



# The Decision whether to Prosecute

(extract from *Guidelines for Prosecutors*)

Office of the  
Oifig an



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**4.1** The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved.

**4.2** It is therefore essential that the prosecution decision receives careful consideration. But, despite its important consequences for the individuals concerned, the decision is one which the prosecutor must make as objectively as possible.

**4.3** Because of the importance of the prosecution decision and the need for objectivity the State has reserved to itself the right to prosecute in all except minor cases. In practice, almost all criminal prosecutions are brought by an arm of the State. In Ireland, by virtue of Article 30 of the Constitution of Ireland and of the Prosecution of Offences Act, 1974 all crimes and offences other than those prosecuted in courts of summary jurisdiction are brought in the name of the People and at the suit of the Director of Public Prosecutions, except for a limited category of offences still prosecuted at the suit of the Attorney General. In the case of indictable offences brought at the suit of the Director, the decision to prosecute or not to prosecute is taken by the Director personally or by an officer of the Director who is authorised to take such a decision. The situation in relation to summary offences is set out in Chapter 13 of the *Guidelines for Prosecutors*.

## The Public Interest

**4.4** As in other common law systems, a fundamental consideration when deciding whether to

prosecute is whether to do so would be in the public interest. A prosecution should be initiated or continued, subject to the available evidence disclosing a *prima facie* case, if it is in the public interest, and not otherwise.

**4.5** There are many factors which may have to be considered in deciding whether a prosecution is in the public interest. Often the public interest will be clear but in some cases there will be public interest factors both for and against prosecution.

**4.6** There is a clear public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished. It follows from this that it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so, unless there is some countervailing public interest reason not to prosecute. In practice, the prosecutor approaches each case first by asking whether the evidence is sufficiently strong to justify prosecuting. If the answer to that question is “no” then a prosecution will not be pursued. If the answer is “yes” then before deciding to prosecute the prosecutor will ask whether the public interest favours a prosecution or if there is any

public interest reason not to prosecute.

## The Strength of the Evidence

**4.7** A decision not to prosecute because the evidence is not sufficiently strong could be considered as an aspect of the consideration of the “public interest”. It can be said that it is not in the public interest to use public resources on a prosecution case which has no reasonable prospect of success. Furthermore, if there was a very high rate of prosecutions resulting in acquittals this could undermine public confidence in the criminal justice system.

**4.8** A prosecution should not be instituted unless there is a *prima facie* case against the suspect. By this is meant that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged.

**4.9** In considering the strength of the evidence the existence of a bare *prima facie* case is not enough.

Once it is established that there is a *prima facie* case it is then necessary to give consideration to the prospects of conviction. The prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a reasonable jury or a judge in cases heard without a jury. The question of what is meant by a reasonable prospect of conviction is not capable of being answered by a precise mathematical formula. It is not the practice to operate a rule under which conviction would have to be regarded as more probable than acquittal. But it is clear that a prosecution should not be brought where the likelihood of a conviction is effectively non-existent. Where the likelihood of conviction is low, other factors, including the seriousness of the offence, may come into play in deciding whether to prosecute.

**4.10** In evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, sufficiency and strength of the evidence which will be presented at the trial. This involves going beyond a superficial decision as to whether a statement, or a group of statements, amounts to a *prima facie* case. The prosecutor must consider whether witnesses appear to be

reliable and credible. Accusations of criminal wrongdoing can be unreliable for all sorts of reasons. They can be unfounded or inaccurate without being deliberately manufactured. They may be the result of human error or they can be made maliciously. Statements cannot therefore simply be accepted at face value and acted upon without considering their credibility. In evaluating the prospects of a conviction the prosecutor must remember that the onus is on the prosecution to satisfy the jury of the guilt of the accused beyond a reasonable doubt. This burden, which is higher than mere probability, must be borne in mind in considering whether to prosecute.

**4.11** It is not sufficient if the evidence is likely to go no further than to show on a balance of probabilities that it was more likely than not that the suspect committed the offence but does not go so far as to establish guilt beyond a reasonable doubt. For this reason it is important to know if there is independent evidence which supports the complainant's story. This could be evidence from another witness, or forensic evidence such as fingerprints or DNA evidence from body tissue. This makes the case stronger than one based on one person's

word against another. Even where the prosecutor believes the victim's story the evidence may simply not be strong enough to convince a jury beyond a reasonable doubt. The evaluation of prospects of conviction is a matter of judgment based on a prosecutor's experience. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, this does not mean that only cases perceived as 'strong' should be prosecuted. The assessment of the prospects of conviction should also reflect the central role of the courts in the criminal justice system in determining guilt or innocence. A preconception on the part of the prosecutor as to views which may be held by a jury about the subject of the offence is not a material factor. The prosecution must assume that the jury will do its duty and act impartially.

