PRACTICAL ISSUES FOR PROSECUTORS AT TRIAL: SOME FRESH PERSPECTIVES

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Introduction

The purpose of this paper is to provide an overview of some of the most recurring problems that arise in the prosecution of indictable offences at trial. Often, these problems are of such an established nature in the practice of prosecution advocacy that they are neither challenged nor discussed. A secondary purpose of this paper is to suggest that these problems, which become manifest in the trial itself, could be eased by a greater emphasis upon the need for a more integrated approach being taken to them by the members of the Garda Síochána, the professional officers in the office of the Director of Public Prosecutions and the legal representatives engaged to act as prosecutors at trial. A specific suggestion is made at the conclusion of this paper as to how such an integrated approach could be augmented.

The obligations upon the prosecutor at trial

Before embarking upon a consideration of some of these problems, it would be prudent to first clarify what are the precise obligations imposed upon a prosecutor at trial. The primary guidance in this regard can be found from paragraph 8.2 of the revised Guidelines for Prosecutors issued by Office of the Director of Public Prosecutions in October, 2007 which provides:

> *The aim of the prosecutor is to ensure that a just verdict is reached at the end of the trial process and not to strive for a conviction at all costs. The purpose of a criminal prosecution is to not to obtain a conviction; it is to lay before a judge and jury what the prosecution considers to be credible evidence relevant to what is alleged to be a crime.*

Paragraph 8.4 of these guidelines also provides that:

> *A prosecutor must not argue any proposition of fact that is not an accurate and fair interpretation of the evidence or knowingly advance any proposition of law that does not accurately represent the law. If there is contrary authority to the propositions of law being put to the court by the prosecutor of which the prosecutor is aware, that authority must be brought to the court's attention.*

The duties imposed upon prosecutors at trial are also succinctly stated in the Code of Conduct of the Bar of Ireland. Paragraph 10.19 of this code provides:-

> *It is not the duty of prosecuting barristers to obtain a conviction by all means at their command but rather they shall lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and shall assist the Court with adequate submissions or law to enable the law to be properly applied to the facts.*

Paragraph 10.24 of the Code of Conduct of the Bar of Ireland further provides that:

> *It is the duty of prosecuting barristers to assist the Court at the conclusion of the summing-up by drawing the attention of the Court to any apparent error or omission of fact or law which, in their opinion, ought to be corrected.* **(1)**

In order to fulfill these obligations, prosecution advocacy at trial involves the discharge of two core duties. On the one hand, the prosecutor seeks to ensure that all of the relevant evidence is properly ordered and presented to the Court at hearing. At the same time, the prosecutor must ensure that the trial process is impeccably correct in its execution. In practice, the role of the prosecutor is somewhat bi-focal in that it requires a parallel and simultaneous awareness of what is unfolding as the trial proceeds and of how this process may appear when possibly reviewed by the Court of Criminal Appeal in the event of an appeal against conviction. It is against this onerous background that one can then consider the following six problems that arise from the prosecution of indictable offences at trial.

1. The restriction upon pre-trial witness interviews by prosecutors

A fundamental difficulty for a prosecutor at trial is the restriction upon any pre-trial consultation with a witness as to fact and in particular, with a complainant. The rationale for this is essentially twofold. Firstly, a witness must not be 'coached' in any way, nor should the prosecutor allow an opening for an allegation that such malpractice has occurred. Secondly, there is a fear that a witness might disclose something in a pre-trial consultation which was not disclosed in the course of giving a statement to the Garda Síochána or may even contradict some aspect of the statement which had previously been given.

The primary rationale for this standard thus appears to be to prevent counsel being placed in a position where he or she may be accused of coaching or otherwise contaminating the evidence of a witness. This could occur in a number of different ways; by introducing other evidence into the interview in such a way that the witness is aware that it is the evidence of another witness; by asking leading questions in relation to the witness's account or by probing into a witness's account in such a way as to cause the witness to question the accuracy of his or her recollection and change the account accordingly.

