured? Are his or her decisions or performance in general, controlled or subject to scrutiny by other bodies (including, for instance, by bar or other professional organisations)? Must he or she publicly account for decisions to prosecute or not?

2.4.1. Common Law

As was already stated under question 2 the prosecutor is subject to control by the normal mechanisms of the court system. During the pre-trial phase these controls are, by nature, limited to the compulsory measures which generally have to be issued by the courts (see below question 6). Passing from the pre-trial to the trial phase, however, the controls are more intense.

In the US federal courts, for example, the prosecutor (attorney) has to present the evidence to a grand jury (which votes on a proposed criminal charge = indictment) or, in urgent cases, directly asks a judge to issue an arrest warrant on the basis of a sworn statement (complaint) and afterwards obtain the indictment. In order for an accused to be indicted at least 12 members of the grand jury (16–23 persons) must find that there is 'probable cause' that the accused committed the crime(s) specified in the indictment.[21] The hearing before the grand jury is secret.

Apart from the normal judicial review mechanisms, especially in the trial phase, there may also exist *internal review* mechanisms. While these might be legally prescribed, any form of public accountability or scrutiny is not legally provided for. However, the increasing importance of 'victim impact statements' together with certain information rights, provided for, for example, in the British Victims Charter (Home Office 1990, revised 1996), are a tool, at least for the victims, to better control the prosecutorial decisions and compel prosecutors to publicly account for their decisions. Similarly, the possibility of private prosecutions entails some form of control and accountability.

In the British system a certain parliamentary control could be construed due to the fact that the DPP is accountable to the Attorney-General and he or she is a member of Parliament. The DPP is also subject to his professional body and to periodic reviews by such bodies as the Audit Commission. In the US, federal prosecutors must report periodically to the Attorney-General and are accountable to the general public. The *independent counsel* has specific reporting obligations to the Special Division and the Congress. In South Africa the Attorney-General is accountable to Parliament and to the Minister of Justice as coordinator of the activities of the 11 Attorneys General (as already mentioned, in South Africa the Attorney-General is not the Minister of Justice). Surprisingly, in Mauritius, though based on the British system, the DPP shall not be 'accountable to anyone in the exercise of his functions'. In Japan, the Public Prosecution Review Committee controls the decision not to prosecute, albeit without binding effect on the prosecutor.

The Bar or other professional organizations may play an important role in assuring accountability depending on their status in state and society and their internal organisation. However, this possibility was not discussed in most reports. In this area of informal mechanisms of control the media or the public in general seem to play a more important role.

2.4.2. Civil Law (French Model)

The prosecutor general is basically accountable to the Minister in disciplinary and other matters. The Minister is generally accountable to the Parliament. The ordinary prosecutors are accountable to their superiors. Disciplinary proceedings take place before

21. In the US federal courts, persons accused of more than one year of imprisonment have a constitutional right to be indicted by a Grand Jury but can waive this right.

a High Judicial Council (e.g., *Conseil Supérieure de la Magistrature, Consejo General del Poder Judicial*).

The prosecutor is not obliged to account for prosecutorial decisions. However, a French reform will introduce an obligation to explain a decision not to prosecute. This decision can be reviewed by the General Prosecutor. The bar associations play no role since they consist only of independent lawyers. They may only inform the prosecutorial organs about misconduct. Certain rights of private citizens can create accountability. Pertinent here are the three mechanisms to initiate proceedings in Egypt (complaint, request and permission to proceed) or the already mentioned possibilities of review in the Dutch system (see above 2).

2.4.3. Civil Law (Prosecutorial System)

Generally accountability exists only in the sense of an internal control: by the (internal) mechanisms of supervision within the same institution (office of the prosecutor up to the Prosecutor General and Minister) or within the judiciary (accountability to the *Consiglio Superiore della Magistratura*; judicial control of coercive measures or for misconduct: *Inspección judicial* in Costa Rica). Prosecutors are also liable on the basis of civil and criminal law.

In the Czech Republic, the Minister may have a say by deciding about the composition of a disciplinary tribunal.

The Minister and/or the Prosecutor General may be accountable to the Parliament (Finland, Argentina, Chile, Hungary, Russia).

Accountability may also be achieved by certain victim's rights of initiating proceedings and challenging prosecutorial decisions (status of '*querellante*'). The victim's position is particularly strong in the Finnish system: he can always continue proceedings if the prosecutors stops them. Further, control of legality is assured by the Ombudsman.

Bar associations play a limited role (for the same reasons as pointed out under b).

2.4.4. China

There is basically a disciplinary control within the office of the prosecutor along the hierarchical lines. The People's Courts play a major role.

Victims can privately prosecute individual cases and may ask the superior to review a prosecutorial decision not to prosecute. They may also lodge their objection directly before the courts.

2.5. Does the prosecutor have responsibilities for the investigation (instruction) of a case, as well as for its prosecution (poursuite)? Does the prosecutor initiate investigations, or is this a decision for the police, a judge or other authority? Does the prosecutor control or influence the way in which an investigation is conducted? What is the prosecutor's relationship with the police? Does the prosecutor exercise any control over the police, and if so, how? Does the police, organisationally, depend on the prosecutor? Can he or she sanction misconduct of the police? Are investigations the sole responsibility of the police, or does the prosecutor also conduct investigations?

2.5.1. Common Law

According to the traditional common law (especially England and Wales; also Canada, Nigeria, Pakistan, South Africa, Mauritius, Singapore and the US) the responsibility for the investigation lies in the hands of the police. The police decides if an investigation is complete and there appears sufficient evidence to present the case to the prosecutor. In this sense, the prosecutor depends on the work of the police. Only if the prosecutor is involved in an investigation (having received the police evidence) does he direct this investigation. In other words, he only assumes the direction of the investigation when the police decides to present him the evidence. It depends on the concept of investigation and prosecution whether – at this stage of proceedings – it can be argued that the prosecutor has responsibilities for the investigation and the prosecution of a case (like in the US and Israel).

At least in British doctrine the concept of investigation refers to the police investigation; the prosecutor only assumes responsibility if the investigation is terminated. Interestingly, in Israel, the police can only formally make recommendations and the prosecutor is empowered to instruct the police whether or not to investigate. In the US, the grand jury is the investigative tool of the prosecutor because, through it, he can issue subpoenas compelling people to appear and bring documents.

The functional separation between police and prosecutor may be justified in the following manner (South Africa report):

> 'It is undesirable that the prosecution service be made formally responsible for the investigation of crime, as this would tend to blur the distinction between the investigation of crime and the dispassionate decision whether the facts of a given case merit prosecution.'

However, this traditional clear-cut division of work between police and prosecutor has recently changed due to the appearance of new forms of criminality (organized crime, especially drug trafficking, money-laundering) and the low level of experience of the police (special case of South Africa). In these more complex cases there is a closer cooperation between the police and the prosecutor at an earlier stage of the proceedings. The police often seek the legal advice of the prosecutor or want to obtain judicial authorisations with his help. Thus, the prosecutor gains some influence over the investigation. However, it is, at least in England and Wales, still up to

the police whether they follow the advice of the prosecutor. In South Africa, the President may ask a (provincial) Attorney-General to lead an investigation in the so-called 'Third Force' crimes (undercover, politically-related). Finally, the prosecutor may also request the police to investigate a matter.

According to the traditional concept the police, responsible for the investigation, and the prosecutor, responsible for the prosecution (after the termination of the investigation), work independently. There is no direct disciplinary control over the police since they depend on the Ministry of the Interior while the prosecutor depends on the Ministry of Justice. In cases of misconduct the prosecutor can only bring the case to the attention of the competent authorities. During investigation, the prosecutor can only exert influence over the police if he is asked for advice (as happens in more complicated cases) or if national law gives him the power to intervene in the investigation.

As far as can be seen this is only the case in Israel where the police can only make recommendations but final authority remains in the hands of the prosecutor who can even instruct the police to investigate or not. Similarly, in Northern Nigeria the Attorney-General has specific powers over the investigation. The factual relationship between police and prosecutor might be characterized as 'cooperative' (Canada) or as a 'working relationship' (Mauritius) at least in systems where both institutions pursue the same objectives. It may be too optimistic to expect that 'police officers have a lot of respect' for the prosecutor (Mauritius).

In Japan and Korea, the prosecutor seem to have a tighter control over the police. He instructs and directs them and if they do not comply they are subjected to disciplinary sanctions.

Once appointed, an *independent counsel* controls all aspects of his investigation and may request assistance from the Department of Justice, including use of resources and investigative personnel. Additionally, the independent counsel has certain investigative functions himself.

2.5.2. Civil Law (French Model)

Generally the civil law systems do not distinguish between investigation and prosecution in the common law sense. The French distinction between *poursuite* and *instruction* refers to different phases of the proceedings and thereby distinguishes between the competences of *procureur* and *juge d'instruction*. The prosecutor is responsible for the investigation and may also, along with the police (*police judiciaire*), initiate it; the police are always controlled by the prosecutor.

The *juge d'instruction* is only responsible for major offences and only after he is requested by the Prosecutor to open an instruction (in France 5% of cases). In this phase the examining judge has the sole responsibility for the proceedings and controls the *dossier*. It is important to note, however, that he never initiates an investigation without the request of the prosecutor or the partie civile. If requested he has to initiate an investigation (a) de jure, if a serious offence (a 'crime', punishable by more than 10 years of deprivation of liberty) is committed, (b) de jure, whenever the facts show that a minor under 18 is suspected to have taken part, (c) de jure, when wiretapping or pre-trial detention are considered, and (d) de facto, when facts are too complex to

be directly submitted to the trial judge. In those cases, the *juge d'instruction* either conducts the investigation by himself or gives the criminal police (*police judiciaire*) orders (*commissions rogatoires*) to perform such parts of the investigation on his behalf.

In the Netherlands, the investigation and prosecution is, in principle, in the hands of the prosecutor. However, the prosecutor can request the examining judge to further investigate the case (which in practice occurs in the more serious and complicated cases and in those cases where the special powers of the investigating judge are needed, for example, for ordering a telephone-tap). During the investigations by the examining judge, the prosecutor may make the police continue investigations of their own. So, unlike in France, the investigating judge does then not have the sole responsibility for the proceedings.

In Rwanda there is no *juge d'instruction*. In Egypt, since 1952, the prosecutor is responsible for indictment and investigation; judicial investigations have become rare.

Legally the criminal police (*police judiciaire*) is controlled by the prosecutor and, where competent, the *juge d'instruction*. The police must report to the prosecutor about all offences known to them; they must seek instructions from the prosecutor as to the lines of investigation and must submit to the prosecutor all measures of police custody. At the end of the investigation, the police have to give the prosecutor a fully detailed report of their work. In practice, however, the increasing professionalization of the police entails a relative autonomy.

In cases of police misconduct disciplinary sanctions are possible. The prosecutors general supervise the police and the *chambre d'accusation* is the disciplinary authority. The *juge d'instruction* may be vested with the same powers over the criminal police as the prosecutor. This power does not extend to police organs other than the criminal police. Interestingly, the French system provides for direct disciplinary power of the prosecutor and of the *chambre d'accusation* over the *police judiciaire* although they depend – as all the police – on the executive (the Ministry of Interior or Defence). In the Netherlands such a direct disciplinary control is reserved to the 'police force manager' an official dependant on the Ministry of the Interior.

2.5.3. Civil Law (Prosecutorial System)

In the prosecutorial system the prosecutor controls the (police) investigation as well as the prosecution. He is the director or master of the whole pre-trial phase. In practical terms, the police carry out the investigation under the legal control of the prosecutor; the extent of this control depends on the case.

In Austria and Argentina, however, the formal *control* of the pre-trial phase (*instrucción*) lies in the hands of an examining judge; yet, normally the investigation is carried out by the prosecutor and the police.

In Hungary, the new procedural law explicitly enables the prosecutor to direct the investigation and thereby makes him the 'master' of it in the sense of the German model (similar in Russia). Further, the prosecutor has – already under the existing legislation – an exclusive competence to investigate in special cases relating to members of parliament, policemen or crimes against the administration of justice. In other more complicated cases there is a 'heightened control'.

In Finland, the police have general responsibility during the preliminary investigation.

The police depend functionally on the prosecutor during the investigation in the sense that they are to inform him about the commission of a crime and investigate under his direction and supervision. However, the Prosecutor has no direct disciplinary control over the police since they normally belong to the Ministry of the Interior or Defence; he may only suggest disciplinary measures to the superior police officer or the Ministry of the Interior. However, he may prosecute the police for the commission of criminal offences. Also, the so-called *Policia Judicial* belongs organizationally to the ordinary police forces which depend on the Ministry of the Interior or Defence.

Notwithstanding, in Italy the *Procuratore Generale* can bring disciplinary proceedings against the police. In Colombia, the Prosecutor General may separate agents of the *Policia Judicial* from the investigation if they do not comply with his orders.

The prosecutor may give a wide variety of orders to the police to influence their conduct, for example in the case of the Czech Republic the prosecutor may:

1. give binding instructions of all kinds concerning the investigation;
2. ask the police for any papers, documents, materials and reports;
3. participate in police activities during the investigation;
4. send a matter back to the investigator to ask for further investigative measures;
5. annul illegal or unjustified decisions and measures of the police and substitute them;
6. withdraw any matter from a certain police official and assign it to another official.

2.5.4. China

In China, the prosecutor investigates and prosecutes only certain cases, e.g. those which involve state functionaries. In ordinary cases the security organs carry out a preliminary investigation and present – after its termination – the evidence to the prosecutor (similar to the British model). The security organs may even object to a decision not to prosecute before the superior prosecutor. Thus, in principle, the prosecutor has only the responsibility for the prosecution (instruction). However, the prosecutor may also ask the security organs to carry out further investigative measures or the prosecutor may even investigate himself.

The security organs do not depend organizationally on the prosecutor. During the police investigation there is no direct control by the prosecutor since (police) investigation and prosecution are separated. However, according to the Constitution security organs, prosecutor and judiciary control each other. This view, obviously, takes into account the criminal process as a whole (see question 4).

2.6. Does the prosecutor have compulsory powers, i.e., may he order arrest or search warrants or other coercive measures?

2.6.1. Common Law

The unanimous answer is that the Prosecutor has no such powers. He has to apply for compulsory measures to the court (e.g. for subpoenas before the US grand jury).

The issuance of compulsory measures may be considered as the most important exclusive judicial competence during the pre-trial phase.

However, it is important to note that the police may on their own carry out compulsory measures (e.g. arrest a person) without a judicial warrant.

The most drastic example presents England and Wales where the police use this possibility – rooted in traditional customs – very extensively. A prosecutor may never think of asking for a judicial warrant since the investigation is in the hands of the police who use coercive measures as needed. In Israel, the police can take out search warrants, and the use of coercive power is decided by them.

The *Independent counsel* has full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney-General, and any other officer or employee of the Department of Justice, with one exception (the Attorney-General must exercise direction or control over authorizations for wiretaps). The independent counsel has the power to issue subpoenas, compel the attendance of witnesses before the grand jury and at trial, grant immunity, subpoena documents, and compel the testimony of certain witnesses who assert privileges. However, as a federal prosecutor, the independent counsel does not have the ability to issue search warrants or order arrests but may apply to a federal court for permission for his agents to effectuate arrests or perform search warrants. The independent counsel also has the power to perform certain prosecutorial functions.

2.6.2. Civil Law (French Model)

The prosecutor has limited compulsory powers and can order the police to execute them (arrest, police custody, search, etc.). Other compulsory powers are reserved for the examining judge or the competent court. In Rwanda these powers seem to go further.

2.6.3. Civil Law (Prosecutorial System)

In principle any compulsory measures have to be authorized by the judge. However, in exceptional situations, when delay would hamper the further conduct of the proceedings, the prosecutor may order certain compulsory measures (in Germany: provisional arrest, search and seizure, surveillance of telecommunications; similar in Finland, Italy, Costa Rica). In these cases an *ex post* judicial control exists. In systems with an examining judge the prosecutor may only order the provisional arrest; for all other measures a judicial warrant is required (Austria, Argentina, Chile). Other systems leave the order of compulsory measures exclusively in the hands of the judge (Brazil). Exceptionally, in Colombia, the prosecutor has full power to order compulsory measures.

In the former socialist countries the prosecutor and, at least in Hungary, even the police may order various compulsory measures (provisional arrest, search and seizure, confiscation). Only recently, certainly due to the influence of the extended European human rights system (membership in the Council of Europe) all coercive measures which limit personal freedom and have a substantial impact on the individual guar-

antees have to be ordered by the court (cf. the new Hungarian Act and the situation in Georgia). Though the Russian constitution of 1993 provides for judicial control of search and seizure, etc. the old soviet system persists due to the lack of implementing legislation, i.e. the prosecutor possesses far-reaching powers.

The prosecutor may also compel suspects, witnesses and experts to appear before him after citation.

2.6.4. China

In China, the prosecutor has wide compulsory powers. Interestingly, Chinese prosecutors complain that they depend on the security organs for the enforcement of the coercive measures.

2.7. More specifically: Does political interference in routine criminal cases exist? How are politically sensitive cases, such as those involving criminal charges against judges, politicians or senior civil servants, prosecuted?

2.7.1. Preliminary remark

Almost all reports deny categorically that (general) political interference exists at all in their systems. In general, the answer depends very much on the concept of the 'routine case'. It is clear, however, that political interference does not operate overtly and, therefore, it is not surprising that most reports cannot identify it. This does not say much about its existence or non-existence, it only confirms our ignorance with regard to the phenomenon. A more or less general acceptable answer has been given in the report on England and Wales where it is stated that political interference 'is not known about' and, if existing, is 'very well hidden'.

2.7.2. Common Law

Less categorical answers which admit a certain degree of political interference are the following: the Pakistan report considers political influence as 'minimal' but admits the 'possibility'. In Nigeria, political interference exists, as stated above (question 2), at least in politically relevant cases (which, however, would not qualify as 'routine criminal cases'). According to the Mauritius report the answer 'cannot be easily answered' but allegations of political interference have been known only on the police level. In the South Africa report, the general phenomenon of trying to influence witnesses is raised. In Japan, political influence is said to be rare not at least because of the control by the public opinion.

A distinction between individual cases and general prosecutorial policy or guidelines has to be made. With regard to the latter there is direct political influence by executive decrees or directives (see question 2).

In the US *politically sensitive* cases may be prosecuted by an independent counsel,

appointed by the Attorney-General.[22] This possibility also exists in Canada even if in the majority of the cases politically sensitive cases are handled in the ordinary way but by senior prosecutors. The same applies to the other countries under examination: political cases are treated in the same way as ordinary cases but on the prosecutorial level the Attorney-General, the DPP or a senior prosecutor may be assigned to prosecute such cases.

Investigations of *independent counsels* are, by definition, not 'routine criminal cases'. Since these investigations are directed against senior public servants or even Ministers and the US President the executive has a strong interest in the case and might tend to manipulate it. The Independent Counsel Act (1978) represents a Congressional response to this danger and some historical precedents in this sense.[23] The Act tries to ensure that not only would there be a method of fairly appointing a special prosecutor but that the special prosecutor could investigate his subject matter without any threat of interference from the executive branch.

2.7.3. *Civil Law (French Model)*

Generally political interference is limited to the general prosecutorial policy by ministerial guidelines or orders (see question 2). In individual cases instances of interference are hardly known.

The right of a positive intervention of the Minister of Justice to prosecute a certain case (*droit d'injonction positif*) is hardly used in practice, at least in France and Belgium. However, the mere possibility to act through the prosecutor(s) general gives the Minister a considerable power to intervene in certain cases. The danger involved might lead the Rwanda report to argue for an abolition of all norms which permit an intervention by the executive in criminal proceedings. In the Egypt report it is stated more generally:

> 'Although it is difficult to find any evidence of conscious attempts by the Minister of Justice to impose his legal philosophy on the public prosecution body through his supervisory powers, the threat to the prosecutor's independence remains. The *potential* for the ministerial abuse – the *possibility* of retribution for unfavourable prosecution actions alone, is sufficient to curb the independence of the public prosecution body.' (emphasis in the original)

A certain remedy is provided for in the new Dutch legislation which prescribes that ministerial interference has to be made known to the public and the court.

In the Civil Law systems *politically sensitive cases* are, in principle, investigated in the same manner as ordinary cases. Some high ranking officials, especially Ministers, enjoy a privileged treatment by way of proceedings before the Cour de Cassation or Appeals Court (e.g., France, Spain). However, the possibility of certain 'favourable'

22. *See* for more details the paper of *Donald Swartz*.
23. For example, when President Nixon in 1972, during the Watergate crisis, appointed a special prosecutor whom he later fired after he became dissatisfied with his efforts.

instructions of the Minister of Justice to some prosecutors in charge of such cases always exist.

Thus, the French reform contemplates the prohibition of all individual instructions. According to the new Dutch legislation the prosecution of a judge, a politician or a senior civil servant can, similar to the prosecution of any other person, be prevented by interference of the Minister of Justice. Such interferences, however, will have to be made public. In Rwanda investigations can be vetoed by the Minister of Justice for state interests.

2.7.4. Civil Law (Prosecutorial System)

As above (b) political interference is limited to general guidelines and in individual cases is hardly known. However, it cannot be excluded that a minister abuses his influence by means of the prosecutor general or even directly to interfere in a concrete case. For that reason, it has been discussed that the general guidelines should be laid down by the Parliament (Italy).

Mandatory prosecution may be considered a 'bulwark' against political interference in the sense that it leaves the prosecutor little or no discretion to prosecute if sufficient evidence exists.

In Finland, there was a time when presidential statements influenced prosecutors. In Brazil, political influence is lower in the more developed regions. The selection process of the prosecutor and his political independence are considered as crucial prerequisites against political influence. In Argentina, there exists strong informal interference in cases of politicians or their friends. In Colombia and Costa Rica such an interference is denied. In Russia and Georgia, former soviet practices (so-called 'telephone law', i.e. intervention by telephone calls) do not yet seem to have been overcome; in any case, personal courage and a faultless reputation is needed.

Politically sensitive cases are either treated in the same way as ordinary ones (Austria, Germany), normally by higher courts (Italy, Colombia, Chile) or/and require an approval by the legislative power, a type of impeachment (Finland, Brazil, Colombia, Costa Rica). In any case, there may be a closer supervision of the acting prosecutor by its superiors, including the Prosecutor General who may report back to the Minister of Justice. Also, in practice, there are rather senior prosecutors or a team of prosecutors in charge (Hungary, Czech Republic). In some states there are heavy pressures on prosecutors who try to investigate in political or politicized cases (Brazil, Argentina, Colombia). Parliament may have an important role as a counterweight against political pressure (Hungary).

In Austria there has been interference in some concrete case of a particular political significance. In Italy the political parties try to influence certain prosecutions but it is not clear what effect their attempts at interference have. In Finland high officials are prosecuted by a special court on the basis of a parliamentary decision (Court of Impeachment). In Brazil the impeachment procedure leads to impunity in states where the investigated have a parliamentary majority. In Argentina impunidad is widespread for complicity or fear of the prosecutors. In Colombia the pressure of prosecutors may involve death threats and even assassinations in investigations con-

cerning organized crime (drug trafficking) and human rights (paramilitarism). The Georgian case shows, that an independent investigation of political cases is intimately related to the separation of powers and the autonomy and strength of the prosecutor.

2.7.5. China

In China, as already mentioned, the prosecutor is considered as an independent organ. However, political interference has a legal basis as regards the selection process and the ideological control by the People's Courts (question 2; cf. Article 22 *seq.* Prosecutor Act 1995).

Politically sensitive cases fall into the exclusive responsibility of the prosecutor (investigation and prosecution).

2.8. Reference to international criminal tribunals: how do your state/judicial authorities cooperate with the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda? Are national authorities required by national law to cooperate with the International Tribunals, or does cooperation depend on discretionary decisions by them or political organs? Are national courts also involved in cooperation with the International Tribunals?

Given the normative and factual differences a threefold distinction seems reasonable:

a) There are countries which regulated the cooperation with the ICTY and ICTR by specific laws:
   - *England and Wales*: UN ITFY Order 1996, SI No. 716 which, inter alia, provides for the surrender of accused and the direct enforcement of order of the Tribunals;
   - *Belgium*: full cooperation, competence of the Cour de Cassation for deferral of proceedings; coercive measures are carried out by examining judge; arrest warrant not directly enforceable, provisional warrant possible;
   - *Netherlands*: requests shall be complied with whenever possible but are subject to a judicial control by the Hague District Court; surrender (not extradition);
   - *Germany*: especially good cooperation with the ICTY (Act of 1995, cf. *Bundesgesetzblatt* 1995 I 480), hardly with the ICTR (Act of 1998, BGBl. 1998 I 843) because of lack of cases; Act of 13 April 1995: orders of the Tribunal are transmitted to the Federal Ministry of Justice which passes them to the locally competent prosecutors; orders are enforced taking into consideration the Act on the International Assistance in Criminal Matters, i.e. not directly enforceable;
   - *Italy*: orders transmitted to the Ministry of Justice and passed to the *Procuratore Generale*; surrender not extradition but extradition requirements examined (especially jurisdiction of the ICTY); in case of execution of sentences international judgement has to be internally recognized;
   - *Hungary*: Act 39 of 1996 recognizes the priority of the ICTY's jurisdiction over the domestic one; the normal requirements/obstacles of extradition do not

apply, orders of the ICTY are to be complied with and seem to be directly enforceable;
- *Georgia*: obligation to cooperate by virtue of presidential decree of 6 January 1997 (rather a political declaration); special interest because of the possible creation of an international tribunal on Abhazia (rebel autonomous republic of Georgia);
- *Finland*: Act of 5 January 1994; request are transmitted to the Ministry of Justice; surrender but rules of extradition are applicable *mutatis mutandis*; orders of ICTY enforceable according to internal legislation; enforcement of sentences according to Act 21/87; pardon, commutation and release to be decided by a court;
- *Spain*: only regarding ICTY there exists Ley Orgánica 15/1994 (1 June) in order to implement the decisions of the ICTY internally;
- *France*: there are two laws regulating the cooperation with the ICTY and ICTR (Act No. 95-1 of 2 January 1995; Act No. 96-196 pf 22 May 1996) adapting the French law to Security Council Resolutions 827 (creation of ICTY) and 955 (ICTR).

b) There are countries which do *not yet* have a law but cooperate actively:
- this is the case of the *US* which supports in particular the ICTY and is certainly the most important power as far as the compliance with judicial decisions, especially arrest warrants, is concerned.
- this is the case of *Canada* on a practical diplomatic level: it is not only represented by the Prosecutor General but also plans to approve a law regarding assistance between the ICTY/ICTR and national courts;
- similar *Mali*: commissions rogatoires internationales (mutual assistance);
- most actively in legal assistance is the *Czech Republic* since it hosts refugees from the Former Yugoslavia who serve as witnesses for the ICTY (a draft law has been prepared);
- regarding *Costa Rica* it is worthwhile mentioning that one of the judges of the ICTY is from this country.

c) There are countries which have no legislation and (would) cooperate on a *discretionary* basis by virtue of international law (Mauritius, Nigeria, Israel, Singapore, Brazil, Argentina, Colombia, Chile, Japan, Korea, Russia, special case of Rwanda), some of them rather waiting for a functioning ICC (South Africa).

