

# **THE ROLE AND DUTIES OF A PROSECUTOR – THE LAWYER WHO NEVER “LOSES” A CASE, WHETHER CONVICTION OR ACQUITTAL**

## **Introduction**

1 First, I would like to thank the Attorney-General for inviting me to address you on the role and duties of the Public Prosecutor from the perspective of the Bench.

2 I spent 27 years of my career at the Bar practicing civil litigation. While I can count the number of criminal cases that I had handled with one hand, on reflection, they were some of the most meaningful and rewarding cases in my career. Perhaps my one regret at the Bar is that I could and should have handled more criminal briefs. I suppose I am making up for lost time by hearing criminal cases on the Bench.

3 What can I tell you about your role and duties which you do not already know? I am sure you know them better than I do and if you are left in any doubt, all you need to do is to read the comprehensive and motivational interview of the Attorney-General which appeared in last Saturday's Straits Times. In fact, I was very tempted to simply rely on the interview notes for my talk today.

4 Since joining the Bench, I have presided over a number of criminal cases and appeals. Not having practiced criminal law in any meaningful way, hearing criminal cases with the knowledge of the consequences of my decision has, at times, been a daunting experience for me. I must confess that it has been a steep learning curve for me. However, through this process, I have been ably assisted by a number of

you. In addition, I have also come to recognize, appreciate and most importantly value the heavy and immense responsibility which all of you play in the administration of criminal justice. For this reason, when the Attorney-General extended the invitation to me to speak today, I simply could not decline it.

### **Role of the Public Prosecutor**

5 The Prosecutor plays a pivotal role in the administration of criminal justice. The Attorney-General is constitutionally conferred the discretion to charge any person for any offence committed. It has been said that the Prosecution possess the greatest part of discretionary power in the judicial system. Given that this discretion is only reviewable on limited grounds (*viz*, on constitutional grounds or bad faith), needless to say, a Prosecutor's decision to charge a person has great impact on the lives and liberty of those affected. It may involve imprisoning a dangerous member of society to prevent him or her from inflicting further harm on society at large; on the other hand, it may deprive a family of their sole breadwinner, putting financial and emotional strain on the family members. It is therefore trite that this discretion has to be exercised with extreme care and after a deliberate and thorough process.

6 Much has already been said recently about the exercise of prosecutorial discretion by the Minister of Law and the Attorney-General himself. For the purposes of today's talk, I shall confine myself to another equally important, but more visible aspect of a Prosecutor's work, which is that of prosecution ethics before the court.

7 The common perception when one thinks of lawyers involved in litigation is that they can and should advance their client's interests before the courts, at all costs. After all they are duty bound to act in the best interest of the client; this duty is, however, subject to the overriding duty to the "interests of justice, public interest and professional ethics".

8 But who is the client of the Prosecutor in the administration of criminal justice? The answer to that question in itself defines the role of the Prosecutor. It has been said time and again that the Prosecutor does not act as counsel for any particular person or party. His client is neither the Attorney-General nor the Government. His client is also not the victim. Instead, his client is society. The accused, the Court and the community are entitled to expect that in performing his function in presenting the case against an accused person, the Prosecutor will act with fairness and detachment with the sole and unadulterated objective to establish the whole truth in accordance with the law. For this reason, Prosecutors are ascribed the noble title as "Ministers of Justice" because they are strictly speaking not "advocates". The role of the Prosecutor therefore excludes any notion of winning or losing a case. His role is not simply one of crime control. His role is to seek and achieve justice, and not merely to convict. The role is to be discharged with an ingrained sense of dignity and integrity. That is not to say that the Prosecutor should not care about the outcome of the case. Because the decision to charge an accused is taken seriously after a thorough process, the Prosecutor would be expected to pursue the case with vigour and conviction to secure a conviction. If the outcome goes against the Prosecution, any self respecting Prosecutor would feel disappointed because you take professional pride in your work. However, professional pride should never come in

the way of the pursuit of the truth because nobody has the right to sacrifice justice to achieve professional success. Whenever the eventual decision is adverse to the Prosecution, you should at least take some comfort in the fact that the outcome was derived after strict observance of due process, which is the cornerstone of our justice system.

