THE ROLE OF THE PROFESSIONAL PROSECUTOR IN PAPUA NEW GUINEA*

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I. *The Public Prosecutor*

The senior prosecuting officer in Independent Papua New Guinea is the Public Prosecutor. That position (and that of the Public Solicitor) was created by Section 176(1) of the Constitution. By virtue of Section 20 of the organic law on certain constitutional office-holders the then Chief Crown Prosecutor became the Public Prosecutor, and by virtue of section 177 of the *Constitution* the ultimate prosecuting authority of the State was vested in him. His function under the *Constitution* is to control the exercise and performance of the prosecution function (including appeals and the refusal to initiate and the discontinuance of prosecutions) before the Supreme Court and the National Court of Justice, and before other courts as provided by or under Acts of the Parliament; and to bring or decline to bring proceedings under the Leadership Code for misconduct in office.1 The Public Prosecutor is a constitutional office-holder2 and a Law Officer of Papua New Guinea.3 He is ex officio a State Prosecutor under the *Criminal Code Act 1974*.4

In the performance of his constitutional functions, the Public Prosecutor is not subject to direction or control by any person, except that the Head of State, acting on the advice of the National Executive Council, may give him a direction on any matter that might prejudice the security, defence or international relations of Papua New Guinea.5 If such a direction is given, it must be tabled by the

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1. *Constitution,* section 177(1).

2. *Organic Law on certain constitutional office-holders,* s.1.

3. *Constitution,* s.156.

4. See Sch. 1.536(3) *Criminal Code Act* 1974 (No. 78 of 1974) *Statute Law Revision (Independence) (No. 2) Act* 1975.

5. *Constitution,* s.176(3).

Prime Minister at the next sitting of the National Parliament unless, after consultation with the leader of the Opposition, the Prime Minister considers that the tabling of the direction is likely to prejudice the security, defence or international relations of Papua New Guinea.6 The right to appeal against an inadequate sentence imposed by the National Court is now vested in the Public Prosecutor,7 as is the right to appeal to the Supreme Court against the quashing of a charge, whether upon indictment or information.8 The right to refer to the Supreme Court a question of law arising in a case in the National Court and which has resulted in an acquittal is now vested by the *Supreme Court Act* 1975 in the Principal Legal Adviser to the National Executive - who may be either the Minister for Justice (if he is a qualified lawyer) or the Secretary for Justice (if the Minister is not so qualified).9 Finally, prosecutors performing duty on behalf of and under the direction of the Public Prosecutor are subject to the same freedom from direction and control by any outside authority as the Public Prosecutor himself.9A

It must be appreciated that the Public Prosecutor has no control over the exercise of prosecutorial discretion in respect of summary offences or the laying of informations generally. The original decision whether or not to charge a person with a criminal offence is usually made by the Police. Even where the offence is indictable the Public Prosecutor cannot direct or control the Police's prosecutorial discretion10 - although he can subsequently decide not to continue with any individual prosecution in the National Court. In practice where a particular case presents some difficulty, the Police would normally refer it to the Public Prosecutor for advice, and normally would also act in accordance with that advice.

It will be readily appreciated that the position of Public Prosecutor in Papua New Guinea differs in a number of radical respects from the position of the Chief Crown Prosecutor prior to Independence and also from the position of prosecuting authorities in other common law countries, for example the United Kingdom and Australia.

Prior to Independence, the senior prosecutions officer of the country was the then Secretary for Law, who was also the "Crown Law Officer". The ultimate responsibility for the exercise of prosecutorial

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6. *Constitution*, s. 176(4).

7. *Supreme Court Act* 1975, s.23.

8. *Supreme Court Act* 1975, s.24.

9. *Principal Legal Adviser Act* 1975, sections 1 and 2.

9A. *Organic Law on the Guarantee of the Rights and Independence of Constitutional Office-Holders*, s.13.

10. *Constitution*, s.197(2).

discretion was vested in him. Subordinate to him was the then Crown Solicitor and under the Crown Solicitor came the Chief Crown Prosecutor. Prosecutions were actually carried out by the members of the Prosecutions Section of the Crown Solicitor's Office.

The power to appeal against an inadequate sentence imposed by the then Supreme Court was vested in the Secretary for Law, as was the power to refer a question of law to the Full Court following the acquittal of an accused on indictment.