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1. Separate references are made in the Guidelines for Prosecutors and in the Code of Conduct of the Bar of Ireland as to the obligations upon a prosecutor in the course of the sentencing process. They are not specifically referred to in this paper as they are not germane to the issues under discussion.

Obviously, a legal representative must never attempt to coach a prospective witness, when acting for the prosecution or an accused in criminal proceedings or for that matter, when acting for any party in civil proceedings. The Code of Conduct of the Bar of Ireland explicitly condemns this practice by stating in paragraph 5.18 thereof that:

> *Barristers may not coach a witness in regard to the evidence to be given.* **(2)**

Paragraph 12.9 (b) of the Guidelines for Prosecutors further provides that the solicitor handling a criminal prosecution has a responsibility:

> *"… at the victim's request, to facilitate a pre-trial meeting between the victim and the solicitor and counsel dealing with the case to discuss the case. The purpose of such a meeting is to explain the trial process to the victim and answer any questions he or she may have. Solicitor and counsel do not discuss evidence with witnesses in advance of a case. There are strict rules which prevent barristers discussing in advance the actual evidence that victims will give. This is intended to prevent the witness being told what evidence to give or to avoid any suggestion that this has happened."*

The inability of a prosecutor to consult with a complainant about his or her evidence before the commencement of a trial has, however, a severely debilitating effect on the presentation of the prosecution case to the jury. Firstly, no prosecutor can assume that the complainant will give the evidence as recited in the written statement previously given to the Garda Síochána. This means that when the case is being opened to the jury, the prosecutor is inhibited in opening the facts of the complaint because it is not based on his or her own direct assessment of what the complainant will say in evidence. Secondly, counsel acting for the prosecution often has to engage in a prolonged and somewhat artificial exercise in the course of examination-in-chief of seeking to draw out the contents of a statement made by a complainant in evidence while not asking a leading question. This can often be acutely difficult, particularly in a case where a complainant has recited a number of incidences of being sexually assaulted. The recounting of what occurred can be very embarrassing for the complainant and the inevitably formal and intimidating environment of the court environs can inhibit the powers of recall and articulation of the complainant. Undoubtedly, the ensuing lack of rapport and awkwardness between the prosecuting counsel and the complainant is not lost on the members of the jury and can only serve to undermine the credibility of the complainant's evidence.

By analogy to civil proceedings, one can consider the position of a barrister acting for a plaintiff and presenting his or her client's case in court without a pre-trial consultation with the client. In the event of the claim being dismissed and in the further event of the client being aggrieved that certain matters were not opened to the court by the barrister who was engaged, it is difficult to see how that barrister could

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2. In fact, witnesses should not be interviewed by anybody in advance of trial in a manner which may resemble a rehearsal of the trial itself. This occurred in *R. v. Dye and Williamson* (The Times, December 19, 1991), in which a television company interviewed three prosecution witnesses before trial as if they were being examined in chief. The English Court of Appeal strongly condemned this practice.

resist a complaint of professional misconduct. The pre-trial consultation between the barrister and the client, in the presence of the instructing solicitor, is arguably the most important step in the preparation of a case for trial in civil proceedings. The fact that it cannot occur between prosecuting counsel and a complainant is then understood as a very significant impairment when held in comparison with the pivotal role of the pre-trial consultation in the proper preparation of a civil action for trial.

The Guidelines for Prosecutors emphasise the point that a prosecutor does not have a "client" in the conventional sense and acts in the public interest. He or she is not the legal representative for victims of crime and does not act as their legal adviser. **(3)** Nonetheless, all that is being questioned here is whether a prosecutor should be able to consult with a complainant prior to the opening of the case so as to be precisely clear as to what this party will say after this opening in evidence.

There is surprisingly little consideration given in criminal textbooks to the issues that arise from this fundamental restriction. In April 2002, the Attorney General for England and Wales, Lord Peter Goldsmith, asked the Director of Public Prosecutions to consider whether the time had come to introduce a system, where, before trial, key witnesses could be interviewed by the prosecutor in order for their credibility to be assessed. Subsequently, a consultation paper was prepared by the Crown Prosecution Service entitled '*Pre-trial Witness Interviews by Prosecutors'*. This consultation process was, however, more directed to the question of consultation with witnesses well in advance of the trial date in order to assess their reliability and to ascertain whether the prosecution case should proceed to trial. The issue raised here is somewhat different and neater, namely, that when the prosecution case is about to proceed, why should a consultation not be held between the complainant and the barrister and the solicitor responsible for the presentation of the case in court so to be sure of what precisely the complainant will say in evidence?