### **Duties of the Public Prosecutor**

9 The scope of the duty is most eloquently summarised by the US Supreme Court in *Berger v United States*, where it was observed that:

[The prosecutor] may prosecute with earnestness and vigor – indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

10 However, it is crucial to recognise that the ethical duty owed by the Prosecution can be distinguished from that owed by private law practitioners in at least three material respects:

- (a) First, life and liberty is at stake in most prosecutions. Some sentences are irremediable and irreversible. The death penalty comes immediately to mind. Any miscarriage of justice would diminish the standing of both the Court and the Prosecution in the eyes of the public. In the words of Yong CJ in his Keynote Address at the 1998 Subordinate Courts Work Plan Seminar, “[the] risks of the innocent being convicted ... must be as low as human fallibility allows”. There is therefore a strong public interest mandating the strict

adherence of the Prosecution's ethical duties before the courts. In short, there is simply no margin for error.

(b) Second, the threshold required to overturn a conviction on appeal is fairly high. Where convictions hinge on the trial judge's assessment of the demeanour, credibility or veracity of witnesses, the appellate court will only interfere if the finding of fact was plainly wrong, unreasonable or against the weight of evidence. Where sentences are concerned, the appellate court will be slow to interfere except where the trial judge had erred factually or in principle, or where the sentence was manifestly excessive or manifestly inadequate. While one may observe that a similar standard applies to civil trials (insofar as findings of fact are concerned), the constraints that the appellate court faces, when coupled with the first point on the consequences of a wrong finding, makes it an even more compelling case for this ethical duty to be strictly adhered to before *all* courts.

(c) The third point is a practical point. Singapore's criminal justice system has been observed by some to be tilted in favour of the Prosecution. Whether that is the case, and the extent to which it is true, is beyond the scope of this talk, and I make no observations in that regard. I am sure some of you present might say from your own experience that this has not been the case with the current Bench. However, what is clear is that positive steps have been taken recently to "level the playing field". For example, the Criminal Procedure Code 2011 introduced a structured disclosure procedure to minimise the risk of defence counsel being caught unaware of statements until the 11<sup>th</sup> hour. This

has been supplemented by case law such as *Mohammed Kadar*. As regards, *Mohammed Kadar*, the Attorney-General has said in his interview that a group of senior prosecutors has been convened to review the case. Since I was a member of the Coram that heard that case, I shall say no more.

11 It is easy to hypothesise the Prosecutor's duties, but what is perhaps more important is to understand the incentives that the Prosecutor has to live up to his ethical duties. For example, in USA, it has been observed that the practice of Prosecutors there has been far from desirable, for the following reasons:

(a) A Prosecutor's conviction rate represents a convenient and observable proxy for assessing performance; it is more difficult to observe whether a Prosecutor has lived up to his ethical duties before the court;

(b) Using conviction rates as a motivational device by internally distributing or listing each Prosecutor's conviction rates *ie* batting averages, giving rise to institutional and psychological pressure to achieve high conviction rates;

(c) The use of conviction rates by Prosecutors to justify their budgets to politicians and to show that they are "tough on crime".

12 I am confident that this form of appraisal, akin to counting the number of kills by a combat pilot to qualify as an "Ace" or the notches on the revolver of a gunslinger, is not the manner in which Prosecutors in the Attorney-General's Chambers are assessed.