The most important differences between that position and that of the Public Prosecutor today are that the latter now has the ultimate prosecuting authority of the State; he is guaranteed independence in the performance of his duties and functions, and he has been given Law Officer status.

In England the general supervision of prosecutions for most indictable offences is vested in the Director of Public Prosecutions, who is, however, expressly subject to direction and control by the Attorney-General. The Director's powers to intervene in existing prosecutions, to initiate prosecutions of his own, or to discontinue prosecutions apply only in relation to specific offences - it does not cover the whole ambit of the criminal law. Apart from murder, the general principle on which the Director acts is to prosecute in cases of general public interest.11

The Director of Public Prosecutions in England is not a Law Officer - that status is vested in the Attorney-General himself, who is also an elected Member of the Parliament, and indeed it is for this reason that the ultimate prosecuting authority is vested in the Attorney rather than the Director. It was considered appropriate that because the Attorney was the responsible Minister and because it was he who ultimately had to justify to the Parliament (and to the electorate) decisions relating to prosecutions, he should therefore have the power to control those decisions.

In Papua New Guinea, however, the Constitution specifically provides that in the performance of his function, the Public Prosecutor is not subject to direction or control by any person or authority. Thus, in Papua New Guinea, whilst the Minister for Justice is the responsible elected Minister, he is responsible for an Officer over whose exercise of function he has no control. I hasten to point out, however, that any suggestion made, or request or view expressed by the Minister in respect of any prosecution matter would naturally be given the most serious consideration by the Public Prosecutor in any case.

II. *State Prosecutors.*

State Prosecutors are appointed by the Governor-General on the advice of the National Executive Council, persuant to Schedule 1.536(2) of the *Criminal Code Act* 1974. Such appointment (inter alia) empowers the prosecutor to present indictments in the National Court,12 to lay

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11. See generally Glanville Williams, "The Power to Prosecute" [1955] Crim. L.R. 597 and *The Law Officers of the Crown*, Edwards (1964).

12. *Criminal Code Act* 1974, Sch. 1.537(2) and 1.538(2).

or decline to lay a charge on indictment,13 and to enter a nolle prosequi.14

III. *Prosecutions upon Indictment.*

When a person is charged with an indictable offence the Police present a committal hearing before a Magistrate whose function it is to decide whether or not there is sufficient evidence to put the defendant upon his trial in the National Court.

If the Magistrate considers that there is not sufficient evidence, he would discharge the defendant forthwith. If he considers that there is a prima facie case, he will commit for trial. It is at this stage that the matter comes within the area of activity of the Public Prosecutor and his officers. The prosecutor has two options open: He may either lay a charge or decline to lay a charge. If he declines to lay a charge a declaration to that effect must be executed by him and filed at the Registry of the National Court. A copy is then served upon the person committed, if he is on bail, or upon the person having custody of him, who is thereupon required to immediately release that person from custody in respect of that committal. This is the first point at which the prosecutorial discretion is exercised.

In making this decision Prosecutors must bear in mind that it was never the law that a suspected criminal offence must automatically be the subject of a prosecution. The first consideration must always be whether the evidence which is available and is legally admissible is such that a court could convict on the basis of it. If there is that degree of evidence the next question is whether a prosecution would be in the public interest. The public interest is always ultimately the predominant consideration. The factors which may have to be taken into account in any particular case will necessarily depend on the circumstances of that case and the person to be charged. The one factor which is never taken into consideration is the political factor.

In the great majority of cases the decision to prosecute is made in accordance simply with an examination of the evidence. Care must always be taken, however, not to usurp the jurisdiction of the court, part of whose function it is to administer at this level the power of mercy by recognising exculpating factors in relation either to an offender or his offence in the type of sentence it imposes. In practice, the dividing line is sometimes difficult to fix.

If the available and admissible evidence is such that a conviction could not possibly result, then the prosecutor's discretion will naturally be exercised by declining to lay a charge. The person originally charged will then not suffer the ordeal of a trial and the time of the court and counsel will not be wasted. It is clearly in the public interest that this be so.

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13. *Ibid,* Sch. 1.537(1).

14. *Ibid,* Sch.1.539.