In addressing the issue of the risk of 'coaching' a witness in a pre-trial consultation, it is helpful to distinguish between the three acts of ascertaining what a witness *will* say, *can* say or *should* say, in evidence. To discuss with a witness what he or she should say in evidence is a precise definition of what 'coaching' is. To explain to a witness what he or she can say in evidence, may or may not amount to 'coaching' depending upon the particular nature of what is being discussed. It is difficult, however, to see how a consultation, which is confined purely to what a complainant will say in evidence at the trial, can be said to be 'coaching' of that witness.

It is also false to assume that such a pre-trial consultation would only serve the interests of the prosecution. It may transpire in the course of this consultation that the complainant is vague or unsure about some essential element of the alleged offence. Equally, it could emerge in a case where there are multiple counts on the indictment that the complainant is unsure of the circumstances of one or more incidents that give rise to these counts. If the latter situation arises, the prosecution could then make an informed decision not to proceed with certain counts on the indictment. This would prevent the unwelcome situation of an accused person being arraigned before a jury

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3. Chapter 8 'The Role of the Prosecutor in Court', at p. 34. (Revised, October, 2007) panel on a certain count, which will not be supported by the complainant's evidence and then being convicted on another count which is so supported.

The secondary rationale for the restriction upon a pre-trial consultation is that the complainant may disclose something in this consultation which contradicts what is stated in an earlier statement or may disclose additional facts. This situation can be easily addressed, however, by furnishing an additional statement to the accused's legal representatives setting out what the complainant has now disclosed in this consultation. If the complainant had said something which undermines the version of events given in the original statement, the full disclosure of this occurrence to the accused's legal representatives underlines that the introduction of this pre-trial consultation could often work to the benefit of the accused person and should not be seen as simply for the sole purpose of a more assured presentation of the prosecution case.

2. The presentation of a complainant who is hostile

By reason of the restriction upon a pre-trial consultation between prosecuting counsel and a complainant in relation to his or her evidence, the former never hears directly from a complainant as to the reason(s) he or she no longer wishes to pursue the original complaint made with the Garda Síochána, when this arises. The presentation of a complainant who is hostile raises a whole range of difficulties. Essentially, it involves the prosecuting counsel having to first engage in a rather artificial exercise of seeking to cajole the complainant into giving evidence consistent with what is contained in the original written statement. Once this fails, a more robust approach has to be adopted by seeking leave from the trial judge, in the absence of the jury, to have the complainant treated as a hostile witness. The leading authority on how to correctly approach the problem of a hostile witness is the judgment of Walsh J. in the case of People (Attorney General) v. Taylor [1974] I.R. 97. Having set out the procedure which should be followed, Walsh J. concludes by stating:-

> *"It must at all times be made clear to the jury that what the witness said in the written statement is not evidence of the fact referred to but is only evidence on the question of whether or not she has said something else – it is evidence going only to her credibility."* **(4)**

If a hostile complainant on being cross-examined on a previous inconsistent statement adopts and confirms its contents, then the contents of the statement become part of his or her evidence. They can then be acted upon by the jury. Nevertheless, the weight to be attached to this evidence will be adversely affected by the inconsistency in the evidence of the witness and the trial judge may, and in some instances is under a duty to direct the jury that little weight should be given to it, depending upon the degree of unreliability of the witness. In R. v. Ugorji [1999] 9 Archbold News 3 CA (98 06131 W3) the English Court of Appeal said that where leave is given to treat a witness as hostile, and the witness, upon being cross-examined upon a previous statement, says that its contents are true, it is incumbent on the judge to warn the jury to approach any evidence given by the witness incriminating the accused, after being treated as hostile

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4. Per Finlay C.J. in People (DPP) v. Kelly [1987] I.R. 596 at p. 598.

with caution, pointing out that the evidence was only elicited as a result of cross-examination by prosecution counsel.