China is quite a specific case. As permanent member of the Security Council it has supported the creation of the ICTY and ICTR. On the other hand, the government has made clear – in its *amicus curiae* brief in the *Blaškić* case – that its national security interests prevail over eventual international obligation to cooperate. Consequently, China voted against the Rome Statute of an ICC.[24]

It is worthwhile noting, though, that all UN members are obliged to obey orders of the ICTY and ICTR – even if this international obligation has not been implemented on the national level. Therefore, in the US report is rightly stated, that the 'United States is bound to provide assistance requested by the International Tribunals by virtue of its membership in the United Nations.'

24. *See* the analysis of the Rome Statute at pp. 3 *et seq.*

3. CONCLUSIONS

3.1. General remarks

The analysis of the national reports suggests that there are certain features found generally in national systems. The existence of these features in a national system does not appear to depend on which of the traditional categories (common law/civil law) the system belongs. This confirms the general result of research on comparative criminal procedure according to which the traditional systems tend to merge instead of distancing further.[25] Thus, the following conclusions aim to be general, reaching beyond the limits of one or other system. They are organized along the lines of the questions and followed by the formulation of the issues which were discussed during the workshop.[26]

3.2. Status of the prosecutor

Who the 'chief prosecutor' is depends very much on the concept of chief prosecutor. From an *organizational* point of view the highest organ is the Minister of Justice or Attorney-General, i.e. a member of the *executive*. His influence is great with regard to the appointment or removal of the highest prosecutor and senior prosecutors in the country. However, he may have to share this power with the Parliament or the Supreme Court. There are also jurisdictions where an independent (judicial) council (*Conseil Supérieur de la Magistrature, Consejo General del Poder Judicial, Consejo Superior de la Magistradura or Judicatura*) – independent of the executive – may appoint and remove prosecutors. Even in this case, though, the executive may have a certain influence by sending representatives to this institution.

If one analyzes the question with regard to the actual competences for investigation and prosecution the 'chief prosecutor' is rather the Prosecutor General (*Procureur General, Fiscal General*) or – in Common Law systems – the Director of Public Prosecutions. He is normally an independent office holder or a 'quasi judicial officer', in any case, he is *formally independent of the executive as far as the investigation and prosecution of individual offences is concerned*.

The jurisdiction of the chief prosecutor may be limited to federal offences or cover all offences. This depends on the administrative structure of the state.

The chief prosecutor is *appointed* and removed by or with participation of the executive. The participation of the parliament (impeachment) exists in some Common Law and some Civil Law jurisdictions. In the US prosecutors are normally elected. An independent judicial organ as the *Conseil Supérieur de la Magistrature* may have an advisory role. The removal is normally only possible after a formal procedure and

25. *See* N. Jörg, S. Field and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?', in P. Fennell [*et al.*], eds., *Criminal Justice in Europe: A Comparative Study* (Oxford 1995) at pp. 41–56 (55), arguing for a 'gradual convergence' of the adversarial and inquisitorial systems.
26. *See* the introductory remarks, *op. cit.*, note 2, pp. 609 *et seq.* and the summary of discussions, *op. cit.*, note 2, pp. 619 *et seq.*

for disciplinary reasons. A removal of ordinary prosecutors normally requires the initiative or approval of the chief prosecutor.

3.3. Forms of control of the prosecutor

With regard to general control over the prosecutor a distinction has to be made between control over *individual* cases and by a *general* prosecutorial policy and legislation. Certainly, in all systems the executive may define a certain prosecutorial policy by issuing guidelines. However, this general influence or control should not, in theory at least, affect the prosecution of individual cases. In systems where such a control is allowed (French model) the prosecutor cannot be instructed *not* to prosecute (there is no *droit d'injonction négatif*). If such a direct influence in a positive and negative sense is considered reasonable ministerial directives have to be made public and known to the competent court (Dutch reform).

Given this situation it is fair to say that, in general, the prosecutor is subject to *specific* control only within its own institution and along hierarchical lines. This control may also entail the right of the prosecutor general to impose disciplinary sanctions. Apart from that there may exist *judicial* control in the pre-trial phase by an examining judge or a pre-trial chamber (*chambre d'accusation*). Such control, in any case, may be preferred to control by the executive since it is technical rather than political. This is the basis of the Argentine-German proposal for an independent prosecutor of an ICC which finally won the day (Article 15 Rome Statute).[27]

In combining conclusions 2 and 3 one could, following *Delmas-Marty*, generally argue for a threefold distinction: either the Prosecutor is dependent and strong (as in Germany and France), or dependent and weak (as in England) or independent and strong (as in Italy, Portugal and Colombia).[28]

3.4. Mandatory prosecution versus discretion

As to the prosecutorial decision to investigate or not to investigate the national reports show a – at least *factual* – tendency towards prosecutorial *discretion*. This is expressly provided for in common law jurisdictions but also in civil law systems, where, despite the principle of *mandatory prosecution* (procedural legality), one can observe various exceptions to this principle (*expediency*, opportunity). In this context, it is striking that recent reforms world-wide have introduced certain mechanisms of bargaining which permit a closing of the case at an early stage based on an agreement between prosecutor and accused with or without judicial participation. Even if a strict mandatory prosecution is called for there are mechanisms of factual discretion since no criminal justice system has nowadays the capacity to prosecute all offences no matter how serious they are.

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27. *See supra* note 24.
28. Cf. M. Delmas-Marty, *The Criminal Process and Human Rights* (Dordrecht [*et al.*] 1995) p. 194.

As a general rule it can be stated that the prosecutorial control over the case ends with the *jurisdiction* of the court. Most systems already provide for a judicial scrutiny of the indictment.[29] During trial, the prosecutor may be empowered to drop charges without judicial approval but he cannot stop the proceedings. This may only be possible in a strict adversarial system (party procedure) where the continuation of the process is the sole responsibility of the parties.

3.5. Accountability of the prosecutor

As already mentioned, internal prosecutorial and, where applicable, judicial control are important mechanisms to ensure prosecutorial accountability. Another, possibly even more important guarantee is the broad participation of *victims* in criminal proceedings. On the one hand, victims and/or their relatives may have the possibility to initiate and continue private prosecutions (not only limited to the so-called private offences – 'Privatklagedelikte'). On the other hand, victims may be given the right to object or appeal against prosecutorial decision to the courts (not only to the superior prosecutor).

3.6. The prosecutor and the police

In general, the prosecutor can hardly control the police investigation. This does not only apply to common law systems where police investigation and prosecution have traditionally been separated and where police and prosecutor are considered as independent actors in criminal proceedings. It also applies to civil law systems since the formal control of the prosecutor over the police hardly materializes given that the actual investigative acts are carried out by the police and they are normally closer to the case than the prosecutor.[30] Certainly, there is still a difference between a prosecutor who may instruct the police to do this or leave that and one who only receives the police evidence. However, police control is more than a formal question. Further, in any system the cooperation between police and prosecutor is tighter in cases of more complicated offences, in particular organized crime.

This analysis is confirmed by the relationship between the prosecutor and the police. Prosecutor and police normally serve, so to speak, different masters (Ministry of Justice and Ministry of Interior/Defence). Thus, the prosecutor normally cannot impose disciplinary sanctions on the police; he may only suggest such sanctions. Exceptions (France, Italy) confirm the rule.

29. *See also* K. Ambos, *op. cit.*, note 3, at pp. 52-55.
30. *Ibid.*, at p. 49.

3.7. Compulsory powers of the prosecutor

In general, the Prosecutor may not initiate compulsory measures (which affect individual guarantees of the suspect) without judicial authorisation.[31] An exception may be admitted if delay did hamper the further conduct of the proceedings. An exception also exists as a consequence of the traditional police investigation during which the police may use coercive powers without judicial authorisation (so-called investigative measures).[32] Finally, there are also countries where the prosecutor has these compulsory rights (Netherlands, Colombia).

It is also important to note that the prosecutor may have certain powers to obtain evidence, for example compel the appearance of witnesses and the production of documents.

3.8. Political interference

Political interference in 'routine cases' does not appear to exist. Certainly, the answer depends very much on the concept of 'routine case'. It is clear that political interference does not operate overtly and, therefore, it is not surprising that most reports cannot identify it. Political interference may be identified if political guidelines of the executive regulate the treatment of routine cases and even more so if the executive (Minister of Justice) has the right to interfere in the prosecution or non-prosecution of certain cases. The latter situation is rather rare.

Political interference may exist in 'politically sensitive' cases.[33] This is self-evident since the interests of the political élite at stake in these cases are obvious. The extent of interference in such cases show whether the rule of law, in particular the separation of powers and equality before the law in a given system really exists or does not exist. These cases are normally prosecuted in the same manner as ordinary cases; on a more practical level, it is acknowledged that senior or even head prosecutors may be in charge of such cases.

Mandatory prosecution may be considered a 'bulwark' against political interference in the sense that it leaves the prosecutor little or no discretion to prosecute if sufficient evidence exists. Another possibility of a control of political interference is the obligation to make such interference public (Dutch proposal).

3.9. Cooperation with the Ad Hoc Tribunals

The cooperation with the ICTY and ICTR is either regulated in specific laws or based on diplomatic practice. The latter implies – despite the international obligations of the state concerned – a wide discretion of the national authorities.

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31. *Ibid.*, at pp. 51–52.
32. *Ibid.*, at p. 52.
33. *See also ibid.*, at p. 47, where it was stated that 'the executive is allowed to intervene only in cases involving offences considered to be of public or national interest'.

If cooperation laws exist it is of utmost importance whether they consider orders and warrants of the International Tribunals as directly enforceable. This is normally not the case. Although suspects are surrendered (not extradited!) to the Tribunals their orders are enforced according to the national extradition or assistance laws. In other words: national authorities have to examine the compatibility of these orders with the national legislation. Interestingly, the Rome Statute, in Part X, opted for a compromise between the traditional inter-state law of mutual legal assistance in criminal matters and a cooperation regime *sui generis* which makes clear that the cooperation between the new ICC and States cannot be dealt with by traditional solutions only.[34]

34. *See* more detailed C. Kreß, 'Penalties, Enforcement and Cooperation in the ICC Statute', 6 *European Journal of Crime Criminal Law and Criminal Justice* (Freiburg 1998) pp. 442 *et seq.*

Eviston v. D.P.P. [2002] IESC 43 (31st July, 2002)

THE SUPREME COURT

Keane C.J.
Denham J.
Murphy J.
McGuinness J.
Geoghegan J.

88/01

BETWEEN:

LINDA EVISTON

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

[Judgments Delivered by Keane C.J., Murphy J. and McGuinness J., Denham J. agreed with Keane C.J., Geoghegan J. agreed with Keane C.J. and McGuinness J., Murphy J. dissenting.]

Judgment delivered the 31st day of July, 2002 by Keane C.J.

Introduction

These are proceedings brought by way of judicial review in which the applicant seeks to restrain the respondent (hereafter "the DPP") from taking any further steps in a criminal prosecution brought against the applicant and arising out of the death of one Tony Moynihan in a road accident on the 28th June 1998.

The facts, insofar as they are not in dispute, are as follows. The applicant was driving from Kilkenny to Killarney, where she lives, on that day in a motor car jointly owned by her husband and herself. Her three year old son was strapped into a baby seat in the rear of the car. Near a crossroad in Cullen, Co. Cork, her car was in collision with another car being driven by Mr. Tony Moynihan, who died as a result of the collision.

In a statement to the gardai, the applicant said that, in the course of her journey from Kilkenny to the scene of the accident, the back left wheel of her car was punctured in Cashel, Co. Tipperary. Two people in a bed and breakfast there changed the wheel for her. As she approached the area of the accident, her car suddenly and without warning pulled itself across to the right hand side of the road: she said that it was as if the steering "had taken on a life of its own". She said that the back left wheel and tyre of her car were in a deflated state after the accident.

The applicant obtained a report from a firm of consulting engineers and assessors, W.J. Rowley and Associates Limited, who examined the tyre and wheel. They confirmed that the tyre was in a deflated state. They said

> *"The tyre in question was in a deflated state and as it is a tubeless tyre it was obviously pushed off the rim. We note that the 1same wheel had given trouble to the owner in Cashel, where the tyre was replaced, and this may have been a case of the air slowly leaving the wheel, until, having reached a point of being under pressure, the car, in making a turn, caused the sealing between the tyre and the rim to open. This would have resulted in a quick let down of the remaining air in the wheel. Alternatively, it could have been a case of the car having been turned quickly on the road, at speed, where the sudden swerving would have caused the tyre to deflate, as it would have been under pressure already as a result of the air leaking out."*

In a further report of the 25th August 1998, they said

> *"We are satisfied, therefore, that the car could have gone out of the driver's control when the wheel deflated completely. It would also have caused the car to vibrate and veer to one side, as the driver would not have had any warning of the sudden deflation that was about to take place."*

The applicant's solicitor furnished these reports to the member in charge at Millstreet Garda Station, Co. Cork and in early December, 1998, he was informed by the gardai that the DPP had decided not to direct the issue of any prosecution in the matter. That information was communicated to the applicant by her solicitor.

On the 16th December 1998, the father of the late Mr. Moynihan wrote as follows to the respondent

> *"I refer to the above accident in which my son Anthony Jnr. was fatally injured as a result of a collision between his vehicle and the vehicle being driven by Mrs. Eviston.*
>
> *"Our whole family have been devastated by your decision not to bring charges of any description against Mrs. Eviston. No words could express the dreadful hurt and deep anguish which your inexplicable decision has caused my family.*
>
> *"We never have nor do we now seek revenge or retribution on Mrs. Eviston, for whom we have great sympathy, but we are duty bound to protect the good name of our late son. The only way we can do this is to have him publicly exonerated of all blame for*
> *this tragic accident and we believe that the only place where this can rightfully be done is in a court of law.*
>
> *"I have personally contacted Minister John O'Donoghue in relation to this matter in the hope that he can use his good office to assist us in this most distressing matter.*
>
> *" I appeal to you as a matter of urgency to reconsider your decision and proffer charges of some description against Mrs. Eviston so that justice can be done and be seen to be done."*

On the 23rd December 1998, a District Court summons was issued against the applicant charging her with dangerous driving causing the death of Tony Moynihan. On the 13th January, 1999, the applicant's solicitor wrote to the DPP seeking an explanation as to why the

decision not to prosecute had been reversed. On the 15th January, 1999, a professional officer in the office of the DPP wrote to the applicant's solicitor as follows

> *"This office is precluded from giving reasons for decisions, whether those decisions are to prosecute, or not to prosecute.*
>
> *"The decision not to prosecute in this matter was taken after a careful and comprehensive study of the garda file submitted here on the conclusion of the garda investigation into the matter.*
>
> *"This office is conscious of the fact that, for various reasons, its decisions are effectively unappealable except in the limited context of judicial review. For this reason, among others, it has operated a system of internal appeal or review of decisions. It is regarded by the office as important that those having a personal or functional interest in the decisions should be at liberty to seek a review of any determination. Section 6 of the Prosecution of Offences Act 1974 has relevance in this regard.*
>
> *"The decision of the professional officers in the first instance accordingly fell to be reviewed comprehensively, and at the highest level. Following that review, the fresh direction referred to by you was issued."*

The applicant on the 22nd March, 1999 was given leave by the High Court to apply by way of judicial review for an injunction restraining the DPP from taking any further steps in the prosecution of the proceedings. The two grounds in respect of which leave was granted were as follows:

> *"That the decision of the respondent not to prosecute the applicant was, once communicated to the applicant following the admitted completion of the garda inquiries, a final and conclusive decision and that the respondent was acting ultra vires, contrary to law and in breach of the applicant's constitutional and legal rights in purporting to reverse it."*
>
> *"That if (which is denied) the respondent has power to review and reverse a decision not to prosecute (such decision having been made following*

the conclusion of garda inquiries and published and communicated to the applicant) that the respondent was guilty of a breach of the applicant's right to fair procedures and constitutional justice in failing to:

> *"(1) To advise and/or warn the applicant at the time of communicating the said decision not to prosecute, that the respondent reserved the power to reverse the said decision."*

A statement of opposition was filed on behalf of the respondent, grounded on an affidavit of Donal Murray, an officer in the DPP's office. In that affidavit, Mr. Murray referred to the summary of the review procedure of the office of the DPP set out in his annual report. A further affidavit was filed by Mr. Murray in which he said that the office did not receive any representation, either oral or written, by or on behalf of the Minister for Justice, Equality and Law Reform in connection with the matter.

The substantive hearing of the application came on in the High Court before Kearns J. In a written judgment, delivered on the 26th January, 2001, the learned High Court judge granted the relief sought by the applicant. It also appears from the judgment (although not from the order of the court) that, during the course of the hearing in the High Court, leave was given to the applicant to argue two additional grounds, i.e., :-

> *"(1) The respondent acted on foot of an improper policy in purporting to claim unto himself an unfettered right to reverse his decision not to prosecute the applicant when the said decision not to prosecute had been communicated to the applicant following the admitted completion of the garda inquiries, and, in the premise, the respondent has acted ultra vires and in breach of the applicant's right to fair procedures;*
>
> *"(2) in the absence of good and sufficient grounds for so doing, it was not open to the respondent to purport to exercise his power to reverse the decision not to prosecute the applicant when the said decision had been communicated to the applicant following the admitted completion of the garda inquiries and, in the premise, the*

respondent has acted ultra vires and in breach of the applicant's right to fair procedures."

The High Court Judgment.

In his judgment, the trial judge noted that it had not been suggested that any new facts or materials had come to light or that some new witness had become available when the DPP reversed his earlier decision not to prosecute. Describing that decision as "the formation of a contradictory view on the same material", the trial judge concluded

"For the respondent to unmake his original decision and to reinstate a prosecution in such circumstances seems to me to be arbitrary and perverse."

Applying the test for irrationality laid down by Henchy J speaking for this court in *The State (Keegan) -v- Stardust Victims Compensation Tribunal* [1986] IR 642, he was of the view that no sensible person who applied his mind to the matters to be decided by the DPP could have arrived at such a decision.

The trial judge was satisfied that, on that ground alone, the applicant was entitled to the relief which he sought. However, he said that he would also be prepared to decide the case in her favour on another ground, i.e., that the DPP had failed to comply with his own review guidelines as set out in his annual report. In particular, the trial judge referred to the statement in the report that, if a person seeking the review advances a reasonable basis for the request it would be granted "unless that particular factor had already been exhaustively considered". He said that in the present case consideration of the particular factor identified in the request for the review - i.e., the distress suffered by the late Mr. Moynihan's family - must be taken to have already been exhaustively considered by the respondent.

The trial judge also referred to the general policy principles to which the DPP is to have regard in considering whether or not to bring a prosecution, which were also set out in the annual report. The first of these was the requirement to have regard in any case to "the evidential test" i.e., was there enough prima facie evidence and was it credible and reliable. The second was "the public interest test", under which, if the first test was satisfied, a prosecution would normally take place unless there were public interest factors against the

initiation of a prosecution which would outweigh those in favour of a prosecution. The trail judge said that, if the evidential test had not been met in the present case, nothing arose thereafter to change that situation. If the case failed the "public interest test", then, in his view, the public interest test on a review demanded that the citizen who had been told that no prosecution would be brought should not thereafter be exposed to prosecution "without good and sufficient cause". There was no indication in this case that any such consideration was taken into account and, if it had, it could only have reinforced the original decision not to prosecute. The trial judge was, accordingly, of the view that the applicant was also entitled to relief on the ground that he had not complied with policy principles which he himself had espoused.

The trial judge rejected, however, a further submission on behalf of the applicant that the DPP was precluded by the terms of s.6 of the Prosecution of Offences Act, 1974, (hereafter "the 1974 Act") from considering the representation made to him by Mr. Moynihan.

Submissions of the Parties.

On behalf of the DPP, Mr. Dermot Gleeson SC submitted that the case had been decided in the High Court on grounds in respect of which leave had never been granted, either originally or in the revised form allowed by the trial judge in the course of the hearing. Those grounds were that the decision of the DPP to initiate a prosecution was so unreasonable as to require intervention by the court and was in contravention of the policy he himself had adopted.

Mr. Gleeson submitted that, even assuming the High Court was entitled to decide the matter on grounds in respect of which leave had never been granted, the decision proceeded on an erroneous view of the law. The terms of the 1974 Act did not in any way preclude the DPP from reviewing a decision he had earlier taken either to prosecute or not to prosecute. Although it was not suggested in the present case that new evidence had come to light, his undoubted jurisdiction to review an earlier decision not to prosecute could not, in law, be confined to cases in which new evidence came to light.

Mr. Gleeson submitted that the trial judge was in error in supposing, in the first place, that the materials before the DPP when he made his decisions in this case were solely those

furnished to him by the applicant in the form of her written statement and the engineer's reports. It has been held by this court in *The State (McCormack) -v- Curran* [1987] ILRM 225 that the DPP, in deciding whether or not to initiate a prosecution, was not confined to assessing the probative value of the evidence laid before him: there were other factors which it might be appropriate and proper for him to take into consideration. It had also been held by the court in *H -v- DPP* [1994] 2 IR 589 that the DPP was not in general obliged to give reasons for a decision not to prosecute. Mr. Gleeson submitted that, while those authorities related to a decision not to prosecute, the same considerations were applicable to a decision to prosecute. It was clear from the authorities that the only circumstances in which the Superior Courts were entitled to review the discretion the DPP enjoyed in this area was where it could be demonstrated that his decision has been arrived at in bad faith or as the result of an improper motive or an improper policy. None of those factors was present in this case.

Mr. Gleeson further submitted that the adoption by the DPP of a policy of reviewing decisions by him to prosecute or not to prosecute was in the public interest: the consequences for citizens, whether they were the victims of crime or suspects, of his decisions could be extremely serious and far reaching and his adoption of a review procedure, such as had been operated in the present case, was no more than an acknowledgement that decisions by him could be erroneous and that as there was no appeal from them, they should be capable of being reversed.

Mr. Gleeson further submitted that the trial judge had misunderstood the procedures provided for in the DPP's annual report. In initiating a review of an earlier decision not to prosecute, he was not confined to cases in which specific reasons had been advanced for the review. While he reserved the right to refuse such requests where he was satisfied that there was no reasonable basis for them, it did not follow that he was precluded from initiating a review even where no specific reason had been advanced by the party requesting the review.

On behalf of the applicant, Mr Patrick Horgan SC submitted that, in the present case, the actions of the DPP in initiating a prosecution where the applicant had already been informed that she would not be prosecuted in circumstances were it was not alleged that anything new had come to light was a clear violation of the applicant's right to natural and constitutional justice and that, accordingly, the High Court was correct in concluding that the further prosecution should be stayed.

Mr. Horgan further submitted that the authorities clearly established that the courts would intervene to restrain the DPP where the continuance of a prosecution would violate the rights of a citizen, e.g., in *DPP -v- Byrne* [1994] 2 IR 236 (the right to a trial with due expedition) *McMahon -v- Leahy* [1984] IR 525 (the citizen's right to equality of treatment) and *The State (Healy) -v- O'Donoghue* [1976] IR 325 (the citizen's right to legal representation in a criminal prosecution). It was also clear from the decision of Finlay P, as he then was, in *The State (O'Callaghan) -v- O'hUdaigh* [1977] IR 42 that the respondent could be restrained where he was acting oppressively in the exercise of his prosecutorial function.

Mr. Horgan further submitted that, as no one had pointed to a scintilla of evidence which had come to light and which would have justified the respondent in departing from his original decision not to prosecute, it followed inevitably that the second decision was unreasonable and should be set aside. He cited in this context the decision of this court in *Farrell -v- Attorney General* [1998] 1 IR 2.

The Review Procedure of the Respondent.

The review procedure adopted by the DPP, which he claims to have operated in this case, is set out as follows in s.10 of the Annual Report, 1998:

> *"10.1 The Director of Public Prosecution's Office is acutely conscious of the fact that, because of constitutional and other considerations, its decisions are effectively unappealable except in the limited context of judicial review. For this reason, among others, it has operated a system of internal appeal or review of its decisions. It is a valuable system, not least from the view point of the office itself, constituting a system of quality control.*
>
> *10.2 If the Garda Siochána (through the Commissioner's office) requests a review of a decision given by the office, that request will be granted. The request need not point to any new fact not included in the files submitted but it would usually give reasons, however general, as to why the decision was considered to be erroneous or required fresh consideration. The Garda Siochána has been reminded by personnel of the office on many occasions of the availability on request of reviews of decisions made by it.*

10.3 A similar procedure would be applied if another official reporting agency were to request a review of a decision.

10.4 Requests for a review by other persons having a personal or legitimate interest in the decision such as a victim or a suspect or accused are sympathetically received. Obviously the office could not automatically grant every request for a review. To do so would divert already scarce resources from its urgent ongoing business. However, if the person seeking the review advances a reasonable basis for the request it would be granted unless that particular factor had already been exhaustively considered. Several reviews had been conducted as a result of such requests.

10.5 When a review is granted, it is conducted thoroughly and by way of complete re-examination of the case unless the request itself is confined to a specific point or points. The procedure adopted will vary according to the circumstances of the case. It will usually be conducted by a professional officer other than the officer who took the original decision. In difficult cases, several opinions including that of the Director may be sought. The important point is that it is a real review and neither the professional officers individually nor the office itself would experience any problem in altering the original decision where that is considered to be the correct course. Apart from cases where new facts are brought to attention, alterations of the original decision would be the exception rather than the rule but there have been examples of alterations where either the officer originally concerned or another officer came to the conclusion that the decision given had been incorrect. It should be emphasised that in the small number of cases in which decisions have been either reversed or modified without new facts having been brought to attention, the judgement call involved had usually been a very fine one."

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The applicable law.

The office of the DPP was established by the 1974 Act. Section 3 provided that the DPP was to perform inter alia all the functions hitherto capable of being performed in relation

to criminal matters by the Attorney General. There were certain exceptions to the vesting in the DPP of the Attorney General's functions in this area which are not relevant. Section 2(5) provided that the DPP was to be independent in the performance of his functions.