There are probably two major categories of cases in which a decision not to prosecute will be made even though there is ample evidence of a person's guilt. The first category consists of those cases in which a court will impose no (or only a nominal) penalty. Each case must be assessed on the basis of its own particular facts and the circumstances of the person sought to be charged. The second category consists of those cases in which wider considerations are involved. One particular consideration is that of policy. Others include those of public morals, whether a prosecution will tend to reinforce or detract from the community's respect for the law, and so on.

The principles applied by the Attorney-General in England were explained to the House of Commons in 1951 by the then Attorney-General, Sir Hartley Shawcross,15 and those principles are generally applicable to the exercise of the Public Prosecutor's discretion in Papua New Guinea.

So far I have adverted to the decision to prosecute after committal and before presentation of an indictment. It sometimes happens, of course, that a decision to prosecute having been made in a particular case, subsequent developments either in the course of evidence or otherwise may necessitate a reconsideration. The prosecutor may decide that in all the circumstances of the case the prosecution should not proceed any further. He would then have two options open to him - either to offer no further evidence or to enter a nolle prosequi. It is important to appreciate the difference - if no further evidence is offered then the accused will be acquitted and discharged forthwith. The acquittal stands as a bar to any further proceedings in respect of that charge or (broadly) any charge based upon the same facts and of which he stood in jeopardy on that indictment. If, instead, the prosecutor enters a nolle prosequi (and that is accepted by the Court), then the result is that the proceedings *upon that indictment only* are terminated. The accused is not acquitted, and the nolle prosequi is no bar to a subsequent prosecution in respect of that offence.16

Once again, in determining first whether or not the case should continue at all, and secondly, if not, how it should properly be terminated, the Prosecutor will be guided primarily by a consideration of which course would best serve the interests of justice (and hence the public interest).

If it were apparent in the particular case that the prosecution witnesses had not come up to proof and that no further evidence could reasonably be expected to arise in the future, then the interests of justice would clearly best be served by the prosecutor terminating the trial at that stage and offering no further evidence. In that way the time of accused, Court and counsel would not be wasted by all having to sit through further evidence for what would obviously be the same result.

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15. *Official Report of Debates in the House of Commons,* 29 Jan. 1951, C.679-690.

16. *Davis v. Gell* (1924) 35 CLR 275; *Poole v. R.* [1960] 3 All E.R. 398.

On the other hand, were the prosecutor to be faced with a situation in which having just opened his case he is informed that his principal witness has just been committed to hospital with a serious illness and would not possibly be able to give evidence for some months, he could properly enter a nolle prosequi if the case could not succeed without that witness.

In broad terms, a nolle prosequi should be entered only where there is substantial material tending to show the guilt of the accused and additional relevant and admissible evidence will be, or is reasonably likely to be, available in the future.

A further consideration would be the stage to which the trial has progressed. It may have gone so far that to deprive the accused of a verdict of acquittal and leave him in jeopardy, after having undergone (if not the cost, at least the trauma of) a lengthy trial, would be so unfair and unreasonable that although a nolle prosequi could be entered, it should not. Indeed this factor has been recognised as giving the Court itself power to refuse to accept the nolle prosequi on the basis that to do so would deprive the accused of his right to a fair hearing.16A

IV. *Consents to Prosecute.*

There are in existence various statutes requiring the consent of the Public Prosecutor before a prosecution can be launched under them. Probably the two most important of such statutes (for practical purposes) are the *Public Order Act* 1970 and the *Prices Regulation Act* 1949.

The principles in relation to the form of consents generally and the attitude of the Courts to them, were collated and adopted by Isaacs J. in *Berwin v. Donohoe* (1915) 21 C.L.R. 1, 25. It is now established that the discretion is absolute and that the courts have no control over its exercise, *ex parte Hurter* (1883) 47 J.P. 724. The leading authority on the principles applicable to the actual granting of consent, however, is the recent English case of *R. v. Cain* [1975] 3 WLR. There the defendants were charged with possessing explosives under suspicious circumstances, contrary to Section 4 of the *Explosives Substances Act* 1883. The Attorney-General then gave his consent under Section 7 of the Act, the defendants being prosecuted "for an offence or offences contrary to the provisions of the ... Act". An indictment was prepared which contained a count alleging that the defendants had committed an offence under Section 4. The Judge ruled that the consent of the Attorney-General was a sufficient consent as required by Section 7, and that it need not disclose with reasonable particularity the details of the offence or offences authorised to be prosecuted. The defendants were convicted and appealed against the convictions. The Court of Appeal held, in