The kernel of this difficulty is that it is most unlikely that a jury will return a verdict of guilty when a complainant has to be treated as hostile. Either he or she will only admit the contents of the statement (which is proof of the statement being made and not of its factual contents) or will admit the circumstances contained in the statement, which the direction of the trial judge will then most likely attach a strong warning to. Even if a verdict of guilty is returned, it is difficult to see how it could weather the scrutiny of the Court of Criminal Appeal when the inevitable appeal against conviction arises.

When a complainant recants from the complaint, it usually arises in two circumstances. Firstly, some wrongful pressure may have been brought to bear upon the complainant acting as a form of duress or undue influence upon this party, forcing him or her to withdraw the complaint. Alternatively, the complainant and the accused may have become reconciled, often in the context of monetary compensation having been paid by the latter to the former and the complainant's willingness to proceed with the complaint is then put to an end. Obviously, any form of interference with the free will of a complainant in relation to the pursuing of a complaint must be addressed. The pursuing of the criminal prosecution to the end, however, may not be the most prudent use of time and resources.

Instead, the criminal process could be fully pursued up to the time that the trial judge is asked to enquire into whether the complainant should be treated as hostile. During this *voire dire* examination, the real reason(s) as to why the complainant no longer wishes to proceed with the matter can be explored as far as this is possible, with a full transcript being taken of the complainant's evidence. After this has been conducted, the prosecution could consider entering a *nolle prosequi* and requesting a copy of the transcript from the trial judge. The basis for a prosecution under section 41 of the Criminal Justice Act, 1999 may then have been laid as this section provides that a person :

> *" ... who harms or threatens, menaces or in any other way intimidates or puts in fear another person who is a witness or potential witness in proceedings for an offence, or a member of his or her family, with the intention thereby of causing the investigation or the course of justice to be obstructed, perverted or interfered with, shall be guilty of an offence."*

Such an approach gets to the root of the problem, namely the wrongful interference with the free will of the complainant. It also prevents the continuation of a trial based upon the evidence of a complainant which is essentially unsafe. Most importantly, it removes the possibility, albeit highly remote, of a conviction being returned by a jury upon the central evidence of a complainant which is not freely given by this party.

3. The unilateral application of the duty to seek out and preserve evidence

One of the most frustrating difficulties for a prosecutor at trial occurs when the accused's legal representatives, having allowed the case to proceed to trial, raise an issue for the first time that the Garda Síochána did not seek out and preserve certain evidence. This can arise where the accused's representatives themselves never saw this potential evidence as being helpful to their client's case but is simply availed of on behalf of the accused, in the course of the trial, in order to question its fairness or the reliability of the prosecution evidence. Paragraph 9.18 of the Guidelines for Prosecutors provides that:

> *"There is a duty to seek out evidence having a bearing on guilt or innocence. The obligation does not require the investigator to engage in disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case. The obligation to seek out and preserve evidence is to be reasonably interpreted and the relevance or potential relevance of the evidence needs to be considered. There is an obligation and responsibility on defence lawyers to seek material they consider relevant."* **(5)**

The last sentence of this guideline is important because when this issue arises in the course of a trial, it can easily be seen as the sole obligation or the unilateral duty of the prosecution to seek out and preserve evidence. There is, however, a corresponding obligation upon the accused and his or her legal representatives, which can easily be forgotten. In the case of Dunne v. Director of Public Prosecutions [2002] 2 I.R. 305 Hardiman J. stated that there is a responsibility on an accused's advisers, with their special knowledge and information, to request material thought by them to be relevant.