Section 6 of the Act prohibits the making of communications to the DPP in relation to criminal proceedings in these terms:

> *"1(a) Subject to the provisions of this section it shall not be lawful to communicate with the Director or an officer of the Director, the acting Director .... for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.*
>
> *2(b) If a person referred to in paragraph (a) of this subsection becomes of opinion that a communication is in breach of that paragraph, it shall be the duty of the person not to entertain the communication further.*
>
> *2(a) This section does not apply to -*
>
> *(i) communications made by a person who is the defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings or*
>
> *(ii) communications made by a person involved in the matter either personally or as legal or medical advisor to a person involved in the matter or as a social worker or a member of the family of a person involved in the matter."*

The effect of the 1974 Act was thus to vest in the DPP the function of prosecuting all crimes and offences in courts other than those of summary jurisdiction in the name of the people. It was clearly envisaged by the Oireachtas that the DPP, in performing those functions, would exercise the same role as had historically been performed by the Attorney General. In contrast to the systems in many civil law jurisdictions, the courts play no role in the prosecution of offences and both the decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned (with limited exceptions) to the DPP under the Constitution and the relevant statutory provisions.

I would, with respect, question whether the learned High Court judge was altogether correct in describing these functions as "quasi judicial", at least as that expression has generally been understood. It is usually applied to executive functions which involve the exercise of a

discretion but require at least part of the decision making process to be conducted in a judicial manner. That would normally involve observance of the two central maxims of natural justice, audi alterem partem and nemo iudex in sua causa. Those canons are of limited, if any, application to the DPP who, like other litigants, initiates and conducts a prosecution but does not ultimately decide any of the issues himself and, specifically, has no role in determining the guilt or innocence of an accused person.

Undoubtedly, the DPP remains subject to the Constitution and the law in the exercise of his functions and it has been made clear in decisions of this court that, while the nature of his role renders him immune to the judicial review process to a greater extent than is normally the case with quasi judicial tribunals properly so described, he will be restrained by the courts where he acts otherwise than in accordance with the Constitution and the law.

In the case of the express power conferred on the respondent (and formerly on the Attorney General) by the Offences Against the State Act 1939 to certify in an individual case that, in his opinion, the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order (thereby resulting in a trial before a Special Criminal Court), it has been held in the High Court on two occasions that the exercise of this power is not reviewable by the courts under any circumstances: see *Savage & Anor -v- DPP* [1982] ILRM 385 and *Judge -v- DPP* [1984] ILRM 224. In *In Re Article 26 -v- The Emergency Powers Bill* 1976 [1977] IR 159, this court found that it was not necessary to express an opinion on the circumstances, if any, in which the courts would be entitled to review any such certificate. In the two High Court judgments referred to, the certificate was treated as incapable of review on the ground that the revealing in open court of the information on which the DPP had reached his opinion would be "a security impossibility". Those decisions may need reconsideration at some stage, since they do not address the issue as to whether the requirement under Article 34.1 that justice be administered in public has the effect of precluding the court in all circumstances from conducting any inquiry into whether an accused person has been wrongfully deprived of his right to a trial by jury guaranteed under Article 38.5. They may also need reconsideration in the light of the later decision of this court in *The State (McCormack) -v- Curran and Ors.* [1987] ILRM 225.

The facts in that case were somewhat unusual but, since, unlike the High Court decisions of Savage and Judge, it was directly concerned with a decision of the DPP not to institute a prosecution, it requires careful consideration.

It arose out of the enactment of the Criminal Law (Jurisdiction) Act 1976 which provided that, where a person had been charged with an extra territorial offence in Northern Ireland, he could elect to be tried in the Republic, provided that a judge of the High Court or the court of trial was satisfied that a warrant for the arrest of the accused person had been issued in the Republic for a corresponding offence. The prosecutor had been returned for trial in the Crown Court at Belfast, charged with an extra-territorial offence within the meaning of the 1976 Act. The acts of which he was accused also constituted offences under Irish law and he elected for trial in the Republic. However, the DPP decided not to require the issue of a warrant for the arrest and charge of the prosecutor in the Republic and the latter obtained conditional orders of certiorari and mandamus in respect of that decision. The High Court, on cause being shown, discharged the conditional orders so obtained and its decision was unanimously upheld by this court on appeal.

It had been submitted on behalf of the DPP that his decisions were not, as a matter of public policy, ever reviewable by a court. In the course of his judgment (with which Henchy, Griffin and Hederman JJ agreed) Finlay CJ said

> *"In regard to the DPP I reject .... the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case, related exclusively related to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reached the decision mala fide or influence by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of policy ever reviewable by a court.*
>
> *In the instant case, however, I am satisfied that no prima facie case of mala fides has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit*

and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based."

In the course of his judgment in the same case (with which Henchy, Griffin and Hederman JJ also agreed)) Walsh J said

> *"I concur in the opinion of the Chief Justice that the actions of the DPP are not outside the scope of review by the courts. If he oversteps or attempts to overstep his function he can, if necessary, be restrained by injunction but I do not think any step he takes or any action or omission which is ultra vires can be of the nature of orders which attract certiorari. A failure to perform his statutory duties could however, be the subject of mandamus"*

As to the facts of the particular case, the learned judge said

> *"There is no evidence in the present case from which it could be reasonably inferred that either the DPP or Chief Superintendent Curran had abdicated their functions or had been improperly motivated"*

The extent to which the courts can review a decision of the DPP not to prosecute in a particular case was the subject of further consideration by this court in *H -v- The Director of Public Prosecutions and Anor*. In that case, the applicant had brought a private prosecution against her husband and his brother charging them with having committed sexual offences against her son. She then instituted proceedings by way of judicial review seeking inter alia an order of mandamus compelling the DPP either to institute a prosecution against her husband and his brother or, alternatively, to give her reasons why he had not done so. The High Court having dismissed the application of the applicant, she appealed to this court which unanimously upheld the decision of the High Court. In the course of his judgment, O'Flaherty J, having found that this was not an appropriate case in which to order the DPP to bring a prosecution, said:

> *"I would also uphold the submissions made on behalf of the DPP that certainly as far as this case is concerned he was not obliged to give his reasons for not bringing a prosecution and I would, in general, uphold the*

appropriateness of that course of action for the reasons submitted on his behalf before us."

He went on to point out that the decision of the High Court in *International Fishing Vessels Limited -v- The Minister for the Marine* [1989] IR 149 - that the Minister was obliged to give reasons for granting or not granting a fishing licence - was distinguishable, because the Minister's decision was reviewable by the court and, accordingly, a refusal to give reasons for his decision placed a serious obstacle in the way of the exercise of that right of review. The learned judge added:

> *"It is clear from the decision in The State (McCormack) -v- Curran that the discretion of the Director of Public Prosecutions is reviewable only in certain circumstances as set out by Finlay CJ at p.237 of the report... It would seem then that as the duty to give reasons stems from a need to facilitate full judicial review, the limited intervention available in the context of the decisions of the Director obviates the necessity to disclose reasons."*

In the course of her judgment, Denham J, having referred to the judgments of Finlay CJ and Walsh J in *The State (McCormack) -v- Curran* said

> *"Applying the test of the Chief Justice set out in The State (McCormack) -v Curran to the facts of this case, I am satisfied that no prima facie case of mala fides has been made out against the respondents. The unsubstantiated statement of belief by the appellant not denied by the Director of Public Prosecution does not of itself give rise to an adverse inference. The facts of the case do not exclude the reasonable possibility of a proper and valid decision of the Director of Public Prosecutions not to prosecute the persons named by the appellant. Consequently, the Director of Public Prosecutions cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it is based.*
>
> *"Applying the reasoning in the concurring judgment of Walsh J in The State (McCormack) -v- Curran it is clear that mandamus would not lie in this case as there is nothing before this court from which it could be reasonably inferred that the Director of Public Prosecution's decision was perverse, or inspired by improper motives, or that he had abdicated his functions."*

It is an important feature of the decisions in *The State (McCormack) -v- Curran* and *H -v- Director of Public Prosecutions* that, in each case, the court was concerned with (a) a decision not to prosecute in a particular case and (b) a challenge to the merits of that decision. The decisions, accordingly, go no further than saying that the courts will not interfere with the decision of the DPP not to prosecute where

(a) no prima facie case of mala fides has been made out against the DPP ;

(b) there is no evidence from which it could be inferred that he has abdicated his functions or been improperly motivated; and

(c) the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the DPP not to prosecute the person concerned.

They also make it clear that, in such circumstances, the DPP cannot be called upon to explain his decision or to give the reasons for it or the sources of the information upon which it is based.

Neither the High Court nor this court, however, were directly concerned in those cases with the question as to whether the DPP can be restrained from continuing with a prosecution where he has previously intimated to the putative defendant that he did not propose to institute a prosecution and where, in the result, in the absence of any established change of circumstances, the reversal of his earlier decision could be regarded as a breach of the fair procedures which, as it is urged, he is obliged to observe in the discharge of his constitutional and legal functions.

It cannot be said, in my view, that to treat the DPP as being subject to such an obligation is to disregard the fact that, in carrying out the duties of his office, he is not acting in a quasi judicial capacity and that, in particular, the classic maxims of audi alterm partem and nemo iudex in sua causa do not apply to him. The modern jurisprudence of this court has established beyond argument that the requirements of natural justice in particular cases may extend beyond the observance of those traditional criteria.

Thus, in *The State (O'Callaghan) -v- O'hUdhaigh*, the Central Criminal Court had ruled that, in the case of an indictment containing ten counts, only one count was properly before the court. The DPP thereupon entered a nolle prosequi in regard to all the counts. The prosecutor was then re-arrested and charged in the District Court with the same offences. In making absolute conditional orders of prohibition to prevent the District Court proceeding with the renewed charges, Finlay P, as he then was, said that

> *"If the contention of the respondent is correct, the prosecutor, having undergone that form of trial (and a remand awaiting trial) and having succeeded in confining the issues to be tried, would be deprived of all that advantage by the simple operation of a statutory power on the part of the Director of Public Prosecution. In this way, the prosecutor would have the entire of his remand awaiting trial set at naught and he would have to start afresh to face a criminal prosecution in which the prosecution, by adopting different procedures, could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused; if the trial judge makes decisions adverse to the interests of the accused, the latter cannot obtain relief from them otherwise than by appeal from the Central Criminal Court, or by appeal or review in the case of an inferior court.*
>
> *"It seems to me that so to interpret the provisions of s.12 of [The Criminal Justice (Administration) Act 1924] as to create such an extraordinary imbalance between the rights and powers of the prosecution and those of the accused respectively, and to give the Director such a relative independence from the decision of the court in any trial, would be to concur in a proposition of law which signally failed to import fairness and fair procedures."*

I am satisfied that the decision of the learned President in that case - that the DPP is not exempt in the performance of his statutory functions from the general constitutional requirements of fairness and fair procedures - was correct in point of law. It also seems to me to follow inexorably from that proposition that where, as here, the Director avails of his undoubted right not to give any reasons for a decision by him to reverse a previous decision not to prosecute, but concedes that there has been no change of circumstances, his decision is, as a matter of law, prima facie reviewable on the ground that there has been a breach of fair procedures. Whether such a breach has been established must, of course, depend entirely on the circumstances of the particular case.

It is not suggested in this case that the DPP has acted mala fide or that he was influenced by an improper motive or policy in reversing his original decision not to prosecute the applicant. The contention on her behalf is that, having arrived at a decision not to prosecute her and communicated that decision to her, he could not as a matter of law subsequently reverse that decision, save where new factors had come to light which were not present when he made his original decision.

It is undoubtedly the law that the DPP is entitled to review an earlier decision by him not to prosecute and to substitute for the earlier decision a decision to prosecute, at least in a case were he has not already communicated his earlier decision to the putative accused. Thus, having initially decided not to prosecute and so informed one of his officers who had given him advice on the matter, he may subsequently on reflection come to a different view and decide to prosecute. If, for whatever reason, it became public knowledge that, in such a case, the DPP had reversed an earlier decision not to prosecute, it would be unthinkable that his later decision should be reviewable on that ground alone. Again, his position can be contrasted with that of a court or quasi judicial tribunal which is normally functus officio once the decision in a particular case has been pronounced.

It follows that the DPP is entitled to review an earlier decision made by him not to prosecute and to arrive at a different decision. Nor is he obliged in either instance to give reasons for his decision. The DPP was thus entitled, as a matter of policy, to adopt a procedure of reviewing earlier decisions made by him. Clearly, it could not be suggested that such a policy was in any sense improper : on the contrary, given the consequences for both the victims of crime and those suspected of having committed crime of a decision to prosecute or not to prosecute, such a policy could only be regarded as being in the public interest, since, in the absence of an appeal procedure, it provides at least some opportunity to the DPP of reversing decisions which, on further consideration, appear erroneous.

Nor can such a review be regarded as legally flawed because it is initiated, as happened here, by a request for a reconsideration of the decision by a member of the victim's family. Once it is accepted that the DPP is entitled to review and reverse an earlier decision he has made, it is immaterial that the review procedure is activated by a request such as was made in this case or some other factor. It is clear that the prohibition on communications with the DPP

contained in s.6 is designed to outlaw attempts to influence the DPP not to bring prosecutions or to withdraw prosecutions already brought. A communication such as that made by Mr. Moynihan to the DPP was not prohibited by the 1974 Act and he was entitled to respond to it by initiating the review which led to the reversal of his original decision.

Conclusions

The applicant having furnished the DPP with her statement and the engineer's reports and having been told that no prosecution would be initiated, it was inevitable that the decision of the DPP to prosecute following the representation from Mr. Moynihan would cause her anxiety and stress. But this case cannot be determined by the sympathy one is bound to feel for the applicant. The sole issue for this court to determine is whether the High Court judge was correct in holding that the DPP could not, as a matter of law, in the circumstances of this case, reverse his earlier decision.

Applying the legal principles which I have already set out, I am satisfied that he was wrong in holding that the decision was so irrational as to require its being set aside by the High Court. Leaving aside entirely the fact that this was not a ground on which, at any stage, leave to proceed by way of judicial review had been granted, it was not a conclusion which could have been reached as a matter of law in this case.

In the first place, the trial judge appears to have assumed that the only factors which the DPP did, or indeed could, take into account were the written statement of the applicant, the engineer's reports and the representation made to him by Mr. Moynihan. Since the DPP is not obliged to give any reasons for either of the decisions under consideration, neither the High Court nor this court is in a position to say whether those were the only materials before him or the only factors he took into account when he arrived at these decisions. In the result, the precondition which must be present before the principle in *The State (Keegan) -v- Stardust Compensation Tribunal* can be invoked, i.e., that on the materials before it the body concerned could not reasonably have so decided, has never been met.

In the second place, for the reasons already identified, the DPP, as a matter of law, is entitled to reverse a decision already arrived at not to prosecute, even in the absence of new evidence or different factors, where he is of the view that his original decision was erroneous.

The trial judge was also, in my view, mistaken in concluding that the DPP had failed to comply with his own review guidelines as set out in the Annual Report. Again, he appears to have proceeded on the assumption that, unless there was either new evidence or different factors brought to the attention of the DPP, he could not, as a matter of law, arrive at a different decision. It is to be assumed that in this, as in any other case, the DPP, in determining whether to initiate a prosecution in the first instance, had regard to the two tests referred to in his annual report, i.e., the "evidence" and "public interest" tests, and concluded that a prosecution should not be initiated. But that would not preclude him, once a review had been initiated, from arriving at a different conclusion on the same materials.

As I have already said, the anxiety and stress which must certainly have been caused to the applicant by the initiating of the prosecution in the present case, following the communication to her of a decision by the DPP not to prosecute, would not, of itself, afford her legal grounds for an injunction restraining the continuance of the prosecution. Moreover, assuming that the doctrine of equitable estoppel applies in a case of this nature, one could not say that there followed in the legal sense some detriment to the applicant which would render inequitable the continuance of the prosecution, since her ability to defend the proceedings had not in any way been impaired. Different considerations would have arisen if, for example, on receipt of the DPP's first decision, the wheel and tyre had been disposed of. In such a case, one could conceive of a prosecution being restrained either on the basis of an equitable estoppel having arisen or since the applicant could not be deprived of her constitutional right to a trial in due course of law because of the loss of evidence resulting from the DPP's actions.

I am also satisfied that the doctrine of legitimate expectations could never have been successfully invoked in this case. Deep and natural disappointment may well be the result of another person's action, as in this case, but that cannot of itself justify the invocation of this doctrine. In general terms, there must at least have been a legitimately founded expectation that a particular procedure would be followed and an alteration in that procedure without prior notice to the person concerned. That is not what happened in this case.

There remains the question as to whether the DPP should be restrained from proceeding with the present prosecution on the ground that his decision is fatally vitiated by a want of fair procedures.

It was undoubtedly open to the DPP in this case, as in any other case, to review his earlier decision and to arrive at a different conclusion, even in the absence of any new evidence or any change of circumstances, other than the intervention of the family of the deceased. The distinguishing feature of this case is the communication by the DPP of a decision not to prosecute to the person concerned, followed by a reversal of that decision without any change of circumstance or any new evidence having come to light. In the light of the legal principles which I have earlier outlined, I am satisfied that the decision of the DPP was prima facie reviewable by the High Court on the ground that fair procedures had not been observed.

Whether, in the particular circumstances of this case, fair procedures were not in fact observed is a difficult question. As I have emphasised more than once in this judgment, stress and anxiety to which the presumably innocent citizen is subjected when he or she becomes the accused in a criminal process could not conceivably be, of itself, a sufficient justification for interfering with the undoubted prosecutorial discretion of the DPP. It is, however, beyond argument that the degree of such stress and anxiety to which the applicant was subjected was exacerbated by the decision of the DPP to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and had not given her the slightest intimation that this was a decision which could be subjected to review in accordance with the procedures in his office. If those review procedures formed part of the law of the land, then, the applicant would be assumed, however artificially, to have been aware of that law. The review procedures of the DPP, however, are not part of the law: they constitute a legitimate, and indeed salutary, system of safeguards to ensure that errors of judgment in his department which are capable of correction are ultimately corrected. No reason has been advanced, presumably because none existed, as to why the applicant was not informed that the decision of the DPP not to institute a prosecution might in fact be reviewed at a later stage. In the result, she was subjected to a further and entirely unnecessary layer of anxiety and stress. Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the DPP candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the DPP in the present case were to succeed.

I would, accordingly, dismiss the appeal and affirm the order of the High Court.

THE SUPREME COURT

88/01

KEANE CJ
DENHAM J
MURPHY J
MCGUINNESS J
GEOGHEGAN J
BETWEEN:

LINDA EVISTON

APPLICANT/RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/APPELLANT

JUDGMENT OF MR JUSTICE FRANCIS D MURPHY DELIVERED THE 31ST DAY OF JULY, 2002

On the 26th January, 2001, Kearns J made an order restraining the Director of Public Prosecutions from taking any further steps in the prosecution of proceedings against the above named Linda Eviston (Mrs Eviston) arising out of a road traffic accident which it is alleged occurred on the 28th June, 1998, near Mallow in the County of Cork. The matter now comes

before this Court by way of appeal from that order.

The accident of the 28th June, 1998, was indeed a tragic one. It resulted in the death of Mr Tony Monynihan. By notice dated the 1st July, 1998, Mrs Eviston was advised by the gardai at Mill Street, Cork, that a prosecution would be instituted against her for dangerous driving. Mrs Eviston at all times admitted that she was the driver of the motor car involved in the accident. She made a statement to the gardai on the 3rd September, 1998. In that she explained her car had been punctured some hours before the accident and the wheel changed by helpful bystanders. It was the belief of Mrs Eviston - and in this belief she was supported by the opinion of Mr WJ Rowley, consulting motor engineer and assessor - that the very regrettable accident was due to a defect in the wheel or tyre and not any negligence or want of care on the part of the driver.

In early December, 1998, Mrs Eviston's solicitors were informed that the DPP had decided not to direct the issue of a prosecution in the matter. On the 16th December, 1998, Anthony Moynihan, the father of victim, wrote to the Director appealing to him to reconsider his decision. The DPP did review his file. It is common case that there he had no additional information available to him since his original decision but he decided, nevertheless, following the review, to direct that Mrs Eviston be prosecuted in relation to the incident.
On the 22nd March, 1999, Mrs Eviston sought and obtained leave to apply by way of application for judicial review for an injunction restraining the DPP from prosecuting the proceedings on a variety of grounds but the only grounds allowed were those specified at E(I) and (VI)(1). Those permitted grounds were as follows:-

> *"E(I) That the decision of the respondent not to prosecute the applicant was, once communicated to the applicant following the admitted completion of garda inquiries, a final and conclusive decision and that the respondent was acting ultra vires, contrary to law and in breach of the applicant's constitutional rights in purporting to reverse it. (VI)(1) That if (which is denied) the respondent has power to review and reverse a decision not to prosecute (such decision having been made following the conclusion of the garda inquiries and published and communicated to the applicant) that the respondent was guilty of the a breach of the applicant's right to fair procedures and constitutional justice in failing to: (i) To advise/or warn the applicant, at the time of communicating the said decision not to prosecute, that the respondent reserved the power to reverse the said decision."*

In the hearing of the application the Court gave leave to extend the grounds by inclusion of the following:-

> *"(C) The respondent acted on foot of an improper policy in purporting to claim unto himself an unfettered right to reverse his decision not to prosecute the applicant when the said decision not to prosecute had been communicated to the applicant following the admitted completion of the garda inquiries, and, in the premises, the respondent has acted ultra vires and in breach of the applicant's right to fair procedures.*
>
> *(D) In the absence of good and sufficient grounds for so doing, it was not open to the respondent to purport to exercise his power to reverse the decision not to prosecute the applicant when the said decision had been communicated to the applicant following the admitted completion of the garda inquiries and, in the premises, the respondent has acted ultra vires and in breach of the applicant's right to fair procedures."*

Counsel for the DPP drew attention to the three phases of the decision making process, first, the decision not to prosecute. Secondly, the decision to undertake a review and, thirdly, the decision (the third decision) to prosecute.

Whilst the DPP is not required - and indeed it would be undesirable that he should be required - to give information as to the basis on which decisions are taken by him, he did make it clear that in reaching the third decision the information available to him was no different from that on which his first decision had been made. It is clear from his judgment that Mr Justice Kearns regarded such a volte face as necessarily being *"arbitrary and perverse"*. That was not in fact a ground on which leave had been given either originally or by way of amendment. Accordingly it was not open to the learned Judge, in my view, to determine the matter on that basis. In any event I would disagree that a change of mind, however dramatic, based on the same evidence is necessarily either arbitrary or perverse. If the Director concluded one day that a prosecution should not be brought and made an internal record of that decision and, perhaps, communicated the decision to his own officers could it be said that his second thoughts on the same material - however dramatic the consequences - were arbitrary, perverse or irrational? The most distinguished judges would be gravely embarrassed by the assertion that the willingness to reconsider an opinion expressed orally or in writing and to substitute a diametrically opposite judgment on the same material would be perverse.

The difficulty in this case is not that the DPP changed his mind but that he did so first, having made it known to Mrs Eviston that he would not prosecute and, secondly, within some six days of the receipt of a letter from Mr Anthony Moynihan, the father of the victim seeking the review and adverting to the contact which he had already made with the Minister for Justice in relation to the matter. I can readily understand that Mrs Eviston would in these circumstances feel that the decision to prosecute was unjust. The problem, as I see it, is to convert this sense of injustice into an enforceable legal right.

It cannot be said that the Director is estopped from prosecuting Mrs Eviston. Apart from any other consideration, there is no suggestion that she altered her position for the worse as a result of being informed in the first instance that she would not be prosecuted. Again, I cannot see any basis on which the somewhat ill defined doctrine of legitimate expectations can be invoked. If the Director is entitled as a matter of law to change his mind - and I am satisfied that he is - I do not see how any belief which Mrs Eviston may have to the contrary could alter the law in that respect. Mr Patrick Horgan, SC, on behalf of Mrs Eviston, contended that the many decisions of this Court in which criminal proceedings were stayed as a result of the failure of the DPP (or the AG) to prosecute with expedition established the existence, or presupposed the existence, of a right of security of the person which, as he said, might be called *"a right to peace of mind"*. Mr Horgan argued that the revival of the prosecution in the present case would be as much an infringement of that right as an unjustified delay in prosecution. Whilst that argument is ingenious and attractive, it is not, in my view, sound in law. The duty on the State and its various agencies to prosecute criminal proceedings expeditiously can be inferred readily from the provisions of Article 38(1) of the Constitution. The right to peace of mind has yet to be enumerated and, if it were, doubts might well arise as to the constitutionality of *s.*2 of the Criminal Justice Act, 1993. A person who has received a suspended sentence and in respect of whom the DPP appeals to the Court of Criminal Appeal on the grounds that the sentence was unduly lenient would appear to have as good grounds for complaint that his or her peace of mind was disrupted as that which Mrs Eviston has in the present case. I would respectfully disagree with the proposition that the decision of the DPP is reviewable for want of fair procedures. I am convinced that the DPP has the right, and indeed the duty, in a proper case to alter his decision to prosecute or not to prosecute in a particular case and that notwithstanding the fact that his original decision was made public. The fact that the change of mind may have a positive or negative result for an accused would not impinge on the validity of the decision nor impose any novel obligation on the Director to justify it where, as here, the

accused is not embarrassed in his or her defence. Whilst I believe that Mr Justice Kearns was incorrect on the particular grounds on which he granted the relief sought and I am unconvinced by the more extensive argument made in this Court in support of his order, I confess to a sense of relief that my views have not prevailed. I believe that the prosecution of Mrs Eviston at this stage and in the particular circumstances would be understood, incorrectly but nevertheless widely, as resulting from an interference with the judicial process insofar as the same is properly said to include the investigation of the alleged crime and the decision to prosecute the same.

THE SUPREME COURT

88/01

Keane, C.J.
Denham, J.
Murphy, J.
McGuinness, J.
Geoghegan, J.

BETWEEN

LINDA EVISTON

APPLICANT/RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/APPELLANT

Judgment delivered the 31st day of July 2002 by McGuinnness J.

This is an appeal by the Respondent/Appellant, the Director of Public Prosecutions (*"the DPP"*) against the judgment and order of Kearns, J. dated the 26th day of January 2001 whereby he ordered that the Appellant be restrained from taking any further steps in the prosecution of the Applicant/Respondent, Mrs Linda Eviston, in proceedings entitled *"The DPP at the Suit of Superintendent Dowd Prosecutor and Mrs Linda Eviston Accused."* These proceedings arose out of the death of one Tony Moynihan in a road accident.

The factual background to the present judicial review proceedings has been helpfully set out in some detail by the Chief Justice in his judgment and there is no need to repeat it here. In summary, the accident involving the Applicant took place on the 28th June 1998 in County Cork. The Applicant made a statement to the Gardai and subsequently provided engineer's reports to the Gardai attributing the cause of the accident to a sudden deflation of one of the tyres of the Applicant's vehicle.

In early December 1998 the Applicant's solicitor was informed by the local Gardai that the DPP had decided not to direct the issue of any prosecution against the Applicant; this information was passed on to the Applicant by her solicitor.