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16A. *Regina v. Abia Tambule & Ors.* [1974] PNGLR 250. The case was decided on the provisions of s.16(2) of the *Human Rights Act* 1971, which has been repealed. Section 37(3) of the Constitution, however, is in almost identical terms.

dismissing the appeal, that (inter alia) the Attorney-General's duty was to consider the general circumstances of the case and decide whether any provisions of the Act could properly be pursued against a defendant charged before the Justices with an offence, and that if the Attorney-General decided that the general circumstances did justify a prosecution, he did not have to consider and approve details of the actual indictment, but could give his consent in the wide terms adopted in the present case, thus leaving the prosecutor free to pursue any charge under the Act justified by the evidence. The Court summarised its attitude to the application in the following terms:

> "The purpose of requiring the Attorney-General's consent to prosecutions under the Act of 1883 is to protect potential defendants from oppressive prosecution under an Act whose language is necessarily vague and general. Hence it is not necessary that the Attorney-General should have considered and approved every detail of the charge as it ultimately appears in the indictment. His duty is to consider the general circumstances of the case, and to decide whether any, and, if he thinks fit, which, of the provisions of the Act can properly be prosecuted against the defendant ... If the Attorney-General considers that the prosecutor should be at liberty to pursue any charge under the Act which is justified by the evidence, there is no Constitutional objection to his giving consent in the wide terms adopted in the present case. Furthermore, when consent is given in any terms it should be presumed that the Attorney-General has made the necessary and proper inquiries before giving that consent ... We do not see how any good purpose would be served by requiring that the Attorney-General ... should not only carry out his function of deciding which of the circumstances justified the use of the powers of the Act ... , but should also anticipate the precise form of the indictment. We are content to stand by a practice which has been followed for 100 years, and we accordingly dismiss the appeal."16B

It is quite apparent from a consideration of this case that the Court of Appeal took the further view that the person whose consent is required has a duty to properly direct his mind to the circumstances of the case and to exercise a proper discretion in deciding whether or not to give his consent. Accordingly, in the context of Papua New Guinea legislation, the Public Prosecutor has not given consent to prosecutions without having had sufficient material placed before him upon which to properly base the exercise of that discretion. This is not to say that all the evidence available need be provided nor that the charge need be specified in particularity - however, it is necessary to identify the alleged offender, the circumstances or the

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16B. *R. v.Cain* [1975] 3 WLR 135-136.

events which are alleged to constitute the offence (briefly), the material or some of the material upon which the prosecution could properly be based, and any other circumstances considered relevant in the particular case.

Consent has been given and usually will be given where the material provided sufficiently shows that the matter is not frivolous or vexatious; that there is available admissible evidence indicating the offence has in fact been committed by the potential defendant (or there is at least a prima facie case), that the prosecution in the circumstances of the case would not be oppressive, and that there is no reason, in terms of the public interest, why the prosecution should not proceed.17

V. *Selection of the Charge.*

Having decided that the prosecution of a particular case should proceed, the Prosecutor must then decide what charge or charges to actually put on the indictment. This decision too is within the Prosecutor's discretion and must be made on a proper basis and according to principle. The selection of the charge is for the Prosecutor alone; in the case of prosecutions in the National and Supreme Court, the decision is ultimately that of the Public Prosecutor. Not only is it for him to decide what charge to prefer, but it is for him to determine the form of the charge as well.18

The first - and most obvious - criterion must be whether the evidence will support the charge contemplated. If there is inadequate evidence of one or more elements of the offence under consideration, then it would not be proper to prefer it on the indictment merely in the hope that the deficiency may somehow rectify itself in the course of the trial, e.g. by the accused himself presenting evidence and inadvertently filling the gaps.

Once the prosecutor has satisfied himself that there is sufficient evidence of each element of an offence he must then consider which of the possible charges open on the evidence is the most appropriate in all the circumstances. In determining what is appropriate he must have regard to the circumstances surrounding the offence and must bear in mind that the charge finally preferred should give the trial Judge sufficient scope on the question of sentence to impose a penalty which is itself consistent with the offence and which takes into account the circumstances of the accused.