In a seminal judgment of O'Donnell J. in the case of Byrne v. Director of Public Prosecutions (Supreme Court, delivered on November 17th, 2010) he considers a number of authorities which establish the proposition that the accused is obliged to engage with the facts of the case against him or her in order to demonstrate the relevance and significance of the evidence alleged to be missing. One such authority is the case of Scully v. D.P.P. [2005] 1 IR 242 where the Supreme Court, in the judgment of Hardiman J. stated:

> *" ... all the Applicant has done here is merely invoke the possibility that exculpatory evidence at one time existed, and that there was something visible on the video, despite the new evidence. He must do more than that. In the words of Finlay C.J. in Z. v. Director of Public Prosecutions [1994] 2 I.R. 476 at page 507 he must "establish a real risk of an unfair trial". The importance of the first adjective in this phrase is that it excludes a risk which is merely remote, fanciful or theoretical. The need to meet this requirement involves much greater engagement with the actual state of the evidence than is apparent here."* **(6)**

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5. at p. 42.
6. at p. 325.

A similar rationale can be found in the judgment of Dunne J. in the case of Fagan v. Judges of the Circuit Criminal Courts and the D.P.P. [2006] IEHC 151 in which another challenge to the trial proceeding, based on absent CCTV evidence, was rejected. The relief sought of prohibition was refused on the grounds of delay but Dunne J. also considered the substance of the applicant's case. She rejected the applicant's claim concluding:

> *" ... the applicant herein has failed to engage with the evidence in this case. Looking at the overall situation herein it seems to me that this is a case in which leave has been sought to prohibit the trial by virtue of the happenstance that the CCTV footage is missing rather than an attempt to show that the applicant has been deprived of a fair trial by the absence of critical missing evidence. I feel that my view in this regard is supported by the fact that such an application was brought only on the eve of trial and accordingly it seems to me to have the characteristics of an application made for the purpose of "tripping up the investigators in discovery of the evidence" as described by Hardiman J. in the Scully case."*

The position is distilled in one of the principles enunciated by Fennelly J. in the case of Savage v. Director of Public Prosecutions [2009] 1 I.R. 185 in which he stated that:

> *" ... The applicant must show, by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial. Hardiman J. said in McFarlane v. Director of Public Prosecutions [2007] 1 I.R. 134 at page 144, that:*
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> > *"In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent." "* **(7)**

Accordingly, if an accused raises an issue about the adverse effect of the absence of certain evidence, after the trial has commenced, the fact that he or she does so at such a late stage must undermine the strength and credibility of the submission being made. Furthermore, the accused will have to demonstrate, not only why this issue was not raised at an earlier stage, but also a real engagement with the facts of the case to show the importance of this potential evidence. It may be prudent, however, for the prosecuting solicitor, to explicitly state the bilateral nature of the obligation to seek out evidence at the pre-trial stage, when other material is being disclosed, so as ward off such an opportunistic application in the course of the trial. When responding to a letter seeking disclosure of material or otherwise, the prosecuting solicitor could add the following paragraph at the conclusion of the letter:-

> … You will note that the duty to seek out and preserve evidence for the hearing of this matter extends to both parties in these proceedings. If there are any further materials which your Client requires for the conduct of the defence of these proceedings, please revert to us well in advance of a date being assigned for the hearing so that this can be addressed in so far as this is reasonable or possible. Please also note, however, that if a date is assigned for the hearing of this case, at

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7. at p. 209.

the behest of, or with the consent of your Client, the prosecution will rely upon this letter to resist any application being made on behalf of your Client at the trial of the action which is based upon any alleged failing on the part of the prosecution to seek out, preserve or otherwise make potential evidence available prior to the commencement thereof.

4. The invalidity of search warrants obtained from a senior officer of the Garda Síochána

The recent decision of the Supreme Court in the case of Damache v. The Director of Public Prosecutions and others [2012] IESC 11 **(8)** presents a challenging difficulty in every prosecution based upon evidence obtained from the search of an accused's home pursuant to a warrant issued under section 29 (1) of the Offences Against the State Act, 1939. On behalf of the Supreme Court, Denham C.J. declared that section 29 (1) of the Offences Against the State Act, 1939 (as inserted by s.5 of the Criminal Law Act, 1976) and referred to as s.29 (1) of the Act of 1939, is repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person.