13 I can think of another possible factor that may motivate Prosecutors to “win” at all costs. The decision to charge an accused person is made by the Attorney-General’s Chambers. Given that only cases with sufficiently cogent evidence, and which satisfy the public interest threshold, will see the light of day before the courts, there may therefore be some incentive to ensure that all such cases are successfully prosecuted. Indeed, there may be some element of public interest in ensuring a high conviction rate to maintain the standing of the Attorney-General’s Chambers in the eyes of the public. However, a vital distinction must be drawn between winning and acting in the interests of justice. In many cases, where the evidence is strong and unchallenged, the Prosecutor’s motivation to “win” and his or her ethical duty to act in the interests of justice may not be incompatible. But Prosecutors must always be mindful that these interests may diverge at times, in particular, where there has been a change in circumstances arising from fresh evidence or otherwise. Prosecutors ought to remember that their ethical duty to act in the interests of justice must always take precedence over whatever pressure or incentives they may face to “win” by securing a conviction. To quote the Attorney-General, “you win whenever you make a good decision rather than when you get a particular outcome in a case.”

### **Assessment of the Prosecutors**

14 How have our Prosecutors measured up against the ethical standard expected of them? Over the past two years, a not insubstantial portion of my caseload involved hearing criminal trials and appeals. I must say that I have derived substantial assistance from the Prosecution over the past two years, and that they have, by and large, acted fairly in the interests of justice. They are resolute when

justified and concede when just. Let me illustrate this observation with some cases that have come before me:

(a) In *Peter John Worrall v PP*, the District Judge acquitted the accused of drink driving under s 67(1)(b) of the Road Traffic Act (“RTA”). However, the District Judge then amended the charge to one under s 67(1)(a) of the RTA pursuant to s 163 of the old CPC without calling on the accused to plead to the amended charge, even though the ingredients of the original and amended charge were quite different. When I asked the DPP, Mr Edwin San whether what the District Judge did was correct, he candidly conceded that it was plainly wrong.

(b) The duty to act fairly is particularly acute in the case of litigants in person. In at least 2 Magistrate’s Appeals, I was impressed by the Prosecutors who made fair and frank submissions in response to queries from me. In *Goh Teck Meng v PP*, the appellant was convicted of money laundering. He was sentenced to 30 months per charge. However the main protagonist was separately sentenced before another District Judge to 18 months per charge. When I asked the DPP, Mr David Chew of the relative culpability of the appellant to that of the main protagonist, Mr Chew accepted the appellant was less culpable and that the sentence was indeed on the high side.

(c) In *PP v Mohammed Sabri bin Talip*, the Prosecution had appealed against the sentence because it was manifestly lower than a previous



sentence. However, the previous sentence was 8 times higher than an earlier sentence in 2002 without any particular aggravating factor. On that occasion, although I allowed the prosecution's appeal and enhanced the sentence, the DPP, Mr Hay Hung Chun fairly accepted that it was unsafe to use the 2002 sentence as the benchmark for the subsequent convictions.

(d) In *Yu Yonghao Kenny v PP*, the accused appealed against his sentence for theft. Parity of sentencing was again a feature of this appeal. The person who received the stolen property was fined, and there was no appeal by the Prosecution. However, the appellant was sentenced to 4 months' imprisonment. Although I agreed with the Prosecution that the roles of the 2 parties were quite different, the DPP in that occasion, Mr Leong Wing Tuck, very fairly informed the Court that the District Judge ought to have deducted the 9 days which the appellant had spent in remand from the sentence. On the strength of that disclosure, I reduced the sentence accordingly.

15 In these examples, I may have allowed the appeals or disagreed with your submission but my respect and esteem for your candour and sense of fairness were enhanced in that process. I am sure that this is likewise the case in the eyes of defence counsel and the public. I do not believe that anyone left my courtroom on those occasions feeling that the Prosecutors had lost their appeals or that their credibility had been diminished in any way. In my view, it was quite to the contrary. Your exemplary conduct on those occasions certainly had not gone unnoticed.

16 The Prosecution should also exercise compassion. This is the human face of the office. In this regard, in cases for which I have presided, where the accused had requested for a short delay in the commencement of the sentence to sort out personal affairs or to attend to important occasions or public holidays, the Prosecution has always readily agreed. These examples demonstrate the point that the Prosecutors do not display an attitude that come what may, they must succeed at all costs or that they are out to “punish” the offender.