The Prosecutor should select the charge which most reflects the substance of the accused's activities. He should not prefer a charge which - although it could technically be established on the

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17. A slightly different approach, *viz.*, that legislation of this nature intends the official whose consent is required to consider whether the proposed prosecution would be in the public interest, and not merely whether the prosecution is likely to succeed, received judicial approval in *re Vexatious Actions Act 1896* [1914] 1 KB 122, 134. In practice, however, both approaches are likely to yield the same result.

18. *R v. Weaver* (1931) 31 CLR 321.

evidence - does not properly reflect what actually happened. As to this, Sir Sydney Frost C.J. has observed that:

> "In the administration of justice, the law should not be strained against a man."19

His Honour said that the question in each case must be "What does the public interest require?" and apropos of this, continued:

> "... the public interest may not require a charge to be laid at all. But if in the public interest a charge should be laid, the real substance of the offence should be taken into account."19A

This proposition does, of course, operate both ways - it is just as much against the public interest to "under-indict" as it is to "over-indict".

It is frequently necessary to consider whether the indictment should contain only one count or whether several counts should be joined. In such a situation the prosecutor should first decide what charges are disclosed, which of those are appropriate, and finally, which can properly be joined. Having decided which of them *can* be joined on the one indictment as a matter of law,20 he must then decide which of them *should* be so joined. Mere technical offences should not be joined, nor should a congeries of separate offences all covering the same facts (unless they are charged as alternatives rather than for conviction on all).

In some cases the proper course must be to charge a number of different offences - even though essentially part of the same transaction - so that the whole of the transaction is actually before the Court and can be taken into account on sentence. Thus, an indictment which contained only one count of stealing would usually be inadequate and deficient where the accused in fact also falsified books of account to conceal the theft. This would be so because although that set of circumstances would usually involve greater culpability than a spontaneous stealing with other dishonest activity, the falsification actually constitutes a separate offence *of which the accused has not been convicted.* Thus, unless the accused indicates that he wishes the Court to take it into account in sentencing him,21 it cannot properly do so.22

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19. *Secretary for Law v. Kabua Dewake*, FC 77 (Unreported), May 1975.

19A. *Ibid.*

20. As to joinder generally, see in particular Schedule 1.543 and 1.544, *Criminal Code Act* 1974 for indictments, and section 37, *District Courts Act* 1963 for information.

21. This procedure is provided for in Sch. 1.615, *Criminal Code Act,* 1974.

22. See *R v. Webb* [1971] VR 147; *The Queen v. Reiner* 8 SASR 102; and *The Public Prosecutor v. Paho Kupari & 5 ORS* (Unreported), SC. 101, July 1976.

VI. *Ethical Obligations of Prosecuting Counsel.*

As he is appearing primarily in his capacity as Counsel of the Court, the Prosecutor has the rights, obligations and duties of any counsel. He also appears, however, in an additional and greater capacity, as representative of the State. He is primarily an officer of the Court, and should regard himself as assisting in its administration, rather than as an advocate.23 His function is not to secure a conviction at all costs, but rather to assist the Court in achieving a just result in accordance with the law. But, as was stated by Wild C.J., speaking for the New Zealand Court of Appeal in *R v. Thomas (No. 2)*:

> "... To that reference to justice in a criminal case it is pertinent to add the observation of Lord Goddard C.J. in *R v. Grondowski* [1946] KB 369; [1946] 1 All ER 559 that:
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> > 'It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.'
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> The other side, of course, is the interests of the community. The duty of counsel for the prosecution is therefore to present the case fairly and completely. They must not, in the words of Crompton J. 'struggle for a conviction' (4 F & F 497, 499, 176 ER 662, 663). But they are fully entitled and indeed obliged to be as firm as circumstances warrant."24

The essence of the prosecutor's role is, therefore, "... to present the case fairly and completely". But does this mean that the prosecutor is obliged to call as witnesses all persons who could have anything to say on the matter before the Court? The short answer to that question, is that it does not.

The Judicial Committee of the Privy Counsel has held25 that the prosecution in a criminal case has a discretion as to what witnesses they shall call. It is consistent with that discretion that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to call for cross-examination by the defence, witnesses whose names are on the back of the indictment but whom the prosecution do not wish to examine. The Judicial Committee stressed, however, that it always remains a matter for the discretion of the prosecutor.

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23. See *Richardson & Ors. v. The Queen* [1974] 3 ALR 115 and *R v. Puddick* 1865 4 F & F 497, 499.