Before addressing certain approaches that could be taken in response to the implications of this judgment, two general observations can be made. In the first instance, it is important to note that the Supreme Court affirmed that it was deciding this case on its own circumstances. These circumstances included the fact that the warrant was issued by a member of the Garda Síochána team, which was investigating the matters in question. In the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person such as the appellant. In this case, the person authorising the warrant was not independent.

Clearly, with a judgment which has potentially profound ramifications, the prudent approach is to proceed on a case by case basis until the principles that arise from the application of the judgment become settled. The wisdom of this approach was endorsed by Hardiman J. in his judgment in A. v. Governor of Arbour Hill Prison [2006] 4 IR 88 in supporting the view that the courts should not attempt to lay down a rigid general rule as to what proceedings under an invalid statute will be given force and effect and what proceedings may be struck down.

> *"I deliberately avoid any general consideration of the broad question as to when … acts done on foot of an unconstitutional law may be immune from suit in the Courts … I think experience has shown that such constitutional problems are best brought to solution step by step, precedent after precedent, and when set against the concrete facts of a specific case."* **(9)**

The second observation is that the implications of this judgment are generally not likely to apply to convictions in cases that have been concluded. In his judgment in A.

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8. delivered on February 23rd, 2012.
9. at p. 180.

v. Governor of Arbour Hill Prison [2006] 4 I.R. 88, Murray J., (as Chief Justice) enunciated the following 'general principle' :

> *"In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle."* **(10)**

The question, which now arises, is to consider approaches to cases that have not been finalised and in relation to which pivotal evidence has been obtained on foot of the execution of a search warrant issued by a senior officer of the Garda Síochána pursuant to the impugned section. The following are some of the approaches that commend themselves in this context:

(a) It is important to avoid a generalised approach and each case must be considered in light of its own particular circumstances and the specific effect upon the case of the omission of evidence obtained pursuant to such a warrant;

(b) With each case, one needs to especially evaluate the particular role that the senior garda officer, who has sanctioned the issue of the warrant, has played in the particular investigation. If the senior officer has played no role in the investigation in question, a substantial ground of distinction arises. The question will then arise whether the issue of the warrant pursuant to an unconstitutional section is sufficient in itself to invalidate the warrant or whether this key distinction will prevent the warrant from being treated as invalid;

(c) One must consider whether there has been a plea of guilty or other conduct on the part of the accused as to give rise to questions of estoppel, waiver, acquiescence or *res judicata* which inhibit the reliance by an accused person upon the argument that the warrant is now invalid;

(d) It is also needs to be considered whether the entry into the dwelling of the accused had a justification separate to the warrant issued pursuant to the impugned section. In particular, one needs to consider whether the entry to the premises could also be justified as effecting an arrest of a person without a warrant for an arrestable offence pursuant to section 6(2) of Criminal Justice Act, 1997;

(e) Finally, one should note the potential willingness of the Courts to entertain an argument that the invalidity of the warrant could have catastrophic effects. In the recent judgment of the Court of Criminal Appeal in D.P.P. v. Timothy (Ted) Cunningham **(11)**, Hardiman J. did allude to this possible ground arising

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10. at p. 143.

11. judgment delivered on May 11th, 2012.

in a case of this nature. Added to this, regard must also be had to the fact that a search warrant, issued under the impugned section, may have arisen in a case where very serious crime is being investigated, including alleged criminal conduct of a subversive nature.

5. Addressing the subjective nature of the defence of lawful use of force

Another practical problem faced by prosecutors at trial is the difficulty encountered in meeting a defence of lawful use of force. The essence of this difficulty is that once a defence of this nature is raised by the accused, the prosecution must then disprove, beyond reasonable doubt, that the accused did not subjectively believe at the time of his or her use of force that it was necessary in all of the circumstances. This onerous obligation upon the prosecution is established by section 18 (1) of the Non-Fatal Offence Against The Person Act, 1997 which states, that in the circumstances listed in the section, a person may use such force *"as is reasonable in the circumstances as he or she believes them to be."* Sub-section five of this section then proceeds to state that:

> *"For the purposes of this section the question whether the act against which force is used is of a kind mentioned in any of the paragraphs (a) to (e) of subsection (1) shall be determined according to the circumstances as the person using the force believes them to be."*

In discharging the burden of disproving this defence, the prosecution must enter the mind of the accused and test the established facts against what the accused believed was the situation he, or the person he was defending, was facing.