On the 16th December 1998 the father of the deceased victim of the accident wrote to the DPP expressing his strong disagreement with the decision of the DPP not to prosecute and calling on him to reconsider that decision. Mr Moynihan senior also indicated that he had *"personally contacted"* the Minister for Justice for assistance in the matter. It appears that this letter was received in the office of the DPP on the 17th December 1998. The full text of the letter is set out both in the judgment of the High Court judge and in the judgment of the Chief Justice.

The original decision not to prosecute was then reviewed in the Office of the DPP. The DPP stated in a letter to the Applicant's solicitor that this review was carried out *"comprehensively, and at the highest level"*. On the 23rd December 1998 on the application of the Gardai a District Court summons was issued against the Applicant charging her with dangerous driving causing the death of Tony Moynihan contrary to Section 53(1) (as amended

by Section 51 of the Road Traffic Act 1968) and (2)(a) (as amended by Section 49(1)(f) of the Road Traffic Act 1984) of the Road Traffic Act 1961.

1 Following correspondence between the Applicant's solicitor and the DPP, the Applicant sought leave of the High Court to commence the present judicial review proceedings. On the 22nd March 1999 she was given leave to apply for an injunction restraining the DPP from taking any further steps in the prosecution proceedings. Leave was granted on two grounds, as follows:

> *"That the decision of the Respondent not to prosecute the Applicant was, once communicated to the Applicant following the admitted completion of the Garda inquiry, a final and conclusive decision and that the Respondent was acting ultra vires, contrary to law and in breach of the Applicant's constitutional and legal rights in purporting to reverse it."*
>
> *"That if (which is denied) the Respondent has power to review and reverse the decision not to prosecute (such decision having been made following the conclusion of Garda enquires and published and communicated to the Applicant) that the Respondent was guilty of a breach of the Applicant's right to fair procedures and constitutional justice in failing to:*
>
> > *(1) to advise and/or warn the Applicant at the time of communicating the said decision not to prosecute, that the Respondent reserved the power to reverse the said decision."*

A statement of opposition was filed on behalf of the Respondent.

During the course of the hearing of the substantive application before Kearns J. the Applicant was given leave to argue two additional grounds as follows:-

> *"(1) The Respondent acted on foot of an improper policy in purporting to claim unto himself an unfettered right to reverse his decision not to prosecute the Applicant when the said decision not to prosecute had been communicated to the Applicant following the admitted completion of the Garda enquiries, and, in the premise, the Respondent has acted ultra vires and in breach of the Applicant's right to fair procedures;*
>
> *(2) In the absence of good and sufficient grounds for so doing, it was not open to the Respondent to purport to exercise his power to reverse the decision not to prosecute the Applicant when the said decision had been communicated*

to the Applicant following the admitted completion of the Garda inquiry and, in the premise, the Respondent has acted ultra vires and in breach of the Applicant's right to fair procedures."

In the course of argument before the High Court it was acknowledged, as indeed it was also in this Court, that no new facts or evidential materials had become available to the DPP between the making of the first decision not to prosecute and the making of the subsequent decision to prosecute. The sole change of circumstance had been the receipt of the letter from the victim's father.

This is not, of course, to say that the only materials which were before the DPP for his consideration were the Applicant's statement and her engineer's reports. In a letter to the Applicant's solicitor dated the 15th January 1999 the officer of the DPP's office stated:

"The decision not to prosecute in this matter was taken after a careful and comprehensive study of the Garda files submitted here on the conclusion of the Garda investigation into the matter."

It can readily be assumed that such a file would in addition to the material submitted by the Applicant also include at least the normal sketch maps, measurements and information collected by the Gardai themselves in their investigation of the accident. There may also have been statements of other witnesses. All of this material would fall to be considered both at the time of the original decision and at the time of the DPP's review of that decision.

In his judgment and order of the 26th March 2001 the learned High Court judge granted the relief sought by the Applicant. In essence, he did so on two grounds.

Firstly he held that the reversal of the DPP's decision not to prosecute was *"arbitrary and perverse"*. At page 20 of his judgment he stated:

"In this case, the Respondent, has given his reasons for undertaking a review which resulted in the reversal of his decision not to prosecute. The reason consists solely and exclusively in the letter written by Mr Moynihan on the 16th December 1998. The portion of the letter to which the Respondent presumably only had regard refers to the upset and distress suffered by the Moynihans. It does not point towards any new element in the case or to the existence of any material of probative value whatsoever.

As for the decision to reverse, there is no suggestion that any new facts or material came to light or that some witness hitherto unknown or unavailable had

become known and available. There is no suggestion that any of the information supplied by the Applicant in her engineer's reports or statement was incorrect. There is no contradiction of the facts relating to the accident as deposed to by the Applicant in her affidavit. There is no suggestion that the Respondent felt that on first consideration something had been overlooked by him or that some other factor meant an incorrect decision had been made at that stage. There is no suggestion that there is some other consideration or reason which the Respondent choose not to discuss or felt precluded from disclosing which might explain the reversal of the original decision. It is, quite simply, the formation of a contradictory view on the same material.

For the Respondent to unmake his original decision and to reinstate a prosecution in such circumstances seems to be arbitrary and perverse."

The learned High Court judge also held in favour of the Applicant on a second ground, which he described as *"the failure of the Respondent to comply with his own policy guidelines"*. He based this decision on an analysis of the annual report of the Director of Public Prosecutions for the year 1998. This report, although not exhibited in any affidavit, was by agreement made available to the Court. The trial judge quoted from section 5.1 of the report as revealing:

"the importance which the Respondent himself attaches to the formation of a decision to prosecute or not to prosecute in any particular case."

He quoted Section 5.1 as follows:

"It has long been recognised that the decision to prosecute or not to prosecute is of fundamental importance in a criminal justice system and particularly in an accusatorial system such as exists in Ireland. Many observers regard it as by far the most important stage in a criminal process, involving as it does serious and far reaching consequences for those affected by it. The consequences for a Defendant can and frequently do include irretrievable loss of reputation or of employment, disruption of family relations and very substantial expense. If in fact the person charged is innocent, the resulting injustice is obvious. The consequences for the victim of a crime or for a victim's family when an incorrect decision not to prosecute is taken can be

equally damaging. It is essential that every effort humanly possible be made to get this decision right."

From this Kearns J. concluded

"The only logical inference one can draw from the foregoing is that a decision once arrived at and communicated to a potential accused will not likely be reversed without good and sufficient reason. This must surely be particularly the case where a decision not to prosecute is replaced by a decision to prosecute."

The trial judge went on to refer to other sections of the report, placing particular emphasis on Section 10.4 which he quoted:

"10.4 Request for a review by other persons having a personal or legitimate interest in the decision such as a victim or a suspect or accused are sympathetically received. Obviously the office could not automatically grant every request for a review. To do so would divert already scarce resources from its urgent ongoing business. However, if the person seeking the review advances a reasonable basis for the request it would be granted unless that particular factor have already been exhaustively considered. Several reviews have been conducted as a result of such requests."

At page 22 of his judgment the trial judge concluded:

"The procedure for reviews makes it clear that the person seeking the review must advance 'a reasonable basis for the request'. Furthermore, even if that condition is fulfilled, which in my view did not happen in the instant case, a review will be granted 'unless that particular factor had already been exhaustively considered'. Any consideration of the 'particular factor'(i.e., the distress suffered by the Moynihan family) must be taken has having already been exhaustively considered by the Respondent. No new facts were brought to the Respondent's attention, nor is there any suggestion that either the Respondent or some official on his behalf came to any conclusion that the original decision had been 'incorrect'. It seems to me the Applicant is entitled to relief for this reason also, namely, non-compliance by the Respondent with his own guidelines for reviews."

Submissions of Counsel

Senior Counsel for the Applicant, Mr Gleeson, submitted as a general principle that in deciding whether or not to bring a prosecution the DPP was not settling any question or dispute or deciding rights or liabilities; he was simply making a decision whether it was appropriate to initiate a prosecution. Since the DPP was not acting as an adjudicator, or in a judicial capacity, he was not subject to the rules of procedural fairness. Counsel here relied on the decision of Carswell LCJ in ***In the Matter of Adams [2001] NIECA2 (Court of Appeal of Northern Ireland 19th January 2001***). Mr Gleeson, however relied primarily on the judgment of Finlay CJ in ***The State (McCormack) v Curran, the Director of Public Prosecutions and the Attorney General [1987] ILRM 225*** which was later followed by this Court in ***H v Director of Public Prosecutions [1994] 2 IR 589.*** These cases, he submitted, established that a decision of the DPP in relation to a prosecution could only be judicially reviewed if it was demonstrated that he had reached a decision *mala fide* or was influenced by an improper motive or improper policy. I will refer to these cases in more detail at a later stage. Mr Gleeson pointed out that the learned trial judge had specifically held that the Respondent had not acted *mala fide* or for an improper motive and it must therefore be assumed that his decision was based on an alleged improper policy on the part of the DPP.

Mr Gleeson went on to draw attention to the policy of the DPP as set out in his Annual Report of 1998 concerning the review of decisions either to prosecute or not to prosecute. He referred in particular to paragraph 10.5 of that Report which stated as follow

> *"When a review is granted, it is conducted thoroughly and by way of complete re-examination of the case unless the request itself is confined to a specific point or points. The procedure adopted will vary according to the circumstances of the case. It will usually be conducted by a professional officer other than the officer who took the original decision. In difficult cases several opinions including that of the Director may be sought. The important point is that it is a real review and neither the professional officers individually nor the Office itself would experience any problem altering the original decision where that is considered to be the correct course. Apart from cases where new facts are brought to attention, alterations of the original decision would be the exception rather than the rule but there have been examples of alterations where either the officer originally concerned or another came to the conclusion that the decision given had been incorrect. It should be emphasised that in the small number of cases in which decisions have been either reversed or modified without new facts having been brought to attention the judgment call involved had usually been a very fine one."*

There was, counsel argued, nothing improper in such a policy. The learned trial judge had failed to identify to any improper policy on the part of the DPP. In holding that the decision of the DPP was arbitrary and perverse on the grounds that no reasonable person who applied his mind to the matters to be decided by the Respondent could have arrived at the decision which he did, because the decision to prosecute was simply the formation of a contradictory view on the same material, the learned judge had failed to take account of the policy of the DPP as set out in his Report. The decision of the Director was not unreasonable in the established sense as set out in the well known judgment of this Court in ***O'Keeffe v An Bord Pleanala [1993] 1 IR 39***. It was clear that there were materials before the DPP on which he could reasonably have relied in making the decision to prosecute. These materials included considerations other than evidential matters, as had been accepted by this Court in ***The State (McCormack) v Curran [1987] ILRM 225***.

With regard to the learned trial judge's second ground for granting relief - the failure of the DPP to follow his own guidelines, Mr Gleeson submitted that this ground did not form any part either of the grounds permitted to be argued in the original order giving leave or of the further grounds permitted during the course of the trial. No argument had been made at any stage in the submissions on the hearing in regard to this ground. The trial judge had therefore no jurisdiction to rely on this ground in making his decision. In addition counsel submitted that the learned High Court judge had erred in equating the Respondent's Annual Review with the Code for Crown Prosecutors issued by the DPP of England and Wales which was referred to in ***R v DPP ex parte C [1995] 1 CR App.Rep.136***. He also erred in law in holding that the Respondent had failed to comply with his Annual Report. The DPP's course of action in the present case had been fully in accordance with the policy as set out in his Annual Report of 1998 and in particular paragraph 10.5 thereof.

Senior Counsel for the Applicant, Mr Horgan, argued that the submissions made on behalf of the Appellant for the greater part did not address the matter which was truly in issue in this appeal. Mr Horgan accepted the role of the Director of Public Prosecutions (as set out in the ***State (McCormack) v Curran)*** in reaching a single decision whether to prosecute or not to prosecute in any particular case. He accepted, also, that it was open to the Director in a proper case to hold a review of his original decision and to reach a different decision. The instant proceedings must be considered in the light of the facts of this particular case, where the procedure adopted by the Director involved at least three decisions. The first decision was a decision not to prosecute conveyed to and received by the Applicant in good faith; the second

decision was a decision to review the first decision; the third was a decision to unmake the first decision and direct that the Applicant should in the event be prosecuted. In the particular and exceptional facts of the case, counsel argued, there was a breach of the Applicant's constitutional rights, in particular her right to natural and constitutional justice and to fair procedures.

Mr Horgan challenged the DPP's contention that the same jurisprudence applied to this *"multiple and contradictory decision-making process"* as applied to a single decision to prosecute or not to prosecute. The DPP's position was that the test in bringing a prosecution should be the same whether or not it was intimated to an individual that no prosecution would follow. Mr Horgan contended that there was no basis in law for the assertion of an unfettered discretion of this nature on the part of the DPP. He submitted that the Courts had consistently held that there was no discretion on the part of the DPP which would allow him to contravene a constitutional or indeed a legal right of the citizen or would allow him to pursue a prosecution which amounted to an abuse of the process of the Courts. The DPP could be and had been restrained from prosecuting an alleged offence in a variety of circumstances as for instance where there was a breach of the citizen's constitutional right to a trial with due expedition ***(DPP v Byrne [1994] 2 IR 236; DPP v Arthurs [2000] 2 ILRM 363)***, where there was a denial of the citizen's constitutional right to equality before the law (***McMahon v Leahy [1984] IR 525)***, where there was an abuse of the citizen's constitutional right to legal representation in a criminal prosecution (***State (Healy) v O'Donoghue [1976] IR 325)***, where the Prosecutor was acting oppressively (***The State (O'Callaghan) v O hUadhaigh [1977] IR 42***, or where the Prosecutor's conduct constituted an abuse of the process of the Court ***(R v Looseley [2001] 4 All ER 897***.)

Mr Horgan went on to argue that the long recognised right of the citizen to bodily integrity under Article 40.3 of the Constitution ***(Ryan) v Attorney General [1965] IR 294)*** included the citizen's right to security of his person. This constitutional guarantee protected the citizen against unlawful and unwarranted invasions of his right to peaceful enjoyment in his life from the State or its agencies, including the DPP. The individual must be dealt with by the State and its agencies (including the DPP) without oppression and not contrary to justice. As was stated by Finlay P. (as he then was) in ***State (O'Callaghan) v O'hUadhaigh [1997] IR 42*** at page 52:

> *"Just as those principles apply to the proceedings of a Court in trying a criminal case, the same or analogous principles must apply, a fortiori, to the exercise by the Director of Public Prosecutions of his statutory powers."*

The issue was not whether it was open to the DPP to review a decision to prosecute or not to prosecute, but whether, once he had informed the Applicant that she would not be prosecuted, it was oppressive and contrary to justice for the DPP subsequently to decide to initiate a prosecution.

The Law and Conclusions

In considering both the particular facts of this case and the applicable law, I propose to deal firstly with the second ground upon which the learned High Court judge granted relief to the Applicant - his finding that the Director of Public Prosecutions had failed to comply with his own guidelines as set out in his Annual Report for the year 1998. As far as this ground is concerned, I would accept the submission of Senior Counsel for the Appellant that this formed no part of the permitted grounds on which a case for judicial review could be argued before the High Court. This applies both to the grounds permitted at the leave stage and to the additional grounds permitted during the course of the trial. Senior Counsel for the Applicant suggests that because the Appellant referred to the text of the Annual Report during the trial in the High Court it is not now open to him to challenge the trial judge's reliance on an alleged failure to observe the guidelines contained in the Report when granting relief. It seems to be that this is an irrelevant consideration. Either failure to comply with the guidelines was a permitted ground for judicial review or it was not. In her judgment in ***G v DPP [1994] 1 IR 374 at 382***, Denham J. stressed the importance of the *"screening process"* which was the aim of the application for leave to bring judicial review proceedings. She stated:

> *"The preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar - to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstatable cases proceeding, and thus impeding public authority unnecessarily."*

It appears to me that it was therefore not open to the learned High Court judge to grant relief on this ground. Apart from this, it does not seem to me that under the 1998 guidelines the DPP is precluded from reviewing the case and reaching a contrary conclusion even if there is no new evidential or other material before him.

In my view consideration of this appeal must start with an analysis of the real issue between the parties to the proceedings. The issue is not whether the DPP has a right to review

an original decision either to prosecute or not to prosecute. Still less is an issue, as it was in earlier cases, as to whether the DPP should give reasons either for his original decision or for an altered decision. Mr Horgan both in his written submissions and in argument before this Court accepted both the DPP's right to review a decision and, indeed, his right to do so where no new evidential material had come into his possession. Quite correctly, he accepted the dictum of Finlay CJ in ***The State (McCormack) v Curran [1987] ILRM 225 at 337*** where he stated:

> *"In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not prosecute in any particular case related exclusively to the probative value of the evidence laid before him."*

Mr Horgan relied on the particular facts of this case, and what he asserts is a denial of the constitutional rights of the Applicant.

I would accept that there are a number of aspects of the history of this case which would give rise to concern, in particular to the Applicant personally, but also in a more general way.

On 30th November 1998 the DPP informed the local State Solicitor that no prosecution would issue. This information was promptly conveyed to the Applicant by her own solicitor. On 17th December 1998 the Office of the DPP received the letter from Mr Moynihan, father of the deceased Mr Tony Moynihan. This letter, which has been quoted in full elsewhere, included the following paragraph:

> *"I have personally contacted Minister John O'Donoghue in relation to this matter in the hope that he can use his good office to assist us in this most distressing matter."*

The fact that the Minister for Justice had taken no action in the matter was not conveyed to the Applicant until the second affidavit of Domhnall Murray of the DPP's office sworn 12th January 2001, almost two years after the initiation of the Applicants' judicial review proceedings following the order of Mr Justice O'Higgins granting leave on the 22nd March 1999. It is extremely likely that the Applicant during all of this period wrongly believed that the decision not to prosecute had been changed on account of political influence.

In Mr Murray's affidavit of 22nd November 1999 (in which Mr Moynihan's letter was exhibited) Mr Murray states that in accordance with the practice of the office of the DPP this review was conducted thoroughly and by way of complete re-examination of the case. It can be assumed, as I have already noted, that in addition to the material submitted by the Applicant herself the reviewing officer would have had before him additional material emanating from the Gardai and possibly from other witnesses. It is acknowledged that apart from the letter

from Mr Moynihan no new material was available which had come into being after the decision not to prosecute.

The direction from the office of the DPP to issue the summons was issued with remarkably little delay. It reached the local Gardai in time for the summons to be issued on 23rd December 1998, which was apparently four working days after the receipt of Mr Moynihan's letter by the DPP.

It is not suggested that the DPP acted *male fide* or from an improper motive in reversing his decision not to prosecute and by and large the procedure he adopted in reviewing the case is not open to criticism. However there can be no doubt that on the information available to her the Applicant was subjected to very considerable stress and anxiety and could have had reasonable doubts about this procedure. The Applicant had been unequivocally informed that she would not be prosecuted. She was not in any way warned of the possibility that the DPP might review his decision.

It would be difficult not to have sympathy for the Applicant's position. This, however, is not a sufficient reason to lead to the conclusion that as a matter of law this prosecution should be prevented.

The Applicant herself through her counsel acknowledges the right of the DPP to review his original decision, even in the situation where no new evidence was available to him. The essential issue, therefore, arises from the fact that the Applicant had been informed that she would not be prosecuted and that no warning or caveat accompanied this information. In these circumstances, was the DPP's subsequent decision to initiate a prosecution a denial of the Applicant's right to fair procedures and constitutional justice?

It also seems clear that this is the essential issue which emerges from all of the permitted grounds which have been cited above. The first ground lays emphasis on the reversing of the DPP's decision, described as final and conclusive. The second ground emphasises the failure to warn the Applicant that the DPP had power to reverse his decision. The third ground refers to the DPP acting on foot of an improper policy but again relies on the communication of the decision not to prosecute. The fourth ground refers to the absence of good and sufficient reasons, but again alleges that the DPP has acted in breach of the Applicant's right to fair procedures by reversing his decision not to prosecute *"when the said decision had been communicated to the Applicant"*.

The DPP, through his counsel, argues that his decision either to prosecute or not to prosecute is not subject to judicial review save where he is found to be acting *male fide*, or influenced by an improper motive or improper policy, or where the facts of the case do not

exclude the reasonable possibility of a proper and valid decision by the DPP. In this he relies on the decision of this Court in the ***State (McCormack) v Curran [1987] ILN 225*** as followed by this Court in ***H v DPP [1994] 2 IR 589***. The facts in the ***State (McCormack) v Curran*** as set out in the headnote are as follows:

> *"The Criminal Law (Jurisdiction) Act 1976, provides that where a person has been charged with an extra territorial offence in Northern Ireland he may elect to be tried in the Republic, provided that a judge of the High Court of Northern Ireland, or the court of trial, is satisfied that a warrant for the arrest of the accused man has been issued in the Republic for a corresponding offence, based on an information laid by a member of the Garda Siochana. The Prosecutor had been returned for trial in the Crown Court at Belfast, charged with an extra territorial offence within the meaning of the 1976 Act. The acts of which he was accused constituted offences under Irish law also, and rendered him liable to arrest, charge and trial within this jurisdiction. The Prosecutor wished to opt for trial within the Republic, and accordingly, he requested the Respondents to issue a warrant for his arrest. The second named Respondent decided not to issue a warrant, and the Prosecutor obtained conditional orders of certiorari and mandamus in the High Court in Dublin.*
>
> *In the High Court Barr J. held, inter alia, that the function of the Director of Public Prosecutions in deciding whether or not to prosecute an individual for the alleged commission of a criminal offence is an executive one, and is not reviewable by the Courts, as this would interfere with his independence. On appeal, this Court held that the decisions of the Director of Public Prosecutions can in certain circumstances be reviewed by the Courts. In that case the evidence did not exclude the possibility of a proper and valid decision by the Director which was not reviewable by the Court."*

In his judgment Finlay C.J. (at pages 236 - 237) stated:

> *"I do not accept the submission that a member of the Garda Siochana who obtains information leading to a submission that a person has been guilty of committing a serious offence must in every case proceed to arrest or seek a warrant to arrest the suspect or otherwise institute a prosecution.*

Neither do I accept the contention made on behalf of the Respondent that the decision of a member of the Garda Siochana not to proceed to arrest or initiate a prosecution can never be reviewable.

I am, however, satisfied that in the instant case, at least, one of the matters which a member of the Garda Siochana would be entitled to seek information on before proceeding to apply for a warrant would be as to whether the issue of the warrant and the arresting of the suspect would lead to his trial. It does not appear to me that the evidence which was before the High Court and which solely consisted of the affidavit of the Prosecutor's solicitor, leads to the conclusion that the first named Respondent abdicated his obligation to exercise his discretion concerning the application for a warrant, but I am satisfied that it goes so far only as indicating that before deciding not to proceed he consulted with the DPP.

In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision mala fide or influenced by an improper motive or improper policy then his decision would be reviewable by a Court. To that extent I reject the contention again made on behalf of this Respondent that his decisions were not as a matter of public policy ever reviewable by a Court.
In the instant case, however, I am satisfied that no prima facie case of mala fides has been made out against either of the Respondents with regard to this matter, secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the Applicant within this jurisdiction and that that being so he cannot call upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based."

In his judgment Walsh J. stated:

"I concur in the opinion of the Chief Justice that the actions of the DPP are not outside the scope of review by the Courts. If he oversteps or attempts to overstep his function he can, if necessary, be restrained by injunction but I do not think any step he takes or any action or omission which is ultra vires cannot be of the nature of orders which attract certiorari. A failure to perform his statutory duties could however be the subject of mandamus."

In ***H v DPP* [1994] 2 IR 589**, which again was a case in which the Applicant sought to compel the DPP to initiate a prosecution (against her husband), it was held by this Court that in the absence of a *prima facie* case of *mala fides* being made out and where the facts do not exclude the reasonable possibility of a proper and valid decision of the DPP not to prosecute, he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it is based. There was nothing before the Court from which it could be reasonably inferred that the decision of the DPP was perverse, or inspired by improper motives, or that he had abdicated his functions and an unsubstantiated statement of belief by the Applicant which had not been denied by the DPP did not give rise to an adverse inference. O'Flaherty J. in his judgment (at page 602) stated:

"I would uphold the finding of the learned trial judge that this is not an appropriate case to order the Director of Public Prosecutions to bring a prosecution. This is par excellence an example of a case where the Director must apply his mind to whether it is appropriate to bring a prosecution where there has been this long history of family strife, where the case is an old one, and where it now appears that the boy would not testify in any event. If the Director of Public Prosecutions were to be subjected to frequent applications by discomforted persons for mandamus to compel him to bring prosecutions, I apprehend that his office would be stretched beyond endurance in seeking to justify that which should not require to be justified.

I would also uphold the submissions made on behalf of the Director of Public Prosecutions that certainly as far as this case is concerned he was not obliged to give his reasons for not bringing a prosecution and I would, in general, uphold the appropriateness of that course of action for the reasons submitted on his behalf before us."

Denham J. in her judgment in the same case at page 606 stated:

"Applying the test of the Chief Justice as set out in the State (McCormack) v Curran to the facts of this case I am satisfied that no prima facie case of mala fides is being made out against the Respondents. The unsubstantiated statement of belief by the Applicant not denied by the Director of Public Prosecutions does not of itself give rise to an adverse inference. The facts of the case do not exclude the reasonable possibility of a proper and valid decision of the Director of Public Prosecutions not to prosecute the persons named by the Appellant. Consequently, the Director of Public Prosecutions cannot be called upon to explain his decision or to give reasons for it nor the sources of the information upon which it is based."

In considering the dicta of Finlay C.J. in ***State (McCormack) v Curran*** it is, in my view, necessary to be clear about exactly what was decided in that case. At issue in the appeal was whether the DPP's decision to prosecute or not to prosecute could in any circumstances be subject to judicial review. The trial judge had held that it could not. This Court, while dismissing the appeal on other grounds, specifically held that the DPP was subject to judicial review, albeit on narrow grounds. The Chief Justice also expressed himself satisfied that the facts of the case did not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute. As a result the DPP could not be called upon to give the reasons for his decision.

It is notable that when the Chief Justice spoke of the discretion of the DPP to prosecute or not to prosecute being related to a variety of considerations other than the probative value of the evidence laid before him he specifically stated that it would not be wise or helpful to seek to list these considerations in any exclusive way. He then goes to refer briefly to situations in which the decision of the DPP would be open to judicial review. While it is not necessary to decide this question for the purposes of the present appeal, it seems to me that there must be at least some doubt as to whether the Chief Justice intended this to be an exhaustive list applicable for all time. This may be borne out by the dictum of Walsh J. who simply states that if the DPP oversteps or attempts to overstep his function he can if necessary be restrained by injunction. However, this question is one which may fall to be considered in a future case.