24. [1974] 1 NZLR 658, 659.

25. *Adel Muhammed El Dabbah v. A-G. for Palestine* (1944) AC. 156.

Of course the prosecutor may decide at the very outset, and before drawing the indictment, not to call a particular witness. The name of the witness will not then be on the indictment - what is the position in that circumstance? The point arose and was dealt with by the High Court of Australia in *Richardson & Ors v. The Queen*.[26] In that case the prosecutor decided not to call as a witness a woman who, prima facie, could have given relevant evidence, because he had considered her not to be a credible or truthful witness. One of the appellants had wished her to testify, and she was called by the defence and cross-examined by the prosecutor. The appellants were convicted and appealed on the ground (inter alia) that the prosecution was under a duty to call as its witness any person who could testify to the circumstances giving rise to the offence charged irrespective of whether his testimony tended to inculpate or exculpate the accused. The High Court[27] in a joint judgement dismissed the appeal, holding that:

> Any discussion of the role of the Crown Prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown to mention but a few.
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> What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused. It is in this sense that it has been said that the prosecutor has a discretion as to what witnesses will be called for the prosecution. But to say this is not to give the prosecutor's decision the same character as the exercise of a discretionary power or to make his decision reviewable in the same manner as those discretions are reviewable. In the context the word 'discretion' signifies no more than that the prosecutor is called upon to make a personal judgement, bearing in mind the responsibilities which we have already mentioned.

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26. [1974] 3 ALR 115.

27. Barwick C.J. and McTiernan and Mason JJ.

> It is, therefore, a misconception to speak of the prosecutor as owing a duty to call all witnesses who will testify as to the events giving rise to the offence charged. The misconception has arisen, we venture to think, from treating some observations in the decided cases, which have been made with the intention of offering guidance to prosecutors in how they are to approach their task, as the prescription of an inflexible duty to call all material witnesses, subject to certain exceptions or to special circumstances. Although the pursuit of certainty may have its advantages, the rigid circumscription of a practical decision to be made by the Crown prosecutor in the conduct of the Crown case is not to be numbered among them.28

A most useful and comprehensive outline of the principles applicable to the prosecutor's duty to call evidence or alternatively to advise the defence of the existence of available evidence, is contained in the South Australian Full Court case of *in re Van Beelan,* [1974] 9 SASR.

Having called his witness then, the prosecutor must examine him. In so doing he should not put leading questions on contentious issues, he should attempt to elicit from the witness all relevant and admissible testimony, and he should be dignified, courteous and fair. In cross-examination he should maintain the same standards, particularly of fairness - thus, if he intends to later call evidence the effect of which would be to contradict the witness, he must put that version adequately to the witness and give him an opportunity to explain the variance. Indeed, failure to do this may well damage counsel's own case.29 The Prosecutor, as any counsel, has a duty not to make "unarguable submissions",30 to refrain from taking untenable points,31 and not to indulge in excessive cross-examination or otherwise unnecessarily prolong the trial.32 All of these responsibilities and duties attach to the Prosecutor in his capacity as counsel and apply equally to counsel for the defence, who of course also has his own responsibilities, for example, to take adequate instructions and to ensure that all available mitigating material is put before the Court.33

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28. *Op.Cit.,* fn.26. For notes and comments on this case, see generally "Role and Duties of Crown Prosecutors" (1974) 48 ALJ 226; and "Must the Crown Call Adverse Witnesses?" [1974] ACLD 152.

29. *Red v. Kerr* [1974] SASR.

30. *Op.Cit., Richardson v. The Queen.*

31. *Dring v. Mann* (1948) 112 QJPR 27.

32. *R v. Kalia & Ors.* [1975] Crim. L.R. 181 (C.A.).

33. *Puitt v. Simpson* (unreported) Supreme Court of the Northern Territory, judgement Nos. 44 and 45 of 1975 (Muirhead J.).