A similar approach has been enacted in relation to the defence of one's dwelling and persons within it, by the Criminal Law (Defence and Dwelling) Act, 2011. The new Act allows for reasonable force by people who believe that they need to use it to protect people in dwellings from assault, to protect property, to prevent a crime or to make an arrest. Section 2 of the Act provides as follows:-

2. (1) Notwithstanding the generality of any other enactment or rule of law and subject to subsections (2) and (3), it shall not be an offence for a person who is in his or her dwelling, or for a person who is a lawful occupant in a dwelling, to use force against another person or the property of another person where –

(a) he or she believes the other person has entered or is entering the dwelling as a trespasser for the purpose of committing a criminal act, and

(b) the force used is only such as is reasonable in the circumstances as he or she believes them to be –

(i) to protect himself or herself or another person present in the dwelling from injury, assault, detention or death caused by a criminal act,

(ii) to protect his or her property or the property of another person from appropriation, destruction or damage caused by a criminal act, or

(iii) to prevent the commission of a crime or to effect, or assist in effecting, a lawful arrest."

It is quite explicit from this section that the test is the appreciation by the accused of the circumstances as he or she believed them to be. The subjectivity of the test is, however, emphatically re-iterated in sub-section four of this section which states:

"(4) It is immaterial whether a belief is justified or not if it is honestly held but in considering whether the person using the force honestly held the belief, the court or the jury, as the case may be, shall have regard to the presence or absence of reasonable grounds for the person so believing and all other relevant circumstances."

The provision in this sub-section that it is immaterial whether a belief on the part of the accused is justified or not, provided it is honestly held, creates a very high standard for the prosecution to disprove beyond a reasonable doubt. In order to have a real prospect of doing so, the contents of an interview with the accused in the aftermath of the violent act or as soon thereafter as possible, become of critical importance. The questioning of the accused of the circumstances that prevailed at the time of the incident, and his or her perception of these circumstances, needs to be explored in detail in an interview as soon as possible after the incident occurred.

A natural tendency can arise in the course of an interview with a suspect, when this person admits his or her presence at the scene where the violence occurred and the execution of the violent act itself, to simply suspend the questioning at that stage. By doing so, however, there is no recording of the circumstances of the incident as the person in question then believed them to be. When an interview could have been conducted with a suspect in the immediate aftermath of the incident, this is a particularly unfortunate outcome because the apprehension by the suspect of the circumstances that prevailed at the time of the incident is particularly fresh in his or her memory. Often, the full effect of this omission is not appreciated until the accused gives evidence at the trial and proceeds to disclose the basis for the defence of lawful use of force based on his or her subjective appreciation of the circumstances that then prevailed. In the absence of potentially inconsistent responses in a searching interview carried out at a time proximate to the event, the prospects of this defence being disproved become greatly diminished.

6. Sentence reviews

The prosecution may seek a sentence review under section 2 of the Criminal Justice Act, 1993. The Director may apply to the Court of Criminal Appeal for review of a sentence imposed by a court on conviction where it appears to the Director that the sentence as unduly lenient. The onus lies on the Director to show that the sentence is not merely lenient but unduly so. Since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence will allow the intervention of the court in order to increase the sentence. **(12)**

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12. Director of Public Prosecutions v. Byrne [1995] 1 ILRM.