17 I am hopeful that the same can be said of trials occurring before the Subordinate Courts. Prosecutors should abide by only one code of conduct before all courts be it the Subordinate Courts, the High Court or the Court of Appeal. This would be especially pertinent, given the vast majority of prosecutions commence and end at the Subordinate Courts stage. In this regard, I have three suggestions for the Prosecution to consider.

(a) First, given the volume of casework, it is inevitable that the same issues of law will arise in different cases that are handled by different Prosecutors. Where novel or complex issues of law are involved, it is desirable that the Prosecution takes a consistent institutional view on these issues. The doctrine of wilful blindness under the MDA is a good example. It is incumbent on the Prosecution to take a consistent view to ensure that all accused persons are treated fairly and equally, be it before the courts or at the stage when the Prosecution decides whether or not to charge an offender.

(b) Second, where further submissions are called upon by the court, this is usually an indication that the court is troubled by certain issues which the Prosecution or the Defence might not have adequately addressed. In such cases, the Prosecution should bring the court's direction to the attention of senior members of Chambers to analyse the additional issues raised since the decision will not only have an immediate impact on the case in question, but may possibly impact other pending cases before the Subordinate Courts. The Prosecution should take a step back to consider whether the issues raised would have had any impact on its initial decision to prefer a charge against the accused and not focus on winning the case. A case in point would be *Lim Boon Keong v PP* where upon my directions for further submissions, a decision was subsequently made by the Prosecution to concede that the evidence relating to the urine testing in that specific case was inadequate. That concession was critical because it limited the impact of my decision to the case at hand and, at the same time, provided time for the Prosecution to review the evidence for the other pending cases before the Subordinate Courts. To me, this was an extension of the Prosecutor's duty to ensure that the complete evidence on the urine testing regime was brought before the court for proper adjudication.

(c) Third, parity of sentencing is one of the typical issues that regularly feature in the appeals before me. I believe it would be useful for the same Prosecutor to be assigned to handle cases emanating from the same criminal transaction or otherwise related cases to ensure consistency in sentencing. Furthermore it would also be helpful if related cases emanating from the same

transaction are heard before the same District Judge and the Prosecution should request for it whenever possible, subject to the caveat that it is not to prejudice or embarrass the accused person's defence (see s 146 of CPC 2010). Alternatively, the Prosecutor should bring the relevant sentence of the related case and cases bearing similar facts to the attention of the sentencing judge. This should reduce the number of appeals arising from issues relating to parity of sentencing.

### **Concluding Remarks**

18 To conclude, I think the Prosecution has done a commendable job in ensuring that we have a fair and effective criminal justice system. I speak from my own personal experience. However, I think it is apposite that we keep the following words of Lord Bingham in mind:

A time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all, and in retrospect most legal systems operating today will be judged to be defective in respects not yet recognised.

19 Likewise, while Singapore may have achieved significant progress in the reform of our criminal justice system with the introduction of the new disclosure regime *etc*, the evolutionary process must continue. All of us present, whether as Prosecutors or judicial officers, play an important role in ensuring that there is

continuous progress for the better. As I remarked at the recent successful Criminal Law Conference, the Attorney-General's Chambers offer the best talent pool for the future of the Criminal Bar. An effective and efficient criminal justice system requires a strong Criminal Bar. In time to come, I hope that some of you will make the transition to practice at the Criminal Bar. After all, according to the Attorney-General's interview, one of you described your role as "the very first line in the defence of civil liberties". I look forward to your continuing assistance as "Ministers of Justice" and hopefully for some of you, as officers of the court practicing at the Criminal Bar. Until then, always remember that you occupy a unique role in the criminal justice system and that your unique position allows you to truly be described as a lawyer who never really loses a case, whether conviction or acquittal.

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