**4.12** It is not intended here, even if it were possible, to set out all the factors which the prosecutor must consider in evaluating the admissibility and strength of evidence. Each case is unique, and the variety of human experience and behaviour so great as to make a comprehensive list of all possible

considerations which could arise impossible. Questions which arise may include the following:

- (a) Are there grounds for believing that evidence may be excluded, bearing in mind the principles of admissibility under the Constitution of Ireland, at common law and under statute? For example, has confession evidence been properly obtained? Has evidence obtained as a result of search or seizure been properly obtained?
- (b) If the case depends in whole or in part on admissions by the suspect, are there grounds for believing that the admissions may not be reliable considering all the circumstances of the case including the age, intelligence, mental state and apparent understanding of the suspect? Are the admissions consistent with what can be objectively proved? Is there any reason why the suspect would make a false confession?
- (c) Where the suspect was aged under 14 years at the time of the offence, is there evidence available to show that, at that time, he or she could distinguish right from wrong?

- (d) Does it appear that a witness is exaggerating, or has a faulty memory, or is either hostile or friendly to the accused, or may be unreliable for some reason? Did a witness have the opportunity to observe what he or she claims to have seen? Are there any other matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness?
- (e) Has a witness been consistent in his or her evidence? If not, can the inconsistencies be explained? Does the evidence tally with the behaviour of the witness?
- (f) Does a witness have a motive for telling an untruth or less than the whole truth?
- (g) Could the reliability of evidence be affected by physical or mental illness or infirmity?
- (h) What sort of impression is a witness likely to make? How is the witness likely to stand up to cross-examination? Is the witness's background, including previous convictions likely to weaken the prosecution case?
- (i) If there is conflict between witnesses, does it go beyond what might be considered normal and hence materially weaken the case?
- (j) If, on the other hand, there is a lack of conflict between witnesses, is there anything which causes suspicion that a false story may have been concocted?
- (k) Are all the necessary witnesses available to give evidence, including any who may be abroad? In the case of witnesses who are abroad, the possibility of obtaining the evidence through a live television link, pursuant to section 28 of the Criminal Evidence Act, 1992 or by means of the issue of a letter of request, under the Criminal Justice Act, 1994 should be considered.
- (l) Are all the necessary witnesses competent to give evidence? If so, are they compellable? If competent but not compellable, have they indicated their willingness to testify?
- (m) Where child witnesses are involved, are they likely to be able to give sworn evidence or evidence in accordance with the criteria in section 27 of the Criminal Evidence Act, 1992? How is the experience

of a trial likely to affect them?  
In cases of sexual offences or offences involving violence, should the children's evidence be presented by way of video link in accordance with section 13 of the Act?

- (n) In relation to mentally handicapped witnesses, are they capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the Criminal Evidence Act, 1992?
- (o) If identification is likely to be an issue, how cogent and reliable is the evidence of those who claim to identify the accused?
- (p) Where there might otherwise be doubts concerning a particular piece of evidence, is there any independent evidence to support it?
- (q) If the suspect has given an explanation, is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?
- (r) Difficulty can arise where a witness has undergone treatment by hypnosis or other therapeutic process intended to assist the witness

to remember events. The questions which may arise in such cases are beyond the scope of these Guidelines other than to say that the evidence of such a witness should be evaluated with great care.

**4.13** In assessing the evidence, the prosecutor should also have regard to any defences which are plainly open to, or have been indicated by, the accused.

**4.14** The assessment of the credibility and reliability of evidence is ultimately a matter for the court. However where there are grave and substantial concerns as to the reliability of essential evidence, criminal proceedings will not be appropriate.

**4.15** The assessment of the evidence not only has to be made initially but needs to be reviewed at every stage of the proceedings. The investigator will be expected to express views on the evidence when referring the case to the prosecution authorities. The solicitor dealing with the case should likewise express any views he or she may have formed. The primary decision to charge will be made by the Director or one of his officers in cases where the file is referred to the Director's Office. At this stage the Director or his officer may

request further investigative work from the investigating authorities. For example, this may include requesting the investigator to give an alleged offender an opportunity to answer or comment upon the substance of the allegations or a request for copies of relevant records, statements or other material not included on the file. A decision not to charge may not be final, particularly when the reason is a simple insufficiency of evidence. To postpone the bringing of proceedings due to lack of available evidence may be preferable to having proceedings fail because they are brought prematurely. When papers are sent to counsel he or she is also expected to consider the sufficiency of the evidence, as it is desirable that any problems in this regard be addressed as early as possible.