One area in which there is occasionally doubt as to the extent of the prosecutor's role, is that of sentencing. It has sometimes been said that the Prosecutor should not concern himself with what happens after verdict, and that his role is completed once the court pronounces its decision on the guilt or innocence of the accused. This is a misconception. There is a substantial distinction between the prosecution "urging" the imposition of a particular punishment on the one hand, and bringing the principles of punishment relevant to the circumstances of the particular case to the attention of the trial judge, on the other. The former should not be done, whereas the prosecutor actually has a duty to assist the Court where necessary in the latter respect. As mentioned above, in Papua New Guinea the Public Prosecutor may appeal as of right against an inadequate sentence imposed by a trial judge.34 Thus, the Public Prosecutor (and counsel appearing for the State on his instructions) would be failing in his duty were he not to assist the court at first instance on the question of sentence in a proper case, but to subsequently institute an appeal on the basis that the trial judge imposed an incorrect sentence.

The duty of the prosecutor in similar circumstances was considered by the Queensland Court of Criminal Appeal in *R v. McKeown*. That case concerned the first Crown appeal against sentence in Queensland on a statutory provision,35 broadly equivalent to Section 23 of the Papua New Guinea *Supreme Court Act* 1975. The Court commented that:

> Had the principle of punishment applicable been brought to the notice of the trial Judge ... we think he would have awarded a different sentence. *We mention this because, in our opinion, since the Crown now has a right of appeal against sentence, it is its duty to take up a positive attitude in assisting the Court to determine sentence.* (Emphasis supplied).

Even prior to *McKeown* there had been judicial recognition and approval of the view that the obligation of prosecuting counsel to assist the Court extends to the issue of sentence as much as innocence or guilt. See, for example, *R v. McIntosh & Ors.*, where the Court said:

> We have had a fuller chance of investigating the circumstances of these prisoners than had the trial Judge, and we think it desirable to emphasise that the circumstances relevant to punishment should be fully placed before the trial Judge by Crown Counsel and Counsel for the Accused, and that fuller details than it has been customary to furnish should be afforded, particularly in regard to first offenders. The grave responsibility cast upon the Judge cannot be satisfactorily discharged if the necessary data are not placed at his disposal.36

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34. *Supreme Court Act* 1975, s.23.

35. Section 4, *Criminal Code Amendment Act* 1939, which inserted S. 669A into the Queensland Criminal Code.

36. [1923] Qd. Sr. 278, 282.

Finally it is worth noting in passing that a recent South Australian Commission of Enquiry into sentencing recommended that the Crown "in appropriate cases" address on sentence for the reason that the public are as equally interested in an appropriate sentence as they are in seeing that guilty persons are convicted and innocent persons are acquitted.

VII. *Preparation and Presentation of Cases.*

In practical terms the scope of a State Prosecutor's activities in the preparation of cases for prosecution in the National Court in Papua New Guinea extends far beyond the traditionally recognised activities of prosecuting counsel.

He must, of course, advise Police and Provincial Affairs personnel in the various circuit towns that the National Court is coming and what cases are listed for hearing. On arrival, he must ensure that all accused persons, all witnesses and the necessary interpreters are available. He must check the exhibits in each case and have them ready for presentation to the witnesses and their tender to the Court at the appropriate time. These activites are usual, but there are others which would not be so regarded in other jurisdictions.

The State Prosecutor does not have a brief. All he will have available to him, and upon which he must base his researches and preparation, will be the depositions. These are frequently of such poor standard that it is impossible to properly determine what evidence actually would be available on the trial. The reception of hearsay evidence on committal is almost universal, failure of the police prosecutor to lead evidence of each element of the offence charged in the particular case is common, and the tender and admission of unproved documents (particularly medical reports) simply handed up from the bar table is not infrequent. In stealing cases there is often no allegation in the charge (and no evidence led on the hearing) that the stolen property actually belonged to any person. Total reliance on records of interview seems still to be the norm - *even where they are completely exculpatory of the defendant.* Admissions or other statements contained in records of interview are rarely checked against other evidence. Committals continually occur on charges of carnal knowledge of girls under the age of 16 or 12, where age has not once been mentioned in the evidence. Frequently a reading of the depositions indicates quite clearly that there must be a number of other witnesses available but who were not called and so whose proofs the prosecutor does not have. All of these deficiencies need to be attended to as soon as possible after the committal if they are to be remedied. That is the State Prosecutor's first job - he must request and guide further investigation.