In ***H v DPP*** this Court was again considering a single decision of the DPP not to initiate a prosecution. This, it appears from the facts recited in the judgments, was in a situation

where there was quite sufficient material before the DPP to enable him to exercise his discretion in this way. This is abundantly clear from the passage already cited from the judgment of O'Flaherty J. at page 602. The main issue in contention in that case, it appears, was whether the DPP should be required to give reasons for his decision. The decision of the Court on that question was summarised in the passage quoted from the judgment of Denham J.

Thus, while in these two cases the situation in which the DPP's original decision to prosecute or not to prosecute may be judicially reviewed is narrowly defined, in neither case did the Court consider the situation which arises on the facts of the instant case. Neither did the Court decide whether it is open to the DPP, once he has unequivocally notified a person that he or she will not be prosecuted, subsequently to alter his decision and initiate a prosecution.

Counsel for the Applicant has given a number of examples of cases where prosecutions were halted, in general because it was held that the actions of the prosecuting authorities amounted to an infringement of the rights of the accused under the Constitution. In the main these were rights to fair procedures and natural and constitutional justice. Relying on these cases Mr Horgan postulated a right on behalf of the Applicant to be protected against unlawful and unwarranted invasions of her right to peaceful enjoyment in her life from the State or its agencies. Apart from this perhaps overly-comprehensive right, he submitted that the Applicant must be protected against a breach of her right to fair procedures. Counsel for the DPP, while accepting that any person appearing before the Court had a right to fair procedures, argued that the DPP, who was not an adjudicator, was not subject in the same manner as an adjudicator to the rules of procedural fairness. The authority on which he relies for this submission is the judgment of Carswell L.C.J. in ***In the Matter of Adams* [2001] NIECA 2**. This is, of course, a persuasive authority and one to which due deference must be paid. Nevertheless, like the other cases mentioned above, its facts are very different from those in the instant case and it also deals with a single decision of the Northern Ireland DPP not to prosecute. As far as the cases cited by Mr Horgan are concerned I would accept that in the majority of these the accused person had already been brought before the Court and his right to fair procedures was asserted and confirmed in that situation.

It appears to me that the case which bears some similarity to the instant case, both in its facts and in its issues, is ***(State) O'Callaghan v O hUadhaigh* [1977] IR 42**. The facts of that case, which are somewhat complex, are set out in the headnote as follows:

> *"The Prosecutor was returned by the District Court to the Circuit Court for trial on eight charges. The Director of Public Prosecutions lodged in the Circuit Court*

an indictment containing one count and, on his application, the trial of the Prosecutor was transferred to the Central Criminal Court. The Director then lodged an indictment containing eight counts and subsequently he lodged another indictment which contained ten counts. A jury was sworn but the Prosecutor was not given into the charge of the jury as he had entered a written plea in bar. After legal argument, the trial judge ruled that the only indictment properly before the Court was the original single count indictment; whereupon, having taken instructions, counsel for the director entered a nolle prosequi in regard to all the counts in each of the three indictments and informed the Court that the Prosecutor, when discharged, would be re-arrested and charged again with the same offences. The Prosecutor, who had been remanded in custody for six months, was released. .... The Prosecutor was re-arrested and charged in the District Court with the same offences. Having obtained in the High Court a conditional order of prohibition to prevent the Respondent District Justice proceeding with the renewed charges unless cause were shown to the contrary, the Prosecutor applied for an order absolute notwithstanding the cause shown by the Respondent."

It is what might be described as the final episode in this chain of events which appears to me to be of relevance to the instant appeal. Given the particular actions of the DPP in entering an *nolle prosequi* on the various counts and subsequently re-arresting the accused and again charging him on the same counts, the Court held that the prosecution of the renewed charges would not accord with the standard of fair procedures required by the Courts in the administration of justice.

In his judgment (at page 52-53) Finlay P. stated:-

*"In the course of his judgment in **The State (Healy) v Donoghue [1976] IR 325** the Chief Justice said at page 348 of the report:-*

'In the first place the concept of justice, which is specifically referred to in the Preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deal with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has jurisdiction to act contrary to justice. Mr Justice Gannon in his judgment in this matter in the High Court said:

> *'Before dealing with the submissions on the grounds on which the conditional orders were made, I think I should say at the outset that it appears to me that the determination of the question of whether or not a Court of local and unlimited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of jurisdiction imposed on the Court. It appears to me that this question involves also an examination of whether or not the Court is performing the basic function for which it is established - the administration of justice. Even if all the formalities of the statutory limitation of the Court be complied with and if the Court procedures are formally satisfied, it is my opinion that the Court in such instant is not acting within its jurisdiction if, at the same time, the person accused is deprived of any of its basic rights of justice at a criminal trial.'*

I agree with these views.'

If this statement of principle (which, of course, I unreservedly accept) applies to the proceedings of a Court in trying a criminal case, it appears to me that the same or analogous principles must apply, a fortiori, to the exercise by the Director of Public Prosecutions of his statutory powers, and to the interpretation by me of those statutory powers in any particular circumstance...

If the contention of the Respondent is correct the Prosecutor, having undergone that form of trial (and remand awaiting trial) and having succeeded in confining the issues to be tried, would be deprived of all that advantage by the simple operation of a statutory power on the part of the Director of Public Prosecutions. In this way the Prosecutor would have the entire of his remand awaiting trial set at naught and he would have to start afresh to face a criminal prosecution in which the prosecution, by adopting different procedures, could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused: if the trial judge makes decisions adverse to the interest of the accused, the latter cannot obtain relief from them otherwise than by appeal from

the Central Criminal Court, or by appeal or review in the a case of an inferior Court."

The dictum of Finlay P. *"it appears to me that the same or analogous principles must apply, a fortiori, to the exercise by the Director of Public Prosecutions of his statutory powers"* would appear to establish that the requirement of fair procedures does indeed apply to the Director of Public Prosecutions, at least in *"particular circumstances"*, in the exercise of his statutory functions.

In my view the *"particular circumstances"* of the instant case must require fair procedures on the part of the DPP. In thus holding I am bearing in mind all the facts of the case as they have emerged during the course of the proceedings. I also bear in mind the level of stress and anxiety which has been borne over a considerable period by the Applicant. On these particular facts it seems to me that once the DPP had unequivocally and without any caveat informed the Applicant that no prosecution would issue against her in connection with this road traffic accident, it was a breach of her right to fair procedures for him to reverse his decision and to initiate a prosecution by the issuing of the summons on the 23rd December 1998. I would dismiss the appeal.

GF Eviston -v- DPP 24th May 02

[1994] 2 IR 589

H., Applicant v. The **Director of Public Prosecutions** and The Commissioner of the Garda Siochana, Respondents [S.C. No. 106 of 1994]

High Court

[1994] 2 IR 589

HEARING-DATES: 31 March a 25 May 1993

26 July 1993

HEADNOTE:
For Headnote see composite Supreme Court decision.

CASES-REF-TO:
International Fishing Vessels Ltd. v. The Minister for the Marine [1989] IR 149.

The State (Collins) v. Ruane [1984] IR 105; [1985] ILRM 349.

The State (Ennis) v. Farrell [1966] IR 107.

*The State (**McCormack**) v. **Curran*** [1987] ILRM 225.

INTRODUCTION:
Judicial review.

The facts have been summarised in the headnote and fully set out in the judgment of Barron J., *infra.*

By order of the High Court (Geoghegan J.) made on the 11 January, 1993, the applicant was given leave to apply for an order of *mandamus* by way of judicial review to compel the **Director of Public Prosecutions** to provide to the applicant certain documentation.

The application, by notice of motion dated the 15 January, 1993, was heard by the High Court (Barron J. on the 31 March and the 25 May, 1993.

COUNSEL:
The applicant appeared in person.

Aindrias O Caoimh for the respondents.

Solicitor for the respondents: *The Chief State Solicitor.*

JUDGMENT-READ:
Cur. adv. vult. 26 July, 1993.

PANEL: Barron J.

JUDGMENTS:
Barron J.The applicant has commenced a private prosecution against her husband, T.T.M., and his brother, J.M., charging them with having committed various sexual offences against her son, N.H., under various provisions of the Offences Against the Person Act, 1861. She has done so following the refusal of the **Director of Public Prosecutions** to institute a prosecution in his name. She sought liberty to apply for judicial review to compel the Director either to initiate a prosecution against her husband

and his brother or alternatively to give her reasons why he had failed to do so and also to supply her with any statements taken by the gardai and any other relevant documentation in his possession to enable her to pursue her independent prosecution. She was given liberty on the 11 January, 1993, to apply for an order of *mandamus* compelling the Director to furnish her with statements and other doc-umentation. She was refused leave to seek judicial review in relation to the other relief she was claiming.

In my view the relief which she was seeking by way of an order of *mandamus* to compel the Director to institute a prosecution or alternatively to give his reasons for not so doing should be dealt with by this court. I have, accordingly, heard argument in relation to these matters.

The application was grounded upon an affidavit of the applicant. There has been no affidavit filed on behalf of the respondents. They have limited their opposition to a statement of opposition filed on the 15 February, 1993, as follows:-

"1.

The respondents or either of them are not under any duty to the applicant whether at law or otherwise to supply her with the garda investigation file as requested by her.

2.

The applicant has no entitlement whether at law or otherwise to the production to her of the said garda investigation file and the same is privileged from disclosure or discovery.

3.

The first respondent has already decided in October, 1988, not to initiate a criminal prosecution in respect of the matters referred to by the applicant and the applicant is not entitled or authorised by law to prosecute on indictment in relation to the said matters and in the circumstances no useful purpose could be served by ordering the disclosure or discovery of the said garda file (even if the same were capable of being disclosed or discovered to the applicant which is denied).

4.

The applicant has failed to move promptly or in any event within the time prescribed by O. 84, r. 21 of the Rules of the Superior Courts and no sufficient grounds exist for extending the time for the making of this application.

5.

The applicant has been guilty of such delay that the court ought to refuse relief (if thought appropriate which is denied) on that ground alone."

The facts so far as they are material appear in the affidavit of the applicant. They are as follows:-

In April, 1988, the minor informed her that his father, i.e. T.M., had committed child sexual abuse against him. The allegation of sexual abuse was referred to Doctor Moira Woods, a specialist in that field, who was of the opinion that the events complained of had occurred and that the proposed defendants were responsible. The doctor's report was sent to the gardai. A statement was made to them by the minor in May, 1988, and in June, 1988, the mother made two statements. The applicant wrote both to the gardai and to the **Director of Public Prosecutions** in October, 1988, pressing for a prosecution to be brought. The gardai informed her that they had sent on her request to

the Director for his directions and, subsequently, that they had been instructed by the Director that the garda investigation file was privileged. On the 25 October, 1988, he wrote to the applicant as follows:-

"Dear Ms. **H.**,

I am in receipt of your letter of 10 October, 1988.

The gardai forwarded to this office their investigation file dealing with the allegations against T.M. The case received studied consideration by two legal assistants in this office and it was decided that a prosecution was not warranted.

The Director considers he is precluded from giving reasons for a decision not to prosecute. It can however be stated by way of general comment that a decision not to prosecute in any particular case does not necessarily reflect any view on the part of this office regarding the truth of the complaint made. There can be and often are other factors which prevent a prosecution taking place.

Yours faithfully."

These allegations of sexual abuse of that child arose out of, and were in part a culmination of, the break-up of their marriage. In July, 1986, following an assault upon her by her husband, the applicant commenced proceedings for a legal separation. Subsequent events are set out in her affidavit as follows:-

"24.

I say that throughout the year since then I have had occasion to call the gardai for assistance when he has assaulted me, assaulted my daughter, assaulted my friend, kidnapped my son, broken into my house and stolen my possessions, driven my son in a car which was not insured etc.

25.

I say that I have consistently found the gardai to be slow to take any action, or where action has been taken against him, it has been only as a result of my persistence, my threats to go to the High Court for orders of *mandamus* etc., or by my involving the press.

26.

I say that T.M., after my taking the matter up with the Attorney General and the Department of Justice, was prosecuted for assaulting me and received a six months sentence, fined and sentence suspended on condition he enter into a bond to be of good behaviour, at Cork District Court in May, 1987.

27.

I say that some eighteen months after this I discovered that the fine remained unpaid and the bond not entered into.

28.

I say that in April, 1987, T.M. assaulted a friend of mine and again, after repeated and persistent attempts to get the gardai and the D.P.P. to take action, a summons was issued against T.M. for grievous bodily harm. However, to date, no attempt has been made to serve him with this summons, even though in July, 1987, he was reporting to a

garda station three or four times a week, to collect my son from there for access visits (this unusual step was ordered by the civil court for my protection).

29.

I say that T.M. fled the country in or around September, 1987, to avoid being served with the said summons for assault and going to prison if found guilty."

Subsequently in December, 1990, the applicant was awarded sole custody of the infant with no access to his father.

In June, 1992, the infant ran away from home, as a result of which he was taken into care by the Southern Health Board. The latter informed his father, who returned to this country and sought to gain access to the infant. This was prevented by a High Court injunction. It was at this stage that the applicant decided to serve a private summons on T.M. in relation to the sexual abuse. This case has come before the District Court for mention and has been adjourned from time to time pending the compilation of a book of evidence. On the 15 September, 1992, the District Court Judge was informed that the applicant had applied to the garda authorities for copies of statements etc. in their possession with regard to the case which they had investigated in 1988, and that she was awaiting a reply. By letter dated the 29 October, 1992, from Superintendent Kelly of Gurranabraher garda station, Cork, she was informed that the Director was still refusing to allow her access to information on file. This letter was as follows:-

"Dear Ms. **H.**,

Re: P.H. v. T.T.M. and J.M.

I refer to your letter of the 11 September, 1992, and my reply to you dated 16 September, 1992, in connection with the above mentioned.

As already stated in my letter of 16 September, 1992, I referred your request for statements, correspondence, etc. in possession of the Garda Siochana, to the **Director of Public Prosecutions.** The D.P.P. has instructed me not to supply you with copies of statements, correspondence, etc. in my possession. The position is the same as that outlined in letter dated 8 November, 1988, forwarded to you by Superintendent J.J. McCarthy (now retired) - copy enclosed.

Yours faithfully,

T.J. Kelly

Superintendent."

In the course of her affidavit the applicant has alleged that T.M. was and still is a police informer and that the reason for failure to move against him or to supply her with the information which she seeks is by reason of this fact.

Although all prosecutions on indictment must be prosecuted in the name of the Director, a common informer is still entitled to bring proceedings in his or her own name in the District Court: see *The State (Collins) v. Ruane* [1984] IR 105.

The function of the Director is an independent administrative function. In *The State (**McCormack**) v. **Curran*** [1987] ILRM 225 at p. 237, Finlay C.J. said:-

"In regard to the D.P.P. I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to

the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court.

In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the D.P.P. not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based."

The grounds of opposition raised three basic defences:-

(1)

That the garda investigation file is privileged;

(2)

That no purpose can be served by a private prosecution of an indictable offence, if the Director refuses to proceed; and

(3)

Excessive delay.

So far as delay is concerned, this application raises serious questions of law involving private rights. Save in exceptional circumstances it seems to me that question of delay should not be a material factor. However, the present application is in time having regard to the most recent decision of the Director even if the events relate back some five years.

Undoubtedly the Director is entitled not to prosecute even where there is a return for trial. However, it may well be that a private prosecution will put the matter in a different light leading to a change of attitude on the part of the Director. See *The State (Ennis) v. Farrell* [1966] IR 107.

A decision not to prosecute, it seems to me, can be based on either of two broad grounds:-

(1)

The evidence is not strong enough to warrant a conviction; or

(2)

Where it is believed to be so, there are other reasons why the prosecution should not be brought.

In making this decision the Director acts independently and can be challenged only upon the bases indicated in the passage from the judgment of the Chief Justice in *The State*

(McCormack)** v. **Curran [1987] ILRM 225 to which I have already referred.

Once an adverse decision is challenged by a person with *locus standi* to challenge it, the Director in my view, is in the same position as any other person acting under statutory power and is obliged to give his reasons: see *International Fishing Vessels Ltd. v. The Minister for the Marine* [1989] IR 149 and the cases therein referred to. I regard the applicant, being the mother of the alleged victim, as a person having the necessary *locus standi*. The Director has not given his reasons for his decision, nor has he refuted the allegation of bias made against him. In these circumstances, the next matter for consideration should be the nature of the relief to be granted to the applicant.

Nevertheless, the court must consider the interests of the infant. The events leading to these proceedings occurred five years ago. The nature of the alleged offence is such that it might not be in the infant's interest to pursue the matter, particularly after such a lapse of time. There is no evidence on this issue before the court. Accordingly, until the court is satisfied by evidence that the granting of relief will not be against his interest, the question of relief will be left over.

DISPOSITION:
Judgment accordingly.

company had or had not paid the wages to which the arrears of contributions related, but I am concerned only with the true construction of the relevant statutes in their ordinary meaning. It is common case that an employer has to adjust the payments made during a contribution year in respect of the employer's contribution - a balancing figure is struck after the contribution year has ended; in the circumstances, ordinarily, the continuing employment would remedy any shortfall in respect of employer's contribution.

I would allow the appeal and declare that the employer's contribution in respect of pay related social insurance on arrears of preferential wages and holiday pay does not constitute a preferential debt in the winding up by virtue of s. 285 (2) (e) of the Companies Act, 1963.

Solicitor for the appellant: *A.&L. Goodbody*
Solicitor for the respondent: *Revenue Solicitor*

Niamh Cahill
Barrister

The State (Gabriel Peter McCormack) v Chief Superintendent Curran, The Director of Public of Public Prosecutions and The Attorney General: High Court 1986 No.95SS (Barr J) 2 May 1986; Supreme Court 1986 No.167 (Finlay CJ, Walsh J, Henchy, Griffin and Hederman JJ) 31 July 1986.

Criminal Law - Procedure - Irish citizen in custody in Northern Ireland - Application to Garda Superintendent to seek a warrant - Prosecutor seeking to be delivered into the custody of the Garda Siochana - Director of Public Prosecutions indicating that proceedings would not be instituted in this jurisdiction - Garda Superintendent deciding to seek a warrant - Application for orders of certiorari and mandamus - Whether decision of Garda Superintendent reviewable - Role of DPP - Whether DPP's decision reviewable - Whether prima facie case of mala fides made out - Whether prosecutor deprived of his constitutional rights of access to the courts of this jurisdiction —

Facts The Criminal Law (Jurisdiction) Act 1976, provides that where a person has been charged with an extra-territorial offence in Northern Ireland, he may elect to be tried in the Republic, provided that a judge of the High Court of Northern Ireland, or the court of trial, is satisfied that a warrant for the arrest of the accused man has been issued in the Republic for a corresponding offence, based on an information laid by a member of

the Garda Siochana. The prosecutor had been returned for trial in the Crown Court at Belfast, charged with an extra-territorial offence within the meaning the meaning of the 1976 Act. The acts of which he was accused constituted offences under Irish law also, and rendered him liable to arrest, charge and trial within this jurisdiction. The prosecutor wished to opt for trial within the Republic, and accordingly, he requested the respondents to issue a warrant for his arrest. The second-named respondent decided not to issue a warrant, and the prosecutor obtained conditional orders of *certiorari* and *mandamus* in the High Court in Dublin.

Held by Barr J in allowing the cause shown by the respondents, and in discharging the conditional orders:

(1) The function of the Director of Public Prosecutions in deciding whether or not to prosecute an individual for the alleged commission of a criminal offence is an executive one, and it is not reviewable by the courts, as this would interfere with his independence. *Savage and McOwen* v *Director of Public Prosecutions* [1982] ILRM 51 applied.

(2) The fact that the laws of evidence relating to the admissibility of confessions made while in police custody differ substantially in the two Irish jurisdictions, obliges the Director to make an independent assessment as to whether or not an individual should be prosecuted in this jurisdiction.

(3) The extent of the right of an accused charged with an extra-territorial offence in Northern Ireland to be tried in this jurisdiction is an option exerciseable only where the Director of Public Prosecutions has caused a warrant to be issued for his arrest for a corresponding offence under Irish law, and where the Director has decided against the issue of such a warrant, the exercise of the option by an accused does not arise.

(4) It would be contrary to public policy to interpret the constitutional right of an accused to trial in due course of law as including a right to compel the Director of Public Prosecutions to bring him to trial in the Republic, or cause his arrest within the Republic on any charge.

Held by the Supreme Court (Finlay CJ, Walsh, Henchy, Griffin and Hederman JJ) in dismissing the appeal:

(1) Members of the Garda are completely independent of the Director of Public Prosecutions in the exercise of their duty.
State (Collins) v *Ruane* [1985] ILRM 349, followed.

(2) In the instant case, the evidence before the court indicated only that the first-named respondent consulted with the Director of Public Prosecutions before deciding not to proceed, and not that he had abdicated his discretion in this regard.

(3) The decisions of the Director of Public Prosecutions can in certain circumstances be reviewed by the courts. In the instant case, the evidence did not exclude the possibility of a proper and valid decision by the Director, which was not reviewable by the court.

Per Walsh J: The actions of the Director of Public Prosecutions cannot properly be the subject of *certiorari*. A failure on the DPP's part to perform a statutory duty could be the subject of *mandamus*.

(4) The constitutional right of access to the courts is a right to initiate litigation, not a right to compel suit or prosecution.

(5) The statutory right of an individual to select to select the jurisdiction for his trial does not arise until a warrant for his arrest has been issued by the appropriate authority in this State.

Cases referred to in High Court judgment:
In re McCurtain [1941] IR 83.
Savage and McOwen v *Director of Public Prosecutions* [1982] ILRM 385

Additional material cited in legal argument in High Court.
Boland v *An Taoiseach* [1974] IR 338: 109 ILTR 13
Clune v *Director of Public Prosecutions* [1981] ILRM 17
Costello v *Director of Public Prosecutions* [1984] IR 436; [1983] ILRM 489.
Creagh v *Gamble* (1888) 24 LR (Ir) 458.
In re Criminal Law (Jurisdiction) Bill 1975 [1977] IR 129; (1977) 110 ILTR 69.
R v *Metropolitan Police* [1968] 2 QB 118; [1968] 2 WLR 893; [1968] 1 All ER 763, CA
State (Quinn) v *Ryan* [1965] IR 70; 100 ILTR 105.

Cases referrred to in Supreme Court
The State (Collins) v *Ruane* [1985] ILRM 349

Patrick MacEntee SC and Diarmaid McGuinness **for the prosecutor**
Kevin Haugh SC and Susan Denham **for the respondents**

HIGH COURT

BARR J delivered his judgment on 2 May 1986 saying:

Background

The Joint Communique issued on 9 December 1973 at the conclusion of the Sunningdale Conference between the Irish and British Governments and representatives of certain political parties in Northern Ireland contained the following passage at paragraph 10:

> It was agreed by all parties that persons committing crimes of violence, however motivated, in any part of Ireland should be brought to trial irrespective of the part of Ireland in which they are located. The concern which large sections of the people of Northern Ireland felt about this problem was in particular forcefully expressed by the representatives of the Unionist and Alliance parties. The representatives of the Irish Government stated that they understood and fully shared this concern. Different ways of solving this problem were discussed; among them were the amendment of legislation operating in the two jurisdiction on extradition, the creation of a common law enforcement area in which an all-Ireland court would have jurisdiction and the extension of the jurisdiction of domestic courts so as to enable them to try offences committed outside the jurisdiction. It was agreed that problems of considerable legal complexity were involved, and that the British and Irish Governments would jointly set up a commission to consider all the proposals put forward at the Conference and to recommend as a matter of extreme urgency the most effective means of dealing with those who commit these crimes...

Pursuant to that Agreement a Law Enforcement Commission was appointed jointly by the Irish and British Governments in December, 1973. This body duly considered various methods for bringing to trial fugitive offenders who, having committed violent crime in one part of Ireland sought refuge in the other part. Its report is dated 25 April 1974. In it the Commission recommended the conferring of additional extra-territorial jurisdiction upon the courts of each jurisdiction in Ireland to try under domestic law certain scheduled offences when committed in the other part of Ireland. This recommendation was adopted by the Irish and British Governments and the respective legislatures gave effect to it by the Criminal Law Jurisdiction Act 1975 (the 1975 Act) which confers extra-territorial powers as proposed by the Commission on the courts in Northern Ireland and the Criminal Law (Jurisdiction) Act, 1976 (the 1976 Act) which confers similar powers on the courts of this State.

The relevant provisions of the 1975 Act are contained in Article 2 in the Third Schedule which is entitled 'Right of accused to opt for trial in Republic of Ireland' and is in the following terms:

> 2(1) If a person is accused of an extra-territorial offence, and a judge of the High Court, or the court of trial, is satisfied that a warrant has been duly issued in the Republic of Ireland on an information laid by a member of the police force (Garda Siochana) in the Republic of Ireland for his arrest for the corresponding offence in respect of the same act or omission, the judge or court shall, if the accused so requests issue an order directing:
> (a) that the accused be delivered as soon as may be at some convenient point of departure from Northern Ireland into the custody of a member of the said police force in the Republic of Ireland, and
> (b) that he be kept in custody in Northern Ireland until so delivered.
> (2) If the accused is serving a sentence imposed for any other offence , the order under this paragraph shall not take effect until service of the sentence is completed.
> (3) An order may be made under this paragraph at any time before entry of the plea of the accused on arraignment on the indictment for the extra-territorial offence.

Extra-territorial offences are defined in S 1 of the Act which is read in conjunction with the First Schedule thereto. They include offences such as those with which the prosecutor has been charged in Northern Ireland.

The corresponding provisions in Irish Law are contained in ss 2, 3, 14 and the Schedule to the 1976 Act. They are substantially similar to those contained in the British Statute.

The Facts

The prosecutor was arrested in Northern Ireland by a member of the Royal Ulster Constabulary on 12 February 1985 and has been duly returned for trial on indictment to the Crown Court at Belfast charged with the offences which are set out in paragraph 6 of the affidavit sworn by Mr Francis J. McManus which grounds the prosecutor's application.

I have read the statements of proposed evidence (the Book of Evidence) which have been furnished to the prosecutor in connection with his proposed trial at Belfast Crown Court and also photocopies of written

statements alleged to have been made by him shortly after his arrest in which he admitted involvement in the events which gave rise to the charges brought against him in Northern Ireland. The prosecutor is alleged to have admitted to police officers who interrogated him on the day of his arrest in that jurisdiction that on an unspecified date in the latter part of 1982 he was one of several men who set up a booby-trap bomb under a small bridge in County Armagh close to the border with County Monaghan near Emyvale. It is alleged that those involved in planting the bomb intended to detonate it when members of the Royal Ulster Constabulary were traversing the bridge and thus kill or inflict serious personal injury on them. It is further alleged that the prosecutor's part in the plan was to take up a position on high ground on the Monaghan side of the border overlooking the bridge and to signal his colleague whose function it was to detonate the bomb by remote control when a motor car containing the proposed victims had reached a certain place near the bridge. It is stated that the plan was not put into effect because the prosecutor told his colleague, the bomber, that he was unsure whether a particular motor car which approached the bridge contained policemen or not.