The Court of Criminal Appeal has also established that there must have been an error of principle by the sentencing court to justify altering the sentence. **(13)** Paragraph 11.6 of the Guidelines for Prosecutors encapsulates the position as follows:

> *"The Court of Criminal Appeal will not, therefore, increases a sentence because of a mere disagreement with its severity, It is necessary that there be a substantial departure from the accepted range of appropriate sentences for the offence committed in the circumstances of the case, including the specific elements relating to the offender, or an error of principle in the way in which the trial judge approached sentencing."* **(14)**

The making of the decision as to whether to proceed with a sentence review is an area which can give rise to misunderstandings. Understandably, in particularly traumatic cases involving a fatality or serious harm being caused to a victim, the injured party or family members can be very upset by the leniency of a sentence. The investigating garda officer, who has to liaise with the victim or the family members, will be particularly conscious of this. Equally, the professional officer engaged with the case will have an overview of the sentences which are being pronounced by the courts for the particular offence in question which the legal representatives engaged in the case will not have. The legal representatives do, however, have the benefit of being centrally involved in the unfolding of the evidence before the court and of assessing whether the sentence was unduly lenient or not.

In essence, the proposition being suggested here is twofold. Firstly, while it is a matter for the Director of Public Prosecutions alone to decide whether a sentence review should be pursued or not, the legal representatives engaged on behalf of the Director have a special understanding of whether the review has a reasonable prospect of success or not. The deliberations of the Court of Criminal Appeal will centre upon the conduct of the sentencing hearing by the trial judge and the legal representatives are best placed to assess how the review of this conduct will proceed. In short, where the legal representatives advise against proceeding with a review, it is suggested that it is most likely that it will not result in any substantial alteration of the sentence imposed by the trial judge.

Secondly, in considering to proceed with a sentence review, particularly in a highly emotive case, it is essential not to lose sight of how high a standard must be met in order to warrant intervention by the Court of Criminal Appeal. A clear and helpful statement of this was given recently by McKechnie J. in the case of D.P.P. v. Derrick Stronge [2011] IECCA 79. **(15)** McKechnie J. made reference to both of the cases mentioned above and to the case of The People (D.P.P.) v. McCormack [2000] 4 I.R. 356 in stating that the following principles can be said to apply in an application for review under section 2 of the 1993 Act :-

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13. Director of Public Prosecutions v. Redmond [2001] 3 IR 390.
14. at p.51.
15. delivered on May, 23rd, 2011.

" (i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be an appropriate sentence in the circumstances. There must be a clear divergency and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose : sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s.2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different : on a s.2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified ; and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

These principles, as set out by McKechnie J., confirm that the threshold to be reached for intervention to be warranted by the Court of Criminal Appeal is very high. What is essentially required is a real sense of error or even injustice with the leniency of the sentence given the particular circumstances of the case. In other words, in proceeding with the review before the Court of Criminal Appeal, if the prosecuting counsel has to engage in a serious debate with the members of the Court as to the why the sentence is unduly lenient, the application for review is effectively lost before counsel for the accused responds. The lack of proportion between the egregious act of the convicted person and the sentence must speak for itself.

Conclusion – The establishment of a prosecution practices advisory board

If any prosecutor was asked to set out the essential difficulties that he or she encounters, considerable divergence would inevitably arise. The purpose of this paper is simply to highlight certain practical difficulties and suggest approaches that may be taken to them or to even stimulate discussion and further consideration of them.

On a more general level, however, consideration could also be given to the prudence of establishing a prosecution practices advisory board. This body could be comprised of senior members of the Garda Síochána, prosecuting solicitors and barristers and members of the office of the Director of Public Prosecutions. Its purpose could be threefold, namely to:-

(a) assimilate nationally the experiences of prosecutors with practical difficulties at trial;

(b) provide guidance as to the best practice which should be adopted by prosecutors in relation to the most recurring difficulties which arise in the trial process and which could be presented each year at this national conference and codified in the next review of the guidelines for prosecutors;

(c) provide guidance to their fellow professionals when issues arise in relation to the preparation of a particular case for trial and/or in the course thereof.

There are many benefits that could ensue from the establishment of such a body. The improvement of the practice of prosecuting could be considerably assisted by a more integrated approach to problems being considered by the different professionals who are engaged in the trial process. A board comprised of the different professional constituencies outlined above could realise this objective.

Furthermore, the practice of prosecuting is increasingly stressful and complex. It would undoubtedly assist all of the professionals engaged in the trial process if they knew that they had access to a body, comprising senior members of their own profession, who could assist in giving guidance and even simple support when practical difficulties inevitably arise.

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