Not unnaturally, where such a system prevails the prosecutor will often be unable to assess the strength or weakness of the evidence actually available until he travels to the circuit town at which the case is to be heard. There he will in most cases have to speak with the witnesses to ascertain in particular what, if anything, they can say about aspects of the case not mentioned during the committal. In speaking to the witnesses he must be sensitive to the tendency of some village witnesses to change their stories in the belief that had they been "satisfactory" when first told (to the investigating police or to the District Court) then the authorities would not be asking for a

repetition. He must likewise ensure that he does not give to the potential witness any indication of what testimony "should be given." Where possible the prosecutor will inspect the scene of the alleged offence so he is in a position to indicate to the Court whether or not a "view"37 would assist its deliberations (and of course, so that he himself is better able to understand the testimony of the witnesses).

Where proof of the charge involves the tender of books of account or other documents the prosecutor must examine them himself well before the trial so as to ensure that the originals are available, that the documents do speak for themselves and are complete and that they can be properly proven through prosecution witnesses.

If there has been any suggestion that the accused was insane at the time of the alleged offence, or that he may not be fit to plead, the prosecutor should arrange to have medical or psychiatric evidence available on either or both issues. Although the Prosecutor cannot himself raise the issue of insanity he should be ready to deal with it where necessary by cross-examination and evidence in rebuttal once it is raised by the defence. If there appears to be some question of the accused's fitness to plead,38 the prosecutor has a positive duty to draw the attention of the Court to the fact. It is therefore incumbent upon him to be in possession of all the relevant material prior to trial.

Cases sometimes occur in which medical or scientific evidence assumes importance. The necessity for a medical or scientific examination of a body, a weapon, bloodstains, glass fragments, suspected poisons and so on in a particular case will almost inevitably have been ignored or simply not appreciated at all by the Police. Thus, although that is an investigative rather than a prosecution function, the prosecutor himself will have to arrange for the examination if it is to be done at all. In many instances, naturally, because of the very nature of such evidence, by the time the depositions reach the prosecutor, it will have become impossible to derive any benefit from such an examination - little can be gained from a medical examination of an alleged rape victim months after the event; indeed a matter of a mere few hours may make the difference between cogent evidence of recent intercourse and no evidence at all, other than the prosecutrix' complaint.

If there is available evidence of a medical examination of a body or article, the prosecutor will have to arrange either for the attendance of the witness at the trial or for the tender of an affidavit.39 If the evidence is to be adduced by way of affidavit, the Prosecutor will have to draft it and arrange for its execution. He must likewise draft and arrange for the issue of any other documentation, for example, subpoenas to witnesses or for production of documents, certificates by magistrates under Section 109(b) of the *District Courts Act* 1963 or affidavits of fingerprint identification for the purpose of proving the accused's prior convictions.

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37. *Criminal Code Act* 1974, Sch. 1.586.

38. See *Criminal Code Act* 1974, Sch. 1.581.

39. Under the *Evidence Act* 1975, ss. 39, 40 or 42.

The above is only a brief outline of some of the State Prosecutor's pre-trial responsibilities. It is by no means exhaustive. I have not referred to his more obvious professional concerns, such as preparation of an opening address, research on the statutes and relevant authorities, consideration of possible interlocutory applications, and preparation of argument to meet and deal with possible defences, to name but a few.

Having completed his pre-trial preparation the prosecutor must then present the case in Court. This is the culmination of the police investigation, the committal hearing and the prosecutor's own preparation. He must now properly lead all the available relevant and admissible evidence. He cannot leave any evidentiary gaps. He must lay a firm foundation for his case and build upon that a complete and flawless structure, conscious all the time that the onus of proof with which he is burdened is proof beyond reasonable doubt. He will be careful to ensure that from each witness he elicits all the relevant and admissible evidence the witness can give, knowing that if he leaves any relevant aspect untouched there may thereby be introduced a doubt, and the benefit of any doubt must be given to the accused. No-one else can patch up a defective case. The trial Judge certainly will not - his duty is to acquit where there exists any reasonable doubt of the accused's guilt. Defence Counsel clearly will not - his duty is to the Court and his client, and within that framework to exploit to his client's advantage any deficiency in the prosecution case. The witnesses cannot - their only concern is with their own testimony and in any event they themselves have to be guided on what is relevant and admissible and what is not. The responsibility is solely that of the Prosecutor. It is an onerous and a demanding one, but to a Prosecutor the knowledge that, irrespective of whether the accused was convicted or acquitted, he prepared and presented the case to the best of his ability, that he did all that could properly be done and that the result was just, is a sufficient satisfaction.