Most of the foregoing information is derived from the alleged written and oral confessions made by the prosecutor to police interrogators in Northern Ireland on the day of his arrest. It was submitted by Mr MacEntee SC on behalf of Mr McCormack and not contradicted by counsel for the respondents that the case against the accused in respect of the offences on which he awaits trial in Northern Ireland stands or falls on the admissibility and veracity of his statements to the police after arrest on 12 February 1985. It is not contended that the respondents have available to them any further information relating to the crimes alleged to have been committed by the prosecutor than that ascertained by the police in Northern Ireland and contained in the Book of Evidence. The facts alleged therein also constitute corresponding offences in Irish Law and, *prima facie*, render the prosecutor liable to arrest, charge and trial in this jurisdiction.

The prosecutor has intimated to the Belfast Crown Court that he wishes to opt for trial in this State in respect of offences corresponding to those on which he has been sent forward for trial to that court. Accordingly, his trial has been adjourned to allow him time to request the first and second respondents to issue a warrant for his arrest on such charges so that he would qualify for transfer to this jurisdiction under Article 2 of the Third Schedule to the 1975 Act. In view of the decision of the second respondent not to direct the issuing of the warrant for arrest sought by the prosecutor and the subsequent institution of these proceedings on foot of such refusal, a further adjournment has been granted by the Belfast Crown Court pending the outcome of his application to this Court.

On 6 February, 1986 counsel on behalf of the prosecutor applied *ex parte* to Egan J for orders of *certiorari* and *mandamus* grounded on an affidavit sworn by Mr McManus, the prosecutor's solicitor in Northern Ireland,

and the learned judge made an order granting the relief sought and giving the respondents 21 days to show cause to the contrary. Although not stated therein, it is common case that the grounds on which the order was made are those specified in paragraph 16 of Mr McManus's affidavit. Notice showing cause was duly served on or about 28 February 1986. This matter came on for hearing before me on 11 and 17 April and I reserved judgment.

Conclusions

There are two crucial questions raised in this case. First, whether the second respondent, the Director of Public Prosecutions, (the DPP) has an obligation to cause the issue of a warrant for the arrest of a person who has been charged in Northern Ireland with the commission of an extra-territorial offence as defined in the 1975 Act, which is also an offence in this jurisdiction, so as to enable such a person to exercise the option granted to him by the latter statute to be tried in this jurisdiction rather than in Northern Ireland. Secondly, in the premises, whether a person so charged in Northern Ireland has a right under the Constitution of Ireland to be tried by a court established thereunder in respect of the corresponding offence in Irish Law where that offence is alleged to have been committed within this State.

Examination of the relevant provisions in the 1975 and 1976 Acts makes clear that what the respective leglislatures have done is to provide, *inter alia*, a framework for dealing with the situation which arises where an offence within the ambit of the respective Acts which is an offence in both jurisdictions is alleged to have been committed and warrants for the arrest of a person in respect thereof have been issued by the police in each jurisdiction and that person is arrested on foot of either warrant, he may opt for trial in the other jurisdiction. In this regard I note in particular that it is a condition precedent to the exercise of such an option that there is in force a warrant duly issued in the jurisdiction to which the accused wished to transfer authorising his arrest for a corresponding offence there and that it has been issued on an information laid by a member of the police force in that jurisdiction. This in turn implies that the police officer has a *bona fide* belief that the person sought to be arrested is answerable for the particular offence under the law of that jurisdiction. There is no provision in the 1976 Act, nor is it necessarily implied from the terms thereof, that where an alleged crime within the ambit of the Act is an offence in both jurisdictions and a police officer in Northern Ireland has obtained a warrant for the arrest of a person in respect thereof, the Director is obliged to put in train the issuing of a warrant for the arrest of that person for the corresponding offence in Irish law. It is not alleged by the prosecutor that there was any impropriety or *mala fides* on the part of the second respondent in deciding not to prosecute him in this jurisdiction.

The Director of Public Prosecutions is the authority for the prosecution of crime in this State. His powers and duties are set out in the Prosecution of Offences Act, 1974. Subject only to the power of the Government under

s 2(9) (a) of the Act to remove him from office (which is not relevant to this case) the DPP is independent in the performance of his functions — see s.2(5).

An issue broadly similar to that under review was considered by Finlay P (as he then was) in *Savage and McOwen v The Director of Public Prosecutions* [1982] ILRM 385

The point for decision was whether an opinion reached by the DPP and certified by him pursuant to the provisions of s.46(2) of the Offences Against the State Act, 1939 was reviewable by the court and, if so, to what extent and on what facts or circumstances it was so reviewable. (The plaintiffs had been brought before the District Court charged with indictable offences which were not scheduled offences within the meaning of the 1939 Act and the DPP, as successor to the Attorney General in that respect, had issued a certificate as provided for in the sub-section in which he stated that in his opinion the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of the plaintiffs on such charges. This certificate was the basis for an application that they should be sent forward for trial to the Special Criminal Court).

The learned President, having reviewed the statutory and constitutional background to s.46 continued as follows:

> The constitutionality of this sub-section was considered by the former Supreme Court on appeal from Gavan Duffy J. in the case of *In Re McCurtain* [1941] IR 83. Dealing with the meaning and effect of s.46 (2) of the Act Gavan Duffy in his judgment which was confirmed on appeal by the Supreme Court stated as follows:
>
> > Fourthly, it is objected that another section of the Offences Against the State Act, 1939, s.46 (2) is unconstitutional, mainly on the ground that it vests judicial or legislative functions in the Attorney-General. Now the Attorney-General is the principal legal officer of the State under Article 30 of the Constitution and the Legislature has declared that if he considers that the ordinary courts are inadequate in relation to a particular trial, effect shall be given to that opinion by sending the accused person for trial to the Special Court. The scheduling of particular offences by the Act of 1939 was not essential under the Constitution and I do not follow the contention that, because an offence is not scheduled, the Attorney-General is therefore required to act either in a judicial or legislative capacity. He is precisely the person to whom one would expect the legislature to entrust consideration of such a question essentially within his domain, because he is the State authority in charge of prosecutions under an express provision of the Constitution. It seems to me that if the Oireachtas had been less careful it might have left the power to send an accused person for trial by the Special Courts in general terms; instead of that the special certificate of the Attorney-General is interposed.
>
> It seems clear to me that this analysis of the meaning and effect of s.46 (2) of the Act of 1939 by necessary implication involves a statement of principle that the question as to whether or not a particular trial for a non-scheduled offence should be sent to be carried out by the Special Criminal Court is peculiarly and exclusively a matter for the Attorney General. The courts it seems to me, it must be implied from this statement, are of course concerned to ascertain as to whether in any particular case the Attorney General's certificate was valid in the sense that it was a certificate issuing from the Attorney General and would be concerned as to whether the Attorney General had reached an

opinion as expressed in that certificate, but it seems to me necessarily to be implied from this portion of the judgment of Gavan Duffy J that the opinion of the Attorney General is not reviewable by the Courts.

. . . . If the contention made on behalf of the plaintiffs in this case was correct and if the opinion of the Director of Public Prosecutions necessary for a certificate issued by him pursuant to s.46 (2) of the Act of 1939 were reviewable by a court, then upon a *prima facie* case being established in pleadings by any person returned for trial pursuant to such a certificate that some of the matters of which the section demands should be the opinion of the Director of Public Prosecutions were not true, or that the opinion was one which was based on false information or an erroneous inference from facts established or made known to the Director of Public Prosecutions, it would be necessary for the Director in order to uphold the certificate he issued and for the Special Criminal Court to have jurisdiction over the case which on his certificate has been sent forward for trial by it to reveal in open court in litigation at the instance of the accused person himself all the information, knowledge and facts upon which he formed his opinion. This would obviously, as a practical matter, entirely make impossible the operation of Part V of the Act of 1939 and for the trial of any non-scheduled offence by the Special Criminal Court whilst it is established and in existence. The revealing of such information in open court under conditions under which persons are seeking to overthrow the established organs of the State would be a security impossibility and to interpret s.46, sub-s 2 of the Act of 1939 so as to make that necessary would be to vitiate the entire of the sub-section. (at p. 387–9)

The President decided for the foregoing reasons that the opinion of the DPP given in a certificate issued by him pursuant to the provisions of s.46(2) of the Act of 1939 is not reviewable by the Courts.

I respectfully concur with the reasoning of the president and the conclusions which he arrived at in *Savage and McOwen's* case that the Court has no power to review an opinion expressed by the Director in a certificate issued by him under s.46(2) of the Act of 1939. It seems to me that his function in deciding whether or not to prosecute a particular person for allegedly having committed a criminal offence is no different in principle to that performed by him in expressing an opinion in a certificate issued under s.46 *supra* on the adequacy of the ordinary courts to try a particular accused. Both functions are executive in nature and I am satisfied that where he decides in any individual case either to prosecute or not to prosecute as the case may be, his decision is not reviewable by the courts. If it were otherwise and if, as submitted on behalf of the prosecutor, the DPP is obliged in every case to put in train the issuing of a warrant for the arrest of any person who is suspected of having committed a criminal offence in this State where information is put before him, which appears to be reliable, and which indicates that the suspect is guilty of the crime in question, then the result would be that the DPP's right and duty to decide such matters is substantially impaired and he would cease to be independent in the performance of his functions as specifically provided in the statute which created his office.

Furthermore, in particular circumstances the DPP might find himself being used as a vehicle to enable an accused person to avoid conviction for serious crime in either jurisdiction in Ireland even though the offence in

question is common to both. The following example illustrates what I have in mind. The laws of evidence relating to admissibility of confessions of having committed crime made by arrested persons while in police custody differ substantially in the respective Irish jurisdictions. Confessions made by an accused person while in police custody in Northern Ireland may be *prima facie* admissible under the law of that jurisdiction, but may be inadmissible in Irish Law. Accordingly it does not follow that because there appears to be sufficient evidence to justify bringing an accused to trial in Northern Ireland that the same evidence is sufficient to warrant a prosecution here. In every case, therefore, the DPP is obliged to make an independent assessment as to whether a particular person should be prosecuted in this jurisdiction or not. He has no obligation to state his reasons for any such decision and, indeed, it would appear to be contrary to public policy that he should be compelled to do so.

Finally, for the reasons already stated, I am satisfied that the constitutional argument advanced on behalf of the prosecutor is not well founded. He has no right to trial in this jurisdiction for corresponding offences in Irish law. In the premises, the extent of his right is a possible option to be tried here rather than in Northern Ireland which is exercisable only if the DPP had caused a warrant to be issued for his prosecution in this jurisdiction for corresponding offences in Irish law. The DPP has decided not to proceed against the prosecutor and, therefore, the exercise of an option by him to be tried here does not arise. The prosecutor like all citizens of Ireland, has a constitutional right if brought to trial in this jurisdiction to be tried in accordance with law and to the benefit of fair trial procedures. This does not include a right to compel the DPP to bring him to trial in this State or to cause his arrest here on any particular charge. I am satisfied that it would be contrary to public policy to intrepret the constitutional rights of an individual as including any such provision.

Accordingly, I am satisfied that cause has been shown by the respondents and, therefore, the orders made by Egan J on 6 February 1986 are discharged.

SUPREME COURT

FINLAY CJ delivered his judgment on 31 July 1986 saying: This is an appeal by the prosecutor against the order of the High Court made by Barr J on 2 may 1986, discharging conditional orders of *certiorari* and *mandamus* dated 6 February 1986, against the first and second-named defendants and allowing the cause shown against them.

The prosecutor is a citizen of Ireland, ordinarily resident in Co. Monaghan and is in custody in Northern Ireland awaiting trial by the Crown Court in Belfast on six charges in relation to acts which are alleged to have occurred between September and October 1982, all of which said acts are alleged to have occurred in this State. The jurisdiction of the Crown Court to try the accused on these charges arises pursuant to the Criminal Law Act

1975, a statute of the United Kingdom Parliament, which was reciprocal to the Criminal Law (Jurisdiction) Act 1976, being an Act of the Oireachtas. The two reciprocating statutes were passed in accordance with recommendations made by the Law Enforcement Commission appointed jointly by the Irish and British Governments pursuant to what is known as the 'Sunningdale Agreement'.

The prosecutor was arrested in Northern Ireland in February 1985 and it is alleged that upon being interrogated with regard to the offences with which he is now charged, he made a series of statements admitting his participation in them.

The offences consist of what was eventually a frustrated attempt by a number of persons to detonate an improvised bomb under a roadway through which it was anticipated that an RUC vehicle containing members of the RUC would be passing. All the witnesses in the case are resident in Northern Ireland and investigations, in the case, such as forensic investigations, have all been carried out in Northern Ireland.

The prosecutor was returned for trial by order of the Petty Sessions Court in Cookstown, made on 15 November 1985 and was apparently due for trial at the Crown Court on 28 January 1986.

On 24 January 1986 the solicitor on behalf of the prosecutor handed a letter enclosing a copy of the depositions and book of evidence to the first-named respondent who is the superintendent in charge of the Monaghan district. On receipt of that letter this respondent apparently telephoned the solicitor for the prosecutor stating that he was consulting the DPP and had forwarded the documentation to him.

The purpose of this application to the first-named respondent was to obtain from him a decision that he would lay an information on oath before the District Court and seek a warrant for the arrest of the prosecutor on charges under the law of this State corresponding to the charges which have been preferred against him in Northern Ireland.

The purpose of this operation was to bring into effect Article 2 of the Third Schedule to the Criminal Law Act of 1975 which provides that:

> if a person is accused of an extra-territorial offence and a judge of the High Court or the court of trial is satisfied that a warrant has been duly issued in the Republic of Ireland on an information laid by a member of the police force (Garda Siochana) in the Republic of Ireland for his arrest for the corresponding offence in respect of the same act or omission, the judge or court shall if the accused so request, issue an order

which had the effect of providing for the delivery of the accused at a convenient point of departure into the custody of the Garda Siochana.

It would appear that on the 28 January an application was made to the Crown Court in Belfast indicating that the prosecutor would apply for an order under Article 2 of the Third Schedule of the Act of 1975 if and when a warrant had issued and asking that his trial in Belfast be adjourned to permit the prosecutor to seek the issuing of a warrant in this State.

On 29 January a further letter was written to the first-named

respondent to point out the urgency of the matter, and on the following day, 30 January, a letter was written to the DPP, stated to be on the advice of counsel on behalf of the prosecutor and asking him 'as a matter of urgency to take whatever steps are necessary to have a warrant or warrants issued for our client's arrest in your jurisdiction so that our client may be tried in your jurisdiction'. A similar letter was written on the same date to the Attorney General.

By letter dated 4 February 1986, the DPP, referring to the letter of 30 January, stated:

> That following a consideration of the documents forwarded by you the Director has decided that it would be inappropriate to institute proceedings within this jurisdiction against Gabriel McCormack.

On the evidence before the High Court there does not appear to have been any eventual reply from the first-named respondent to the application made directly to him to lay an information and to apply for the issue of a warrant and there does not appear to have been any reply on behalf of the third-named respondent.

These proceedings were immediately instituted and as has been indicated, the conditional order was obtained in the High Court on 6 February 1986.

The submissions made on behalf of the prosecutor / appellant may thus be summarised:

1. Notwithstanding the correspondence with the DPP entered into on behalf of the prosecutor, it is now submitted that the DPP had no function of any description with regard to the laying of an information by the first-named respondent as a member of the Garda Siochana and the application by him for a warrant, and that any interference by him in that process, whether by way of advice or direction, was improper and nullified the decision of the superintendent.

2. It was asserted that on the evidence it must be concluded that the superintendent failed to exercise any discretion himself with regard to this request made to him but simply obeyed the orders of the DPP which he was not entitled to do.

3. It was submitted that the only ground on which the first-named respondent, the superintendent, could have refused or failed to lay an information and apply for a warrant was the insufficiency of evidence and that having regard to the book of evidence and other documentation supplied to him that that was a conclusion he could not reasonably have reached.

4. It was submitted that the same considerations applied to the DPP and that he was not entitled to reach a decision to refuse to prosecute within this jurisdiction except on the basis of a want of credible evidence.

5. It was submitted that the combined effect of the decisions apparently made by the first and second-named respondents was to deprive the

prosecutor of what was described as his constitutional right of access to the courts within this jurisdiction and a right, which it was said was also conferred on him by the Constitution, to have a trial in this jurisdiction of the charges made aginst him so as to clear his good name and obtain a fair trial.

With regard to these submissions I have come to the following conclusions:

In general, a member of the Garda Siochana who becomes aware of information leading to a suspicion that a serious crime has been committed by some individual should proceed to arrest that individual where it is permissible in law without a warrant, and where a warrant is required, laying an information on oath before the District Court and seeking the issue of a warrant or otherwise initiating a prosecution against him. He should do so without the necessity in every case to consult the DPP. It is open to him, however, in any case where he is anxious to obtain guidance to consult the DPP. In the instant case, having regard to the provisions of the Act of 1975 which I have quoted, it is clear that the consequence of laying an information on oath as was requested by the prosecutor, and obtaining a warrant from the District Court, would be to have the prosecutor removed from the jurisdiction of the courts of Northern Ireland and brought before a court in the State. If at that stage the DPP decided not to proceed in what are clearly major offences the consequence would be that the prosecutor could not be tried in Northern Ireland or the State in respect of these alleged offences.

In those circumstances, it seems to me to have been perfectly reasonable and proper for the first-named respondent, the superintendent, to consult with the DPP, and in particular, to ascertain from the DPP whether in the event of a warrant being executed it was his (the DPP's) intention to proceed with a prosecution against this prosecutor within this State.

I do not accept the submission that a member of the Gards Siochana who obtains information leading to a suspicion that a person has been guilty of committing a serious offence must in every case proceed to arrest or seek a warrant to arrest the suspect or otherwise institute a prosecution.

Neither do I accept the contention made on behalf of the respondent that the decision of a member of the Garda Siochana not to proceed to arrest or initiate a prosecution can never be reviewable.

I am, however, satisfied that in the instant case, at least, one of the matters which a member of the Garda Siochana would be entitled to seek information on before proceeding to apply for a warrant would be as to whether the issue of the warrant and the arresting of the suspect would lead to his trial. It does not appear to me that the evidence which was before the High Court and which solely consisted of the affidavit of the prosecutor's solicitor, leads to the conclusion that the first-named respondent abdicated his obligation to exercise a discretion concerning the application for a warrant, but I am satisfied that it goes so far only as indicating that before deciding not to proceed he consulted with the DPP.

In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court.

In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based.

I have come to these conclusions notwithstanding the assertion on behalf of the appellant of constitutional rights of access to the court and what is described as a right to select the jurisdiction in which he will be tried, having been charged with an extra-territorial offence.

With regard to the constitutional rights, I am satisfied that the right of access to the courts, stated in its broadest fashion, is a right to initiate litigation in the courts. There is not, in my view, any right necessary for the protection of any constitutional right to force another person to sue you, whether in the civil law or to prosecute you in the criminal law in the courts.

The claim to select the jurisdiction in respect of an extra-territorial offence is subject to to these considerations. Within the law of this State, the offence alleged against the prosecutor is not an extra-territorial offence. It is an offence which is alleged to have occurred within the jurisdiction of this State. It is only in and according to the law of Northern Ireland that this is an extra-territorial offence and if the prosecutor has any rights concerning it, they are rights entirely arising from the provisions of the Criminal Law Act 1975. I have no doubt that having regard to the terms of Article 2 of the Third Schedule of that Act which has already been quoted that a condition precedent to the exercise by a person charged in a court in Northern Ireland of a right to trial within this State is the existence of a warrant issued by the appropriate authority in this State for the arrest of that person to face corresponding charges. Unless and until that comes into existence, the prosecutor can not be said to have a right to select his jurisdiction. The possibility of that right arising from the issue of a warrant does not alter the view which I have reached concerning the duties

of the Garda Siochana and of the DPP respectively, concerning the issue of a warrant.

I am, therefore, satisfied that Barr J was correct in the view which he reached in deciding to discharge the conditional orders and that this appeal must be dismissed and the order of the High Court affirmed.

WALSH J (Henchy, Griffin and Hederman JJ agreeing): I agree that this appeal must be dismissed. The orders sought in this case were an order of *certiorari* directed to the Director of Public Prosecutions DPP and an order of *mandamus* directed to Chief Superintendent Curran of the Garda Siochana. I concur in the opinion of the Chief Justice that the actions of the DPP are not outside the scope of review by the courts. If he oversteps or attempts to overstep his function he can, if necessary, be restrained by injunction but I do not think any step he takes or any action or omission which is *ultra vires* can be of the nature of orders which attract *certiorari*. A failure to perform his statutory duties could however be the subject of *mandamus*.

In the present case it is sought to quash a direction he is alleged to have given to the first-defendant not to swear an information and procure a warrant based on such information for the apprehension of the plaintiff in respect of certain offences alleged to have been committed in Co. Monaghan and which are currently the subject of criminal proceedings in Northern Ireland pursuant to the United Kingdom statute referred to in the judgment of the Chief Justice. As was clearly stated in the decision of this Court in *The State (Collins) v Ruane* [1985] ILRM 349 all members of the Garda Siochana in the exercise of their duties are completely independent of the DPP as he is completely independent of them. In the present case there is no evidence that he actually directed the first-named defendant not to take the aforementioned steps to secure the apprehension of the plaintiff. But even if there was such evidence *certiorari* would not lie as any such direction would be devoid of legal effect; even on the face of it.

The enforcement of the law of this State and the prosecution and punishment of the perpetrators of criminal acts within this jurisdiction must be given precedence over the actual or constructive surrender of such persons to another jurisdiction for the same or any other crime and it is the duty of the appropriate prosecuting authority to act accordingly.

There is evidence that the DPP thought that it would be inappropriate to institute proceedings within this jurisdiction against the plaintiff as he so stated in a letter to the plaintiff's solicitor. It is a fair inference that he said at least the same to the first-named defendant who had sought his advice on the matter. As the defendants have chosen not to offer any evidence in this case the court does not know what are the reasons which warranted the DPP's conclusion or in what respects it would be inappropriate to institute the proceedings. It may well have been that the apparently ample evidence gathered by the police in Northern Ireland would not for various reasons sustain a prosecution in this jurisdiction. Be that as it may there is nothing

before this Court from which it could be reasonably inferred that the opinion was either perverse or inspired by improper motives. In any event the first-named defendant was not bound by it but he could reasonably assume that the DPP was intimating to him that if he went ahead in procuring a warrant the DPP would not put down an indictment so the exercise, if undertaken, would not be one undertaken with the intention and belief that the plaintiff would be put on his trial in this jurisdiction.

It is of course the common law duty of a policeman to bring criminals to justice and a refusal by a policeman on notice not to pursue a criminal is a common law misdemeanour. The first-named defendant was most probably not unfamiliar with the case in as much as the plaintiff, according to the evidence obtained by the Northern Ireland police, had been arrested near the scene of the crime by the Garda Siochana shortly after it took place and was apparently detained for 48 hours, presumably under the Offences Against the State Act, 1939, and then released after Garda investigations. However the first-named defendant could not reasonably be expected to undertake proceedings which he might have had good reason to believe would be abortive.

There is no evidence in the present case from which it could reasonably be inferred that either the DPP or Chief Superintendent Curran had abdicated their functions or had been improperly motivated.

Solitors for the prosecutor: *Garret Sheehan & Co*
Solicitors for the respondent: *Chief State Solicitor*

Noreen Mackey
Barrister

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2935. Arrest, Citation, and Disposition Alternatives
Arrest

R.C. § 2935.09

2935.09 Accusation by affidavit to cause arrest or prosecution

Currentness

(A) As used in this section, "reviewing official" means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate.

(B) In all cases not provided by sections 2935.02 to 2935.08 of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer or a private citizen having knowledge of the facts shall comply with this section.

(C) A peace officer who seeks to cause an arrest or prosecution under this section may file with a reviewing official or the clerk of a court of record an affidavit charging the offense committed.

(D) A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk's office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official's normal business hours resume.

CREDIT(S)
(2006 H 214, eff. 6-30-06; 128 v 97, eff. 1-1-60)

Notes of Decisions (42)

R.C. § 2935.09, OH ST § 2935.09
Current through 2015 Files 1 to 7 of the 131st GA (2015-2016).

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Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2935. Arrest, Citation, and Disposition Alternatives
Arrest

R.C. § 2935.10

2935.10 Procedure upon filing of affidavit or complaint; withdrawal of unexecuted warrants

Currentness

(A) Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk, or magistrate, unless he has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit, and directed to a peace officer; otherwise he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant.

(B) If the offense charged is a misdemeanor or violation of a municipal ordinance, such judge, clerk, or magistrate may:

(1) Issue a warrant for the arrest of such person, directed to any officer named in section 2935.03 of the Revised Code but in cases of ordinance violation only to a police officer or marshal or deputy marshal of the municipal corporation;

(2) Issue summons, to be served by a peace officer, bailiff, or court constable, commanding the person against whom the affidavit or complaint was filed to appear forthwith, or at a fixed time in the future, before such court or magistrate. Such summons shall be served in the same manner as in civil cases.

(C) If the affidavit is filed by, or the complaint is filed pursuant to an affidavit executed by, a peace officer who has, at his discretion, at the time of commission of the alleged offense, notified the person to appear before the court or magistrate at a specific time set by such officer, no process need be issued unless the defendant fails to appear at the scheduled time.

(D) Any person charged with a misdemeanor or violation of a municipal ordinance may give bail as provided in sections 2937.22 to 2937.46 of the Revised Code, for his appearance, regardless of whether a warrant, summons, or notice to appear has been issued.

(E) Any warrant, summons, or any notice issued by the peace officer shall state the substance of the charge against the person arrested or directed to appear.

(F) When the offense charged is a misdemeanor, and the warrant or summons issued pursuant to this section is not served within two years of the date of issue, a judge or magistrate may order such warrant or summons withdrawn and the case closed, when it does not appear that the ends of justice require keeping the case open.

CREDIT(S)

(1972 H 511, eff. 3-23-73; 129 v 582; 128 v 97)

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LEGISLATIVE SERVICE COMMISSION

1973:

This section permits a misdemeanor warrant to be withdrawn from the files and the case closed, if the warrant is not served within two years from the date it is issued. Withdrawal of "stale" warrants is not mandatory, and a case may be kept open if the interests of justice require it.

Under former law, a warrant could not be withdrawn no matter how old, and once a warrant was issued a case theoretically remained open indefinitely.

Notes of Decisions (26)

R.C. § 2935.10, OH ST § 2935.10
Current through 2015 Files 1 to 7 of the 131st GA (2015-2016).

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550 Pa. 580
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant,
v.
Michael Reuben BROWN, Appellee.