## Is there a Public Interest Reason not to Prosecute?

**4.16** Once the prosecutor is satisfied that there is sufficient evidence to justify the institution or continuance of a prosecution, the next consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that

all offences for which there is sufficient evidence must automatically be prosecuted.

**4.17** The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. As already stated the interest in seeing the wrongdoer convicted and punished and crime punished is itself a public interest consideration. The more serious the offence, and the stronger the evidence to support it, the less likely that some other factor will outweigh that interest. The first factor to consider in assessing where the public interest lies is, therefore, the seriousness of the alleged offence and whether there are any aggravating or mitigating factors.

**4.18** The following aggravating factors, which are not intended to be exhaustive, tend to increase the seriousness of the offence and if present will tend to increase the likelihood that the public interest requires a prosecution:

- (a) where a conviction is likely to result in a significant penalty;
- (b) where the Oireachtas has prescribed a mandatory penalty or other consequence of a conviction such as a disqualification or forfeiture;

- (c) if the accused was in a position of authority or trust and the offence is an abuse of that position;
  - (d) where the accused was a ringleader or an organiser of the offence;
  - (e) where the offence was premeditated;
  - (f) where the offence was carried out by a group;
  - (g) where the offence was carried out pursuant to a plan in pursuit of organised crime;
  - (h) where a weapon was used or violence threatened or the victim of the offence has been otherwise put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim the greater the aggravation;
  - (i) where there is a marked difference between the actual or mental ages of the accused and the victim, and the accused took advantage of this;
  - (j) if there is any element of corruption;
  - (k) where the accused has previous convictions or cautions which are relevant to the present offence;
  - (l) if the accused is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding the accused to keep the peace and be of good behaviour, or released on licence from a prison or a place of detention;
  - (m) where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct.
- 4.19** On the other hand, the following mitigating factors, if present, tend to reduce the seriousness of the offence and hence the likelihood of a prosecution being required in the public interest:
- (a) if the court is likely to impose a very small or nominal penalty;
  - (b) where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment;
  - (c) where the offence is a first offence, if it is not of a serious nature and is unlikely to be repeated.
- 4.20** In addition to factors affecting the seriousness of an offence, other

matters which may arise when considering whether the public interest requires a prosecution may include the following:

- (a) the availability and efficacy of any alternatives to prosecution;
- (b) the prevalence of offences of the nature of that alleged and the need for deterrence, both generally and in relation to the particular circumstances of the offender;
- (c) the need to maintain the rule of law and public confidence in the criminal justice system;
- (d) whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender;
- (e) the attitude of the victim or the family of a victim of the alleged offence to a prosecution;
- (f) the likely effect on the victim or the family of a victim of a decision to prosecute or not to prosecute;
- (g) whether the likely length and expense of a trial would be disproportionate having regard to the seriousness of the alleged offence and the strength of the evidence;
- (h) whether the offender is willing to co-operate in the investigation or prosecution of other offenders, or has already done so;
- (i) if a sentence has already been imposed on the offender in relation to another matter whether it is likely that an additional penalty would be imposed;
- (j) whether an offender who has admitted the offence has shown genuine remorse and a willingness to make amends;
- (k) whether the offence is of a purely technical nature;
- (l) whether a prosecution could put at risk confidential informants or matters of national security;
- (m) whether any circumstances exist that would prevent a fair trial from being conducted;
- (n) whether the offender is either very young or elderly or suffering from significant mental or physical ill health or disability. In such cases, however, other factors tending to indicate that the offence is serious or that there is a risk of the offence being repeated

must be taken into account. Under no circumstances should a person be prosecuted solely to secure access to psychiatric treatment. In the case of young offenders the provisions of section 18 of the Children Act, 2001 and the provisions in relation to the Diversion Programme referred to in Part 4 of that Act must be considered. This is dealt with in more detail in Chapter 5 of the *Guidelines for Prosecutors*.

**4.21** The relevance of these, and other factors, and the weight to be attached to them, will depend on the particular circumstances of each case. Fairness and consistency are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of the discretion not to prosecute on public interest grounds cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion reflects the need to apply general principles to individual cases.

**4.22** Where there are mitigating factors present in a particular

case, the prosecutor should consider whether these are factors which should be taken into account by the sentencing court in the event of a conviction rather than factors which should lead to a decision not to prosecute. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution, the prosecutor should consider whether the public interest requires a prosecution.