Submitted March 3, 1997.
Decided Feb. 17, 1998.

Commonwealth appealed from order of the Court of Common Pleas, Warren County, Criminal Division, No. 6 of 1990, Robert L. Wolfe, J., requiring prosecution of private criminal complaint. The Superior Court, No. 330 Pittsburgh 1994, 447 Pa.Super. 454, 669 A.2d 984, affirmed. Commonwealth appealed. The Supreme Court, No. 39 W.D. Appeal Docket 1996, held that Attorney General acted in bad faith in disapproving private criminal complaint.

Affirmed by an evenly divided court.

Nigro J., filed opinion in support of affirmance in which Flaherty, C.J., joined and Zappala, J., concurred in the result.

Cappy, J., filed opinion in support of reversal in which Castille and Newman, JJ., joined.

West Headnotes (5)

[1] **Criminal Law**
Discretion of Lower Court

There is no separate and distinct "gross" abuse of discretion standard of review. (Per evenly divided court).

3 Cases that cite this headnote

[2] **District and Prosecuting Attorneys**
Charging discretion

District attorney is permitted to exercise sound discretion to refrain from proceeding in criminal case whenever he, in good faith, thinks that prosecution would not serve best interests of the state. (Per evenly divided court).

Cases that cite this headnote

[3] **Criminal Law**
Requisites and Sufficiency

Trial court should not interfere with prosecutor's policy-based decision to disapprove a private criminal complaint absent showing of bad faith, fraud, or unconstitutionality. (Per evenly divided court). Rules Crim.Proc., Rule 133 (1993).

7 Cases that cite this headnote

[4] **Criminal Law**
Requisites and Sufficiency

Attorney General acted in bad faith in disapproving private criminal complaint charging defendant with perjury; obviousness of defendant's falsehoods and fact that defendant was already incarcerated on unrelated charges could not serve as policy for disapproval of complaint, and prosecutor failed to demonstrate that disapproval of complaint was within policy of avoiding costly criminal prosecutions. (Per evenly divided court). Rules Crim.Proc., Rule 133 (1993).

4 Cases that cite this headnote

[5] **District and Prosecuting Attorneys**
Discretion in general

Discretionary decisions of prosecutor must be given due deference. (Per evenly divided court).

Cases that cite this headnote

Attorneys and Law Firms

**81 *581 Thomas W. Corbett, Jr., Mary Benefield Seiverling, Harrisburg, Catherine Marshall, Philadelphia, for the Com.

Michael Reuben Brown, Pro Se.

Barry L. Smith, Warren, for Jay William Buckley.

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John J. Kerrigan, Newtown, for Criminal Defense Lawyers, Amicus Curiae.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO and NEWMAN, JJ.

*582 *ORDER*

PER CURIAM.

THE COURT BEING EVENLY DIVIDED, THE ORDER OF THE SUPERIOR COURT IS AFFIRMED.

NIGRO, J., files an Opinion in Support of Affirmance in which FLAHERTY, C.J., joins and ZAPPALA, J., concurs in the result.

CAPPY, J., files an Opinion in Support of Reversal in which CASTILLE and NEWMAN, JJ., join.

SAYLOR, J., did not participate in the consideration or decision of this matter.

**82 *OPINION IN SUPPORT OF AFFIRMANCE*

NIGRO, Justice.

In this case, the Attorney General of the Commonwealth of Pennsylvania appeals from the Superior Court's affirmance of the trial court's order compelling the Attorney General to prosecute a private criminal complaint against Appellee Michael Reuben Brown. At issue is the proper standard of review to be used by a trial court when reviewing a prosecutor's disapproval of a private criminal complaint. For the reasons presented herein, we would affirm.

In September 1989, police in Warren County, Pennsylvania were investigating the kidnapping, rape, and murder of Kathy Wilson, a resident of Chautauqua County, New York.[1] Hoping to further the investigation, the New York and Pennsylvania State Police offered a $26,000 reward for information leading to discovery and conviction of the killer. Appellee Brown, a sixteen-year-old New York resident, contacted the authorities and claimed to have information about the case.

The police arranged for Brown to be transported to Pennsylvania, ostensibly to receive the reward. When he arrived at the State Police barracks in Warren County, however, he *583 was immediately arrested and charged in the Wilson killing. In response, Brown identified Jay William Buckley as the killer. Buckley was then arrested and charged with kidnapping, rape, and murder. In return for his testimony against Buckley, Brown was permitted to plead guilty to the lesser charges of indecent assault, felonious restraint, and hindering apprehension.

At Buckley's trial, Brown testified that he had been with Buckley and had witnessed him kidnap, rape, and kill Ms. Wilson. However, during cross-examination, defense counsel pointed out numerous inconsistencies between Brown's testimony and his previous statements to police. As a result, Brown eventually admitted that he had repeatedly lied both in his statements to police and at Buckley's preliminary hearing. In all, Brown admitted to over 700 instances of falsification or perjury in connection with the abduction and murder of Ms. Wilson. After a four-week trial, Buckley was acquitted on all charges on June 6, 1991.

Brown, however, had pled guilty to lesser charges. After being sentenced to seven to fourteen years in prison, he filed a motion to withdraw his guilty plea and for reconsideration of sentence. A hearing was held, at which Brown stated that he had lied at Buckley's trial and that he was never an eyewitness to any of the crimes in the Wilson case. He claimed that Buckley had simply told him about having committed the crime. Brown stated that he had initially told the police that he was an eyewitness in order to receive the reward money offered. He then claimed that, once arrested, he was coached and prompted by police and the district attorney to repeatedly change his story so that it coincided with the physical evidence in the case. He stated that he altered his accounts in order to satisfy the authorities' desire for an eyewitness and because he was threatened with the withdrawal of his plea agreement.

The trial court granted Brown's motion to withdraw his guilty plea, finding that the police had worked with Brown, prompting him to align his story with the physical evidence *584 and with the time frame of the events.[2] **83 Although the district attorney was authorized to reinstate the original charges against Brown, he chose not to prosecute, and the charges were nolle prossed. The district attorney also chose not to file charges against Brown for his false

statements to police or for his perjury at Buckley's preliminary hearing and trial.

In response, Buckley filed a private criminal complaint with the district attorney's office, pursuant to Pa. R.Crim. P. 133, on November 21, 1991.[3] Buckley alleged that Brown had committed nine offenses: three acts of perjury and one act each of making false reports to law enforcement authorities, tampering with or fabricating physical evidence, hindering apprehension or prosecution, obstructing the administration of law or other governmental function, making unsworn falsifications to authorities, and criminal conspiracy.

***585** In the complaint, Buckley named the district attorney and a State Police officer as Brown's co-conspirators, alleging that they had conspired to present false testimony at Buckley's trial. The district attorney therefore asserted a conflict of interest and asked the Attorney General to review Buckley's complaint.[4] The Attorney General did so and, in July 1993, disapproved the complaint, stating:

> There is no credible proof of a criminal conspiracy and the available evidence tends to negate any conspiratorial accord.
>
> Mr. Brown's conflicting accounts were patently obvious to everyone and rather than prejudicing Mr. Buckley, they aided his defense and substantially contributed to his acquittal.
>
> The trial resulting from [Buckley's] complaint, if [it] were approved would consume substantially more court time and resources.
>
> Furthermore, Mr. Brown has already been incarcerated for two years [as a result of his guilty pleas in the Wilson case].
>
> The decision to decline prosecution in this matter is based upon factors broader than simply the quantum of evidence available and is founded in the policy considerations inherent in this Office as public prosecutor.

R.R. at 129a (Disapproval of Buckley Complaint, dated 7/26/93).

Pursuant to Pa. R.Crim. P. 133(b)(2), Buckley sought approval of the complaint from the trial court. After a hearing, the court determined that the Attorney General had committed a gross abuse of discretion in disapproving the first eight charges in the complaint all of them except the conspiracy charge. The court therefore directed the Attorney General to prosecute Brown on everything but the conspiracy charge.

The Attorney General appealed, and a divided Superior Court panel affirmed. After reargument *en banc*, the Superior ***586** Court again affirmed, finding that the trial court had not erred in concluding that the Attorney General had committed a gross abuse of discretion by disapproving Buckley's complaint. The Attorney General again appealed, and this Court granted allocatur. We must now determine the proper standard of review to be used by the trial court when it reviews a prosecutor's policy-based disapproval ****84** of a private criminal complaint under Pa. R.Crim. P. 133.[5]

[1] Initially, we find that the lower courts in this case erred in applying a gross abuse of discretion standard. This Court has previously indicated that there is no distinction between a gross abuse of discretion standard of review and an abuse of discretion standard. *See Moore v. Moore*, 535 Pa. 18, 28 n. 4, 634 A.2d 163, 168 n. 4 (1993). In other words, the term "gross" is mere surplusage; there is no separate and distinct gross abuse of discretion standard of review. *See id.; see also Coker v. S.M. Flickinger Co., Inc.*, 533 Pa. 441, 447, 625 A.2d 1181, 1184 85 (1993) (defining abuse of discretion). Thus, the lower courts erred in reviewing the Attorney General's actions under a gross abuse of discretion standard.

[2] We note that

> [a] District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case. *See Commonwealth v. Ragone*, 317 Pa. 113, 176 A. 454 (1935); *Commonwealth ex rel. Specter v. Freed*, 424 Pa. 508, 228 A.2d 382 (1967).

Commonwealth v. DiPasquale, 431 Pa. 536, 540 41, 246 A.2d 430, 432 (1968); *accord Commonwealth v. Stipetich*, 539 Pa. 428, 430, 652 A.2d 1294, 1295 (1995); *Commonwealth v. Whitaker*, 467 Pa. 436, 443, 359 A.2d 174, 177 (1976). "Thus, the district attorney is permitted to exercise sound discretion to refrain from proceeding in

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a criminal case whenever he, in good faith, thinks that the prosecution would not serve the ***587** best interests of the state." *Commonwealth v. Malloy*, 304 Pa.Super. 297, 303, 450 A.2d 689, 692 (1982).

In *Commonwealth v. Benz*, 523 Pa. 203, 565 A.2d 764 (1989), a plurality decision, this Court distinguished between a prosecutor's disapproval of a private complaint for reasons of policy and a disapproval based on a legal evaluation of the sufficiency of the complaint. The district attorney in *Benz* had disapproved a private complaint because it failed to make out a prima facie case. The trial court reviewed that decision and affirmed the disapproval. On appeal, the Superior Court reversed after concluding that the evidence did establish a prima facie case. This Court then affirmed and explained that because the district attorney's decision not to prosecute was based on a legal evaluation of the merits of the case, the courts were authorized to determine the propriety of that decision. *See Benz*, 523 Pa. at 208, 565 A.2d at 767. The Opinion Announcing the Judgment of the Court stated: "because the reason [for the disapproval] was the ultimate determination by the district attorney that no crime had been committed, this Court is authorized to review that determination without the special deference afforded a separate branch of government." *Id.* at 208 n. 4, 565 A.2d at 767 n. 4.

Thus, the Court in *Benz* essentially endorsed a *de novo* review by the trial court when a prosecutor's disapproval is based on a legal determination of the sufficiency of the complaint. *See Commonwealth v. Jury*, 431 Pa.Super. 129, 636 A.2d 164 (1993) (citing *Benz* and conducting *de novo* review of prosecutor's disapproval of complaint based on failure to make out prima facie case), *appeal denied*, 537 Pa. 647, 644 A.2d 733 (1994); *Commonwealth v. Metzker*, 442 Pa.Super. 94, 658 A.2d 800 (1995). The *Benz* plurality recognized, however, that when a prosecutor's disapproval is based on policy concerns, a *de novo* review would be improper: "[i]f the district attorney had stated policy reasons to support the decision not to prosecute, this Court would show the deference accorded to such a discretionary use of the executive powers conferred in that officer." *Benz*, 523 Pa. at 208 n. 4, 565 A.2d at 767 n. 4.

[3] ***588** In keeping with that statement, we believe that a trial court should not interfere with a prosecutor's policy-based decision to disapprove a private complaint absent a showing of bad faith, fraud, or unconstitutionality. Application of this standard recognizes that proper deference must be given to the discretionary decisions of a prosecutor ****85** a member of the executive branch while acknowledging the authority and responsibility of the judiciary to ensure justice in the criminal court system.

The term "bad faith" has been defined as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of ... moral obliquity...." Black's Law Dictionary 139 (6th ed.1990). "Obliquity" involves a "deviation from moral rectitude or sound thinking." Merriam Webster's Collegiate Dictionary 802 (10th ed.1996).

[4] On the facts of this case, we do not believe that the decision to disapprove Buckley's complaint exemplifies moral rectitude and sound thinking. The Attorney General declined to prosecute Brown on the first eight charges of the complaint for three reasons: 1) because the inconsistencies in Brown's story were "patently obvious to everyone" and actually worked to Buckley's advantage by "substantially contribut[ing] to his acquittal," 2) because a trial would "consume substantially more court time and resources," and 3) because Brown had already been incarcerated for two years as a result of his guilty pleas in the Wilson case. R.R. at 129a (Disapproval of Buckley Complaint, dated 7/26/93).

Addressing these justifications in reverse order, we note first that the fact that Brown had already been in jail for two years in connection with the Wilson case is essentially irrelevant to the decision whether or not to prosecute him for perjury. If Brown's "time served" is relevant at all, it would be at sentencing, not at the complaint stage. Moreover, as the trial court pointed out, an individual who commits a crime while incarcerated is charged and tried for those crimes like any other defendant. Accordingly, this alleged policy argument ***589** fails to support the Attorney General's disapproval decision.

Next, the Attorney General claimed that the trial that would result from an approval of Buckley's complaint would be too costly in terms of both time and money. While the expenditure of judicial and prosecutorial resources is a valid factor to consider, we simply find no merit to the Attorney General's assertion that in this case a trial of Brown would be too time-consuming and costly. Brown is an admitted perjurer. Indeed, his admissions form part of the notes of testimony of Buckley's trial. Given the overwhelming evidence of Brown's guilt, we agree with both lower courts that the cost of prosecuting him would not be excessive. We also note

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that the Commonwealth routinely expends substantial sums prosecuting less serious offenses.

Third, the Attorney General claimed that Buckley's complaint did not merit approval because Brown's inconsistencies and lies were obvious to all concerned and actually benefitted Buckley by securing his acquittal. We find this argument completely meritless, as did both lower courts. As the Attorney General admits, Brown's falsehoods were apparent to all. The Attorney General cannot claim that those falsehoods and inconsistencies were not likewise apparent *to the prosecution prior* to Buckley's trial.[6] However, despite its knowledge of ***590** the blatant inconsistencies in Brown's story and its consequent awareness of how lacking in credibility Brown actually was, the Warren County District Attorney's office nonetheless proceeded to subject Buckley to a prosecution for kidnapping, ****86** rape, and murder, with Brown as the star witness. To now claim that Brown should not be tried for his admitted perjuries because they helped acquit Buckley is simply unacceptable given the prosecution's prior knowledge of Brown's falsehoods. In short, to the extent that Brown's patently inconsistent statements resulted in the prosecution of Buckley, the argument can be made that Buckley should not have been tried in the first place and therefore should never have been in need of an acquittal.[7] Given this, we cannot accept the Attorney General's argument that Brown's perjury should be excused because it helped Buckley secure that acquittal.

[5] In sum, we are unable to conclude that the Attorney General's decision not to prosecute Brown's flagrant criminal conduct was in furtherance of any valid policy of this Commonwealth. While the discretionary decisions of a prosecutor must be given due deference, it is clear that the Attorney General's position in this case represents a "deviation from moral rectitude [and] sound thinking," and is simply not tenable. Thus, we are compelled to conclude that the Attorney General acted in bad faith in disapproving Buckley's complaint.

Accordingly, although the lower courts in this case erred in applying a gross abuse of discretion standard, we nonetheless should affirm the judgment of the Superior Court.[8]

***591** FLAHERTY, C.J., joins in this opinion.

ZAPPALA, J., concurs in the result.

OPINION IN SUPPORT OF REVERSAL

CAPPY, Justice.

The precise issue presented in this appeal is the articulation of the proper standard of review to be employed by a trial court when called upon to consider the propriety of a prosecutor's policy-based decision to forego a criminal prosecution. As this appeal concerns the role of the judiciary in reviewing the propriety of a decision rendered by an independent and co-equal branch of government, in this case the executive branch, this court must undertake its task with deference towards maintaining the delicate balance of power between the branches. *Beckert v. Warren*, 497 Pa. 137, 144, 439 A.2d 638, 642 (1981).

The opinion in support of affirmance sets forth the correct standard of review as one requiring a showing of fraud, bad faith or unconstitutionality. This standard sufficiently safeguards the concept of separation of powers which is at the heart of this appeal.[1] It is the definition of the terms employed within the standard of review and the application of this standard which necessitates this opinion in support of reversal.[2]

***592** First, the term "bad faith" has been defined in case law as an action undertaken with the purpose of fraud, dishonesty or corruption. *Thunberg v. Strause*, 545 Pa. 607, 682 A.2d 295 (1996). Second, the opinion in support of affirmance, in choosing to rely solely on Black's Law Dictionary for its definition, ****87** has focused on the most obscure part of the definition provided. The entire definition as set forth is certainly of more assistance to the legal community in comprehending the import of this term as it provides:

> **Bad faith.** The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

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Black's Law Dictionary, 6th Edition 1990.

Given the nature of the task we are undertaking in this appeal, that is: enunciating the proper standard of review in situations where one branch of government is reviewing policy-based decisions of another branch of government, it is imperative that we provide the clearest possible statement of that standard for the benefit of all concerned. Thus, following the dictates of our decision in *Thunberg* and the cases cited therein which hold that bad faith is shown where the action under review was undertaken with a dishonest or corrupt purpose provides the simplest, clearest and most workable standard available.[3] By defining the standard as such, consistency in its application is maintained in all areas of the law.

***593** Contrary to the conclusions of the opinion in support of affirmance, the reasons proffered by the Attorney General in declining to pursue a prosecution of Brown fails to reveal any indication of bad faith.[4]

The opinion in support of affirmance focuses on three of the reasons relied upon by the Attorney General in reaching the decision not to prosecute: 1) Brown has already been incarcerated for two years; 2) substantial time and resources of their office would be consumed by a trial on these charges; and 3) the inconsistencies in Brown's testimony were so obvious that it contributed to the acquittal of Buckley.[5] The opinion in support of affirmance rejects each of these proffered policy-based reasons and concludes therefrom that the decision of the Attorney General was rendered in bad faith.

First, in rejecting the Attorney General's consideration of Brown's two year incarceration, the opinion in support of affirmance focuses on the relevancy of this concern to sentencing, thus dismissing it as a valid pre-indictment consideration. The focus here is misplaced. From a judicial perspective pretrial incarceration is a concern only relevant at sentencing. However, here the court is reviewing a policy decision of the executive branch. In that light, the weighing of Brown's time in jail against the potential sentence should the prosecution succeed is certainly of relevant concern in deciding whether to prosecute. In any case, consideration of Brown's two year incarceration certainly does not reveal bad faith.

Second, in rejecting the Attorney General's concern for the expenditure of resources in pursuing this prosecution, the opinion in support of affirmance looks to the fact that the evidence necessary to this prosecution has been amassed substantially within the prior Buckley trial and that less serious offenses are routinely prosecuted at substantial cost. ***594** The dismissal of the allocation of resources by the Attorney General is inappropriate. A decision on the distribution of funds and man hours within the exclusive control of one ****88** branch of government should not lightly, and without good cause, be overborne by another branch of government.

Third, in rejecting the Attorney General's consideration of the fact that the inconsistencies of Brown's testimony actually aided the acquittal of Buckley, the opinion in support of affirmance chastises the prosecution for its original decision to prosecute Buckley using Brown as its star witness. There is an attraction to pointing out the questionable logic of this proposition. However, the conclusion that in proffering this reason in support of the decision not to prosecute the Attorney General displayed bad faith, is of equally questionable logic.

Apparently the opinion in support of affirmance finds bad faith in the initial decision to prosecute Buckley in reliance on Brown's testimony. However, it is not this decision which is under review herein but rather the decision on whether or not to prosecute Brown. Questionable logic is not the equivalent of dishonesty or corruption.

Accordingly, for the reasons stated herein, the decision of the Superior Court should be reversed.[6]

I respectfully dissent.

CASTILLE and NEWMAN, JJ., join this Opinion in Support of Reversal.

Parallel Citations

708 A.2d 81

Footnotes

1 Ms. Wilson disappeared from Chautauqua County on May 18, 1988. Her body was found in a wooded area in Warren County, Pennsylvania on September 24, 1989.

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2 After noting some of the instances of coaching and some of the more glaring inconsistencies in Brown's statements, the trial court stated:

> The Commonwealth's efforts in rehabilitating [Brown] and refreshing his memory over a two-year period are acceptable; however, it is apparent objectively [that] lapse of memory cannot support or account for the change of place of abduction of the victim, the lack of [Brown's] knowledge of [the] color of her clothing and the style thereof; nor account for a misdescription of the ring the victim wore, the different locations where she was taken, and the Commonwealth's full knowledge of multiple contradictions. If there were any doubt, it did not last long with the Buckley jury in exonerating Buckley within six hours of deliberation after a four-week trial.
>
> We are compelled to conclude that the Commonwealth knew [Brown's] assertion he was an eyewitness was without merit.

Trial Ct. Op., dated 10/22/91, at 12 (footnote omitted).

3 Buckley's complaint was filed pursuant to Pa. R.Crim. P. 133, which was amended and renumbered as Rule 106 in 1994. At the time the complaint was filed, Rule 133 stated:

> **(a)** When the affiant is not a law enforcement officer and the offense(s) charged include(s) a misdemeanor or felony which does not involve a clear and present danger to any person or to the community, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove without unreasonable delay.
>
> **(b)** If the attorney for the Commonwealth
>
> * * *
>
> (2) Disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter the affiant may file the complaint with a judge of the Court of Common Pleas for approval or disapproval....

Trial Ct. Op., dated 12/30/93, at 6; *see also* Pa. R.Crim. P. 106.

4 Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732–205(a)(3) (1990).

5 As noted earlier, Rule 133 has been renumbered as Rule 106.

6 In its opinion allowing Brown to withdraw his guilty pleas on the charges in the Wilson case, the trial court found itself "compelled to conclude [that] the Commonwealth knew [Brown's] assertion he was an eyewitness was without merit." Trial Ct. Op., dated 10/22/91, at 9–10. In support of this conclusion, the trial court noted, *inter alia*, the following:

> [A] graphic example that the Commonwealth recognized it had an extreme problem with [Brown's] credibility is the letter of Mr. Massa, District Attorney, on January 15, 1991, to [Brown's] then counsel [discussing the proposed revocation of Brown's plea agreement]:
>
> > I have reached this conclusion reluctantly and only after a thorough and exhaustive review of the file which leads to the inescapable conclusion that Mr. Brown has not told the absolute truth on all matters relavent [sic] to the instant case, as is requisite by our agreement. His ongoing attitude 'we need him but he does not need us', is erroneous and has led him to continuously 'jerk us around' from one contact to the next.

Trial Ct. Op., dated 10/22/91, at 9–10. This letter was drafted and sent almost four months prior to the start of Buckley's trial in May 1991.

7 As Judge Del Sole noted in *Metzker*, "[t]he power to prosecute is enormous, bringing as it does the resources of the Commonwealth to bear on the accused. Thus, we expect those entrusted with this authority to exercise it wisely...." *Metzker*, 442 Pa.Super. at 97, 658 A.2d at 801.

8 "It is well settled that, even though an order is based on erroneous reasoning, this Court may affirm if the result is correct for any reason." *Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania, Dep't of Labor and Industry*, 461 Pa. 68, 83 n. 10, 334 A.2d 636, 643 n. 10, *appeal dismissed*, 423 U.S. 806, 96 S.Ct. 14, 46 L.Ed.2d 26 (1975); *Bell Atlantic Mobile Systems, Inc. v. Borough of Baldwin*, 677 A.2d 363 (Pa.Cmwlth.1996), *appeal denied*, 548 Pa. 620, 693 A.2d 590 (1997).

1 Where the prosecutor's decision is based on a legal conclusion this court may exercise de novo review of the sufficiency of that legal conclusion. *Accord Commonwealth v. Benz*, 523 Pa. 203, 565 A.2d 764 (1989).

2 The opinion in support of affirmance defines bad faith as follows:

> The term "bad faith" has been defined as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of ... moral obliquity...." Black's Law Dictionary 139 (6th ed.1990). "Obliquity involves a deviation from moral rectitude or sound thinking." Merriam–Webster's Collegiate Dictionary 802 (10th ed.1996).

Commonwealth v. Brown, 550 Pa. 580, ——, 708 A.2d 81, 85 (Pa.1998).

3 The term fraudulent was purposely omitted as "fraud" is an element separate and apart from bad faith, providing a distinct reason for overturning a decision by the prosecutor in declining to pursue a prosecution.

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4 The opinion in support of affirmance concedes that neither fraud nor unconstitutionality was shown and it focuses only upon the element of bad faith in reaching its conclusion.

5 The opinion in support of affirmance ignores many of the other policy reasons offered by the Attorney General. For example, the prosecution considered Brown's age at the time of the crime (16), his low I.Q. (87), and his unstable psychological state.

6 A potential problem exists with the order of the opinion in support of affirmance that the Attorney General now go forward with the prosecution of the private criminal complaint as it is at odds with the legislative directive found in 16 P.S. § 1409, which would require the attorney bringing the private criminal complaint to prosecute same. *See Commonwealth v. McHale*, 97 Pa. 397 (1881).

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150 Wis.2d 352
Supreme Court of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
v.
UNNAMED DEFENDANT, Defendant-Appellant.

No. 87-2152-CR. | Argued Jan. 5, 1989. | Decided June 22, 1989.

Unnamed defendant moved to dismiss "John Doe" criminal proceeding against him. The Circuit Court, Waukesha County, John B. Danforth, J., denied motion, and defendant appealed. Certification from Court of Appeals was accepted. The Supreme Court, Heffernan, C.J., held that "John Doe" criminal proceeding provision did not violate constitutional doctrine of separation of powers.

Affirmed.

Heffernan, C.J. and Day, J., concurred and filed opinions.

Steinmetz, J., concurred and filed opinion in which Ceci, J., joined.

West Headnotes (1)

[1] **Constitutional Law**
Judicial Exercise of Statutory Authority as Encroaching on Executive
Criminal Law
Examination of Witnesses and Evidence
"John Doe" criminal proceeding, requiring judge to investigate alleged violations of the law and, upon finding probable cause, to initiate prosecution does not violate constitutional doctrine of separation of powers by impermissibly delegating exclusive powers of executive branch to judiciary; overruling *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis.2d 118, 401 N.W.2d 782. W.S.A. 968.26.