## Delay

**4.23** The prosecutor should, in any case where there has been a long delay since the offence was committed, consider in the light of the case law of the courts whether that delay is such that the case should not proceed. It is not the purpose of this paragraph to attempt to summarise the considerable volume of case law which now exists in relation to this matter, but among the considerations which may be relevant and which the prosecutor should bear in mind are the following:

- (a) whether any delay was caused or contributed to by the suspect;
- (b) whether the fact of the offence or of the suspect's

- responsibility for it has recently come to light;
- (c) where any delay was caused or contributed to by a long investigation, whether the length of the investigation was reasonable in the circumstances;
- (d) whether there is a real and serious risk of an unfair trial;
- (e) where the victim has delayed in reporting the offence, the age of the victim both when the offence was committed and when it was reported;
- (f) where there has been a delay in making a complaint, whether the complainant was emotionally and psychologically inhibited from or incapable of making the complaint, and, if so, to what extent and in what manner, and whether this was by reason of behaviour that could be attributed to the suspect, whether by overt actions or threats or a more subtle form of dominion or psychological control;
- (g) whether there is specific prejudice caused to the alleged offender by reason of any delay or lapse of time;

- (h) whether the suspect has admitted the offence.

## Special Factors which may apply where the extradition of a suspect to face trial will be required

**4.24** The extradition of persons required to answer any charge of an offence or to serve a sentence imposed will always involve expense to the State. In the case of serious offences it will generally be appropriate to incur that expense where there are reasonable prospects of conviction, in order to maintain confidence in the administration of the law and to deter offenders fleeing from justice.

**4.25** Where it is proposed to take steps to secure extradition, in addition to the assessment of the prosecution case in accordance with these guidelines, particular attention should be paid to the following factors:

- (a) any delay after discovery of the suspected offender;
- (b) the likely disposition following conviction;
- (c) the nature and gravity of the offence or offences alleged against the fugitive.

## Altering a prosecution decision or discontinuing a prosecution

**4.26** In relation to decisions not to prosecute, review of such decisions is dealt with in Chapter 12 of the *Guidelines for Prosecutors*.

**4.27** Where a decision has been taken to commence criminal proceedings the prosecutor remains under a duty to ensure that the decision remains appropriate in the public interest. Where there is a change of circumstances or where the prosecutor receives new information it will be necessary to consider whether the prosecution should continue.

**4.28** The approval of the Director or professional officer who directed the prosecution should be sought for any proposed withdrawal of charges or addition of new charges. Such communications should preferably be made via the Chief Prosecution Solicitor or the local State Solicitor dealing with the case. If due to time constraints direct contact with the Professional Officer is necessary, the Chief Prosecution Solicitor or the local State Solicitor should be fully informed of the outcome of the discussions. These should

be committed in writing and forwarded to the Directing Division.

**4.29** The independence of the Director does not mean that those who investigated the matter should be excluded from the decision-making process. In deciding whether or not a prosecution is to be instituted or continued and, if so, on what charge or charges, any views put forward by the investigator are carefully taken into account. If the prosecutor is considering changing the charges already preferred or stopping a case, he or she should consider whether to consult with the investigator first, as the investigator may have relevant information or useful views. This gives the investigator an opportunity to provide more information that may affect the decision. Ultimately, however, the decision is made by the Director or his professional officers having regard to the considerations set out in these Guidelines.

**4.30** Proceedings pending on indictment may be stayed by the entry of a *nolle prosequi*. A *nolle prosequi* may be entered only on the direction of the Director or professional officers of the Director. There may occasionally be circumstances in which a *nolle prosequi* is the best

means of halting proceedings which the prosecution considers ought not to be continued. The entry of a *nolle prosequi* stays the prosecution but does not in all circumstances operate as a bar to further proceedings and the accused may be re-indicted where this does not amount to an abuse of process.

**4.31** If a jury fails to reach a verdict in a particular case or a trial otherwise does not proceed to a conclusion, consideration should be given as to whether the public interest requires a second or subsequent trial of the issue. That consideration should include an assessment of the likelihood that a jury on a retrial could deliver a verdict on the available evidence. Where a second jury disagrees the public interest would usually not require a third trial of the accused person but every case should be decided on its own merits.

**4.32** Relevant factors to be considered in determining whether or not there should be a retrial include:

- whether or not the jury was unable to agree or the trial ended for other reasons;
- whether or not another jury would be in any better or worse position to reach a verdict.