28 Cases that cite this headnote

Attorneys and Law Firms

****696 *354** Dennis P. Coffey, argued, and Coffey, Coffey & Geraghty, on brief (in court of appeals), Milwaukee, for defendant-appellant.

David J. Becker, Asst. Atty. Gen., with ***355** whom on the brief (in court of appeals) was Donald J. Hanaway, Atty. Gen., for plaintiff-respondent.

Opinion

HEFFERNAN, Chief Justice.

This is a permissive appeal of an order of the circuit court, denying a motion to dismiss a criminal complaint issued after a John Doe proceeding under sec. 968.26, Stats. The court of appeals certified the appeal to this court pursuant to sec. (Rule) 809.61. We accepted the certification. We affirm Judge Danforth's order.

This case presents the question of whether sec. 968.26, Stats.,[1] the John Doe criminal ****697** proceeding provision, violates the constitutional doctrine of separation of powers.

This case arose as follows. The complainant alleged that she was sexually assaulted in Waukesha county by the unnamed defendant (hereinafter the defendant) in August of 1985. Both the complainant and the defendant ***356** were well known to members of the local legal community. The Waukesha county sheriff's department investigated the complaint and contacted the county district attorney's office.

The Waukesha county district attorney's office perceived a potential ethical problem in the matter because members of the office knew both the complainant and the defendant. Steven E. Tinker, an assistant district attorney for Dane county, was therefore brought in and appointed acting district attorney for Waukesha county in this matter. Tinker reviewed the investigative file of the sheriff's department. On about September 20, 1985, Tinker decided that he would not commence criminal proceedings against the defendant because he did not believe that he would be able to establish guilt beyond a reasonable doubt.

When Tinker refused to file charges, the complainant petitioned the Waukesha county circuit court pursuant to sec. 968.02(3), Stats.,[2] to initiate criminal proceedings. Because the judges of the Waukesha county circuit court

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personally knew the complainant and defendant, Judge Walter J. Swietlik of Ozaukee county was appointed to consider the complainant's petition. On February 19, 1986, Judge Swietlik heard evidence on the petition and directed Tinker to reevaluate his charging ***357** decision. On March 5, 1986, Tinker advised Judge Swietlik that, even after reconsideration, he would not change his decision not to file charges. Judge Swietlik then ordered the Waukesha county district attorney, or his designee, to file charges against the defendant.

Judge Swietlik's order was stayed pending appeal. This court's decision in *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis.2d 118, 401 N.W.2d 782, issued on March 6, 1987, and declared sec. 968.02(3), Stats., unconstitutional because it violated the separation of powers doctrine by unduly impinging on the powers of the executive branch of the government. On May 6, 1987, the court of appeals issued a writ enjoining Judge Swietlik from proceeding in the matter.

The complainant avoided the effect of the *Connors* mandate by petitioning on March 26, 1987, the Waukesha county circuit court pursuant to 968.26, Stats., for commencement of a John Doe criminal proceeding. Judge Richard T. Becker of Washington county was appointed to consider the petition. Judge Becker held a hearing on the matter on May 6, 1987. Part of the hearing was closed to the public, and to the defendant's attorney. During the closed portion of the hearing, a special prosecutor elicited the complainant's testimony. Three weeks later Judge Becker signed and filed a complaint against the defendant.[3] With the filing of the complaint, the instant action was commenced. Section 968.02(2).

****698** Judge John Danforth of Jefferson county was assigned the matter as judge for Waukesha county. Counsel for the defendant moved to have the action dismissed, arguing that the complaint had been issued pursuant to a statute that unconstitutionally gave executive ***358** powers to the judiciary. A hearing was held on October 16, 1987 on the motion. By order of November 5, 1987, Judge Danforth denied defendant's motion to dismiss, holding that the John Doe procedure for commencement of a criminal complaint was constitutional. The defendant petitioned and was granted permission to appeal Judge Danforth's order denying the motion to dismiss. The court of appeals then certified the matter to this court and we accepted the certification.

The defendant in this case relies heavily on the opinion in *State v. Connors* for the proposition that discretion to charge or not in a criminal case is exclusively an executive power. In *Connors* we held that the judicial charging procedure provided by sec. 968.02(3), Stats., a procedure somewhat similar to the procedure under scrutiny in this case, was an unconstitutional violation of the doctrine of separation of powers.

The state, however, argues that this case arising out of a John Doe proceeding is directly controlled by *State v. Washington*, 83 Wis.2d 808, 266 N.W.2d 597 (1978), which holds that the John Doe statute does not violate the doctrine of separation of powers. The state also argues that *Connors* was incorrectly decided and urges us to overrule that precedent.

We are thus confronted with a clash between the rationale of the *Connors* opinion and a practice that has been found to be constitutionally sound in *Washington*. We conclude that the premise of *Connors*-that initiation of criminal prosecution is an exclusively executive power in Wisconsin-is erroneous. We therefore overrule the precedent established in *Connors* and affirm the order of the circuit court in this case.

The John Doe criminal proceeding has a long history in Wisconsin. The proceeding has been used by ***359** courts, pursuant to statute, since 1839. *State ex rel. Long v. Keyes*, 75 Wis. 288, 292, 44 N.W. 13 (1889); *Washington*, 83 Wis.2d at 819, 266 N.W.2d 597. A John Doe proceeding requires a judge to assume two functions: investigation of alleged violations of the law and, upon a finding of probable cause, initiation of prosecution. *Washington* at 820. The proceedings are presumptively open, although the John Doe judge may in the exercise of discretion close the proceeding to the public for compelling reasons. *State ex rel. Newspapers v. Circuit Court*, 124 Wis.2d 499, 370 N.W.2d 209 (1985). The John Doe judge's discretion guides the extent of the inquiry. Section 968.26, Stats.

The defendant's attack on the constitutionality of sec. 968.26, Stats., the John Doe criminal proceeding provision, asserts that the procedure provided by the statute violates the doctrine of separation of powers. The defendant argues that the *Washington* opinion is limited by its dependence on the theory of judge and prosecutor cooperation. In the *Connors* opinion, defendant argues, this court validated the authority of *Washington* only insofar as it allowed cooperative blending or sharing of powers. *Connors*, 136 Wis.2d at 141, n. 9, 401 N.W.2d 782. The defendant points out that the opinion in *Washington*, 83 Wis.2d at 823, 266 N.W.2d 597, specifically rejects the notion of judicial orchestration of an investigation.

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Defendant contrasts the facts of this case with the justifying rationale in *Washington*. In this case, the John Doe judge orchestrated the prosecution. In this case, the prosecution was not, as in *Washington*, a joint executive and judicial undertaking: the Waukesha district attorney was not even consulted.

We recognize that the *Washington* case was concerned primarily with the investigative role of the judge under the John Doe statute, rather than the charging role. We also recognize, and reaffirm, the statements in *Washington* and ***360** *State ex rel. Kurkierewicz v. Cannon*, 42 Wis.2d 368, 166 N.W.2d 255 (1969), that suggest that the John Doe is normally and preferably carried out in cooperation with the district attorney. As desirable as such cooperation ****699** may be, however, the John Doe statute itself requires no participation by the district attorney. We find that the separation of powers analysis employed in the *Washington* opinion is also applicable in this case.

The doctrine of separation of powers is not express but rather is "embodied in the clauses of the Wisconsin Constitution providing that the legislative power shall be vested in a senate and assembly (art. IV, sec. 1), the executive power in a governor and lieutenant governor (art. V, sec. 1) and the judicial power in the courts (art. VII, sec. 2)." *State v. Washington*, 83 Wis.2d at 816, 266 N.W.2d 597. The separation of powers doctrine is an implicit provision of the Wisconsin Constitution.

Separation of powers prevents one branch of government from exercising the powers granted to other branches. *Davis v. Village of Menasha*, 21 Wis. 497 (1867); *Thoe v. Chicago M. & S.P.R. Co.*, 181 Wis. 456, 195 N.W. 407 (1923). Not all governmental powers, however, are exclusively committed to one branch of government by the Wisconsin Constitution. *Rules of Court Case*, 204 Wis. 501, 514, 236 N.W. 717 (1931). Those powers which are not exclusively committed may be exercised by other branches. *Id.* In areas of shared power, however, one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's essential role and powers. *State v. Holmes*, 106 Wis.2d 31, 44, 315 N.W.2d 703 (1982). The doctrine serves to maintain the balance between the three branches, preserve their independence and integrity, ***361** and to prevent the concentration of unchecked power in the hands of one branch. *Washington* 83 Wis.2d at 826, 266 N.W.2d 597.

This court has three primary sources for interpretation of provisions of the Wisconsin Constitution. *State v. Beno*, 116 Wis.2d 122, 136-37, 341 N.W.2d 668 (1984). We look first to the language of the constitution itself. *Id.* Because the separation of powers doctrine is not expressly a part of the Wisconsin Constitution, however, this inquiry is of little help. We also look to the constitutional debates and the practices of 1848, as well as the earliest interpretation of the provision as manifested in the first law adopted by the legislature. *Id.* These latter two items are highly relevant to the determination of whether initiation of criminal prosecution is an exclusive executive function.

We point out that not every constitutional controversy can be resolved by simple reference to the intent of the framers. The court's job is obviously more complicated than that, and judicial resources more adaptable to changed conditions. As Chief Justice Winslow pointed out, the state constitution was not intended to halt the race in its progress:

> Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.

***362** *Borgnis v. Falk Co.*, 147 Wis. 327, 349-350, 133 N.W. 209 (1911).

The framers' intent, however, has special significance when we are dealing with a matter which was demonstrably contemplated by the framers. We may confidently presume that the framers were familiar with, and earnestly concerned about, the question we address in this case: the proper procedure for initiation of criminal actions. In this circumstance, we find especially persuasive the fact that the same procedure we review today was in use in 1848, and was presumably considered constitutionally sound by the framers themselves. *State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381 (1946).

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Added weight to the constitutional validity of this procedure is given by the long and continuous use of the procedure since 1848, and the uniform acquiescence in its **700 constitutionality. The instant attack on the propriety of judicial initiation of criminal prosecution comes to this court now for the first time after nearly one hundred and fifty years of usage. Persuasive value is accorded to a long-standing, uniform and continuous interpretation of a constitutional provision. *Washington*, 83 Wis.2d at 827, 266 N.W.2d 597.

The state[4] presents a historical record that disputes the statement in *Connors*, 136 Wis.2d at 133, 401 N.W.2d 782, that "we write on a clean slate." By showing evidence that until 1945, initiation of prosecution was an exclusively judicial power, the state's argument casts grave doubt on the *Connors* conclusion that forty years later the charging *363 power was, as a matter of constitutional law, exclusively within the province of the executive.

The argument is that the authority to initiate a criminal proceeding historically has been a judicial function. From the days of the Wisconsin Territory until 1945, the statutes allowed only magistrates to issue criminal complaints. From 1945 to 1969, either a magistrate or a district attorney could charge. Only in 1969 did section 968.02(3) give district attorneys the primary power to charge criminal offenses. The state contends that the district attorney had no power to issue criminal complaints at all until 1945.

The provision for a John Doe criminal proceeding to commence criminal prosecution has been in the Wisconsin statutes since territorial times. Section 2, chapter 369 of the Territorial Statutes of Wisconsin (1839), provided:

> Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine on oath the complainant and any witnesses produced by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offence has been committed, the court or justice shall issue a warrant reciting the substance of the accusation ...

This provision was in force in 1848 when the Wisconsin Constitution was adopted. The first state legislature reenacted the provision in 1849.[5] Although it has been occasionally recodified, the John Doe proceeding has remained, substantially unchanged, in our statutes for over one hundred and fifty years.[6] The salient aspect of *364 the John Doe proceeding for the purpose of this case-judicial initiation of criminal prosecution-has never appeared to be considered to be inconsistent with the doctrine of separation of powers.

On the other hand, the statutory provision allowing a district attorney to commence a criminal prosecution was first adopted in 1945.[7] The power to commence a criminal action has been given by statute to both trial judges and district attorneys in Wisconsin since that date. Before 1945, however, there was no statutory authorization for a district attorney to issue a complaint. Thus, it appears[8] that prior to 1945, the filing of a criminal complaint was not only allowable as a judicial prerogative, **701 it was probably exclusively a judicial responsibility.

Section 968.26, like all other statutes, is presumed constitutional.[9] *365 *Mack v. State*, 93 Wis.2d 287, 297, 286 N.W.2d 563 (1980). The party challenging a statute's constitutionality has the burden to so prove. Thus, in order to prevail in this case, the defendant must prove that the statute is unconstitutional. *Soo Line Railroad Co. v. Department of Transportation*, 101 Wis.2d 64, 76, 303 N.W.2d 626 (1981).

Given the strong evidence of the long-standing acquiescence in the constitutionality of this statute, from before the adoption of the Wisconsin Constitution to today, we conclude that the statute does not impermissibly delegate exclusive powers of the executive branch to the judiciary. The statute does not violate the constitutional doctrine of separation of powers.

We also conclude that there is no basis for upholding the John Doe proceeding in this case and continuing to assert the precedent stated in *Connors*. A *sub silentio* overruling would spring from the mandate in this case. The separation of powers problem that was decisive in *Connors* cannot be distinguished from the separation of powers problem in this case. Nor can we expect that the *Connors* opinion will be easily challenged directly if it is not overruled here. Because of the cumbersome sequence that would be necessary to get the *Connors* statute directly before this court again, in light of our decision in that case, we find it appropriate to specifically overrule *Connors* in this opinion.

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***366** The reasons for which we came to an incorrect conclusion in *Connors* do not justify the decision reached in that opinion. One, however, is worth mention. In *Connors* we relied upon the position of the state that the district attorney is an executive officer and that initiation of prosecution is an executive power, but that the legislature had not gone too far in its allocation of executive charging authority to the judicial branch of government. The court was not presented in *Connors*, as we have been here, with the argument that initiation of prosecution has traditionally been considered a judicial power: the attorney general's office in *Connors* failed to bring any of the relevant constitutional history to our attention. Regardless of our wisdom in accepting the concessions of the attorney general in that case, it is clear that those concessions should not bind other cases. The precedential value of *Connors* is therefore already suspect. See *Wilson v. State*, 82 Wis.2d 657, 663-64, 264 N.W.2d 234 (1978), wherein we pointed out that a prior case that rested upon an inappropriate concession by the attorney general was without precedential significance.

We note that in contrast to sec. 968.26 (the John Doe criminal proceeding), sec. 968.02(3) (which was the subject of *Connors*) provides for more judicial discretion in the charging function. Section 968.02(3) is operative in specific circumstances: in absence of the district attorney or after a refusal of district attorney to initiate prosecution. Moreover, sec. 968.02(3) allows judges greater discretion: the John Doe judge "shall" charge upon finding probable cause, whereas a judge under sec. 968.02(3) "may permit" the filing of a complaint.

Wisconsin constitutional history leads inexorably to the conclusion that the complaint in this case was issued as a result of a valid, time-honored and constitutional procedure.

***367** Section 968.26, Stats., does not violate the doctrine of separation of powers and is constitutional. The order of the circuit court is therefore affirmed. Moreover, having given further consideration to *Unnamed Petitioners v. Connors* in the context ****702** of this case, we overrule the precedent there established.

Order affirmed.

HEFFERNAN, Chief Justice (concurring).

As the author of the majority opinion, I agree with it and join it; but I cannot but feel a sense of unease over the validation of secs. 968.02(3) and 968.26, Stats., when viewed from a public policy aspect. I therefore write additionally in concurrence. The criminal law reform undertaken by the Criminal Rules Committee of the Judicial Council had as one of its purposes the elimination of the last vestiges of the pernicious practice of private prosecutions by persons who owe no allegiance to society as a whole. For a general public policy statement, see *State v. Scherr*, 9 Wis.2d 418, 426, 101 N.W.2d 77 (1960) ("It is against public policy and the impartial administration of criminal law for a court to allow attorneys for private persons to appear as prosecutors.") and *State v. Peterson*, 195 Wis. 351, 356, 218 N.W. 367 (1928) ("Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.").

Both of the statutes validated herein make it possible for persons to trigger the prosecutorial powers of the state *in any kind of criminal action* where "probable cause" can be established. No consistent prosecutorial policy in respect to the initiation of charges can be maintained under these circumstances. What will be charged ***368** can lie within the whim of any complainant. The *de facto* standard for prosecuting attorneys is, in the experience of this writer, but for the exceptional case, not to invoke the awesome power of the state unless the crime in all likelihood can be proved beyond a reasonable doubt. Our imprimatur upon these statutes may well give a gloss that runs counter to the legislative intent of Wisconsin's criminal law reforms. The writer is not unmindful of the predicament of a victim of a crime who is afforded no relief by a recalcitrant prosecutor. It would appear, however, that this situation might better be alleviated by legislative approval of a limited judicial review of a prosecutor's declination to prosecute. See, *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis.2d 118, 134, 142, 401 N.W.2d 782 (1987).

While I am uncomfortable with the validation of what may be the unwise policy of secs. 968.02(3) and 968.26, Stats., as the writer of the majority opinion I nevertheless have concluded that the statute at issue in *Connors* has not been shown to be unconstitutional. Because the writer of the majority opinion in this case was also the author of *Connors*, it is of some comfort to know that judicial recantation is not without precedent. Judge Ruggero J. Aldisert, formerly Chief Judge of the Court of Appeals for the Third Circuit, has provided me with the

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following utterances that have accompanied judicial second thoughts:

Justice Potter Stewart, concurring in *Boys Markets v. Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), wrote:

> In these circumstances the temptation is strong to embark upon a lengthy personal *apologia*. ... An aphorism of Mr. Justice Frankfurter provides me refuge: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'

***369** And Justice Jackson, concurring in *McGrath v. Kristensen*, 340 U.S. 162, 178, 71 S.Ct. 224, 233, 95 L.Ed. 173 (1950), relied upon an English Judge, Lord Westbury, "who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: 'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.' "

Perhaps most apropos to the present situation and also quoted by Justice Jackson is the statement of Baron Bramwell in *Andrews v. Styrap*, 26 L.T.R. (N.S.) 704, 706 (1872), "The matter does not appear to me now as it appears to have appeared to me then."

I invoke all of the above utterances on the occasion of the overruling of a decision ****703** so recently written by the author of this opinion, an opinion that I believe was in the public interest and in accordance with rational prosecutorial policy, but which has not withstood subsequent scrutiny on a constitutional basis.

DAY, Justice (concurring).
I write this concurrence to the majority opinion in response to the concurrence written by its author. That concurrence is critical of both John Doe statutes secs. 968.26 and 968.02(3), Stats., which provide for judicial review where a district attorney refuses to prosecute.

The concurrence refers to the "awesome power of the state" in criminal matters. To the ever increasing army of crime victims, "awesome impotence" of government would appear to be a more accurate description. President Bush has recently requested congress for a multi-billion dollar program to build more federal prisons, increase law enforcement personnel and "win back the streets" of our large cities where armed thugs terrorize the citizenry. We now have Washington, D.C. winning the title of "Murder Capitol of the World."

***370** An article by Richard B. Abell, Assistant United States Attorney General, in charge of the Office of Justice Programs, appearing in the March 21, 1989 issue of the *Wall Street Journal* shows the fact is that the apprehension and imprisonment of criminals for substantial periods of time "works." That is it cuts down the amount of crime and saves society billions of dollars. Building prisons and utilizing them is a good investment. The article points out that a Rand Corporation study shows that in 1983 there were 42.5 million victimizations. In a country of 250 million that is a shocking statistic. "We find a typical offender in the survey is responsible for $430,000 in crime costs. The costs to imprison this offender for one year is $25,000. Thus a year in prison costs $405,000 less than a year of criminal activity. A year of crime is seventeen times more expensive for society than a year in prison." A chart accompanying the Abell article shows a direct correlation between incarceration rates and the crime rate. In 1960 the chance that an offender (in Part I Crimes, i.e., Homicide, forceable rape, robbery, aggravated assault, burglary, larceny, theft, motor vehicle theft) would receive a prison sentence was 6.2 percent per 100 crimes. The number of Part I Crimes was less that 2 percent per 100 population. In 1974 the chances for imprisonment fell to 2.1 percent and the number of crimes rose to 4.8 percent per 100 population.

What all the statistics on monetary crime costs do not reflect is the "misery index," the individual physical and emotional suffering of those crime victims and their families who have been murdered, beaten, robbed and "ripped off" by the criminal element in our midst.

In this period when we see interest in "victim's rights" coming to the fore, certainly having one's tormentor brought to justice should be near the top of any ***371** victim's rights program, second only to the right not to be a victim in the first place.

This is not, as the author of the majority opinion in his concurrence sees it, as somehow a tendency in the direction of "the pernicious practice of private prosecutions" nor does it "allow attorneys for private persons to appear as prosecutors" (Chief Justice Heffernan concurring, p. 702). Neither statute allows private counsel to act as prosecutor. Prosecution can only be done by the elected district attorney or special prosecutors appointed by the courts. Nowhere do our statutes permit private attorneys representing victims to prosecute and try criminal defendants.

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The John Doe provisions have been frequently used by district attorneys to ferret out the perpetrators of crime where ordinary investigative procedures fail. I believe it would be a mistake to alter a procedure that has served us well since before statehood. Section 968.02(3), Stats., is a clear expression of legislative intent that victim's have recourse to the courts when a district attorney refuses to act. [1]

****704 *372** Crime victims should have recourse to the judicial branch when the executive branch fails to respond. This seems to me to be in keeping with constitutional rights. The first amendment to the United States Constitution guarantees the right "to petition the government for a redress of grievances." The Wisconsin Constitution also provides in art. I, sec. 4: "The right of the people peaceably to assemble, to consult for the common good and to petition the government, or any department thereof, shall never be abridged." The statutory provisions here under consideration are a legislative codification of the right to petition the judicial branch for a "redress of grievances" when that is appropriate.

I would retain these statutes.

STEINMETZ, Justice (concurring).

I disagree with the Chief Justice's statement in his concurring opinion that secs. 968.02(3) and 968.26, Stats., may be against ***373** good public policy from a historical perspective. These statutes are a part of the public policy of this state and have withstood the test of time, and as Justice Day describes in his concurring opinion, these statutes promoted victims' rights before that term became popular in political circles.

The fear that, "What will be charged can lie within the whim of any complainant" (Chief Justice Heffernan's concurring op. at 702) is an unfounded one. Section 968.02(3), Stats., requires the circuit judge to find that "there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing" and the judge "may" then issue a complaint. Section 968.26 only requires the issuance of a complaint "[i]f it appears probable from the testimony given that a crime has been committed and who committed it ..." The validation of these statutes does not, as the concurrence suggests, revive "the pernicious practice of private prosecutions by persons who owe no allegiance to society as a whole." (Chief Justice Heffernan's concurring op. at 702.)

The John Doe statute particularly assists the district attorneys as well as victims. The district attorney can ask a judge to conduct a John Doe and thereby (1) force victims to testify under oath; (2) ask for witness immunity to develop the investigation; and (3) have an investigation conducted in secret at the judge's discretion to protect the development of the investigation. These are tools of investigation not within the authority of the district attorney.

I agree entirely with the majority decision.

I am authorized to state that Justice CECI joins this concurring opinion.

Parallel Citations

441 N.W.2d 696

Footnotes

1 Sec. 968.26, Stats., provides:

John Doe proceeding. If a person complains to a judge that he has reason to believe that a crime has been committed within his jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but such counsel shall not be allowed to examine his client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, the record of such proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

2 Section 968.02(3), Stats., provides:

Issuance and filing of complaints.

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. . . . .

(3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

3 The record, however, was kept secret pending appeal.

4 The state's thesis has also been presented in a recent law review article by Attorney Samuel Becker, *Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 Marq.L.Rev. 749 (1988).

5 Wis.Rev.Stat., ch. 145, sec. 2 (1849).

6 See Wis.Stat. sec. 4776 (1878); Wis.Stat. sec. 361.02 (1925); Wis.Stat. sec. 354.025 (1949); Wis.Stat. sec. 954.025 (1967).

7 Chapter 558, Laws of 1945, creating sec. 361.02(2), Stats.

8 In *State ex rel. Pflanz v. County Court*, 36 Wis.2d 550, 554-555, 153 N.W.2d 559 (1967), the court stated that:

> prior to 1949 ... the practice was for the magistrate to examine the complainant and his witnesses on oath and to reduce the charge to writing in the complaint if he thought there was probable cause.

See also, "Law Enforcement in Wisconsin" Vol. 1, Legislative Council Reports, 1948-1951, which states (at p. 64):

> An additional, discretionary duty was added to the office by the 1945 legislature, which authorized district attorneys to swear complainants and issue warrants returnable before some magistrate of the county. Secs. 360.02(2), 361.02(2). But they are not required to do so.

9 Justice Scalia, in a portion of his dissenting opinion that is not disputed by the majority in *Morrison v. Olson*, 487 U.S. 654, ---, 108 S.Ct. 2597, 2622, 101 L.Ed.2d 569 (1988), points out that perhaps the presumption of constitutionality attaches equally to the conduct of any party in separation of powers cases. Not only the legislature, but all branches of government are presumed to act constitutionally. There is some doubt whether the presumption is meaningful when dealing with questions of law. See, *Brown v. Multnomah County Dist. Court*, 280 Or. 95, 100, n. 6, 570 P.2d 52, 56, n. 6 (1977) (opinion by Linde, J.).

1 Section 968.02, Stats., was established in 1969 by chapter 255, Laws of 1969. The accompanying comments to the section stated in part:

> Sub. (3) provides a check upon the district attorney who fails to authorize the issuance of a complaint, when one should have been issued, by providing for a judge to authorize its issuance.
>
> Sub. (3) also provides a vehicle for the issuance of complaints when the district attorney is unavailable.
>
> The section is based upon s. 6.01 of the ALI Model Code of Pre-Arraignment Procedure.

Section 6.02(3) of the Model Code (Tent.Draft No. 1, 1966), provided:

> (3) *Filing by Order of a Judicial Officer.* In any case in which a prosecuting attorney refuses to issue a complaint, a judicial officer may permit the filing of a complaint if, after hearing the complainant and the prosecuting attorney, he finds there is reasonable cause to believe that the person named in the complaint has committed the offense charged.

This subjection was included to provide a check upon the prosecutor's decisions not to issue complaints. *Id.* Note on Section 6.02. The judge was "given power to permit the filing of a complaint over the objection of the prosecutor...." *Id.* The Criminal Procedure Code Revision Committee reviewed these provisions. Notes from the committee meetings of November 17 and 18 (year unknown), show that the Model Code was modified by the Committee. Section 968.02(3), Stats., was created by adding the words "or is unavailable" to the text and "after a general discussion, it was decided to delete the last part of (3) making it read only: In any case in which a district attorney refuses or is unavailable to issue a complaint, a judge may permit the filing of a complaint. Drafting Record of Chapter 255, Laws of 1969, Legislative Reference Bureau.

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