THE PROSECUTOR AND THE VICTIM

Introduction

Any analysis of the relationship between the prosecutor and the victim has to start with the fundamental proposition that in our system of justice the Director of Public Prosecutions prosecutes cases on behalf of the people of Ireland and not just in the interests of any one individual. This basic proposition is not always appreciated or understood by members of the public, and sometimes not by victims themselves. For example, one sometimes hears victims of crime talking about "their" lawyer. Of course, seen from the perspective of a victim who thinks that the function of the prosecutor is to represent his or her interests rather than the interests of society as a whole, it is not difficult to see why prosecutors should sometimes be criticized by victims for failing to take their interests into account.

However, just because the function of the prosecutor is to represent the interests of the people and not those of the individual victim it does not follow that the prosecutor is to have no regard whatsoever to the victim's interests. The days when a prosecutor might regard a victim of a crime as no more than just a witness in the proceedings are over in this jurisdiction. The fact that the prosecutor has to have a wider perspective than the interests of the victim, and in particular has to ensure that the prosecution and the criminal process is consistent with the interests of justice rather than the interests of any one individual does not mean that the prosecutor may not take the views and interests of the victim into account in arriving at decisions. Even on the most utilitarian consideration, it is rare to find a prosecution which can be brought successfully without the evidence of the victim, and it is therefore not in the interests of a prosecutor to have a disgruntled victim whose disillusionment may lead to a refusal to give evidence.

It must also be acknowledged that while society has an interest in a general sense in prosecuting crime the victim has a particular and personal interest in seeing the perpetrator of the particular crime brought to justice. That is an interest which the victim shares with the prosecutor. Where the interests can diverge, of course, is where the prosecutor decides that the evidence simply does not warrant or justify a prosecution, or is such that a prosecution would be unsafe. In such cases it sometimes

happens that the victim's desire to see the perpetrator brought to justice blinds him or her to the possibility that a particular suspect may not in fact be the perpetrator of the offence.

Apart from utilitarian considerations, it also seems to me that a person who has personally suffered as the victim of a crime and who is central to the trial process has the right to as much information about the criminal process as is consistent with the prosecutor's obligation to the interests of justice and the law. Put simply, if I or any member of this audience were the victim of crime we would want to know as much as possible about what was happening. In my view this is the main reason for the changes in the attitude of prosecutors towards victims which have occurred in recent years.

Dealing with Crime Victims

I want to start by describing the current situation regarding the interaction between my Office and victims of crime. In the first place, it is now acknowledged that victims have a right to as much information as can practicably be given concerning the trial process itself. This right has been acknowledged both in the Victims Charter and in the Guidelines for Prosecutors which I have published. Our Office has published information about the trial process which is available on our website in a number of different languages. On an international level the right of victims to information is recognized in the EU Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, and the EU has competence to establish minimum rules on the rights of victims of crime.

In the early stages of a prosecution, information will primarily be conveyed to the victim through the Garda Síochána. The investigating Garda is the main contact which a victim has with the system of investigation and prosecution following the reporting of a crime. In cases of serious crime, in particular homicide and serious sexual offences, it is now the practice of the Garda Síochána to appoint a member of the force as liaison officer in respect of particular victims or, in the case of homicide, the families' of victims (and in this paper when I refer to victims it should be understood that I include within that term the families of homicide victims). When a decision is made to

prosecute, the fact of that decision will be communicated by the Gardaí to the victim who should be given as much information about court hearing dates and the process that will be followed as is practicable.

Our Office has also adopted a practice of holding a meeting in advance of the trial between victims and the lawyers who will handle a serious case in court. This is routinely done in cases of homicide, serious assaults and serious sexual offences. The purpose of such a meeting is to inform the victim of the procedures which will be followed in court. The Garda liaison officer will inform the victim of the possibility of arranging such a meeting. Normally these meetings take place relatively close to the trial date, as this is probably the optimum time for conveying information of this sort. If it is provided too early on it may be forgotten by the date of the trial. This also provides an opportunity to the victim to meet the barrister and solicitor who will conduct the case in court. At such meetings, however, no discussion of the evidence will take place because it is very important that there should be no suggestion that the prosecution would coach its witnesses.

During the trial itself there will also be considerable interaction between the victim of crime and the legal team representing the prosecution. For example, where the defendant offers to plead to an offence less than that which is charged, it has for some time now been the practice to inform the victim of that fact and to ascertain the attitude of the victim to such a development. In some cases a victim will be unhappy with, for example, a decision to accept a plea to sexual assault where the original charge was one of rape or a decision to accept a plea to manslaughter where the original prosecution was for murder. In other cases, a victim may be very happy to see the case end in a conviction, even though he or she would have preferred a conviction for a more serious offence. A victim is often relieved not to have to go through the ordeal of giving evidence. Where a plea is offered it will be explained to the victim what are the advantages or disadvantages of accepting a plea. For example, it is frequently the case that the evidence actually given in court falls short of what was anticipated. Very often a witness' evidence in court is much less strong than the statement originally given to the Garda Síochána. As a result, it may be that a case which originally looked much stronger by the time of trial stands a significant chance of ending in an acquittal. In

such a case, it will be explained to the victim that the assessment of the legal team and of the Office of the DPP is that to reject the offer of a plea and to allow the case to proceed to a verdict runs a significant risk of an acquittal and that from the victim's point of view accepting a plea to a lesser offence may represent a better outcome. There may be other factors which a victim will make the prosecution aware of which might affect the prosecutor's attitude to accepting a plea. For example, there can be cases where victims or their families might be relieved to be spared having to hear evidence which is distressing or embarrassing. In such a case, it may even be that the prosecutor, despite an initial reluctance to accept a plea to a lesser offence, does so partly out of consideration for the feelings of the victim who may be more anxious than the prosecutor to see a plea to a lesser offence accepted.

Our Office does not necessarily do what the victim would like in such cases. The primary concern of our Office always has to be the public interest and not the private interests of the victim. However, the general experience of my staff in dealing with victims is that even where they do not agree with the decision which is made in such cases they tend to appreciate the fact that the thinking behind a decision either to accept or reject the offer of a plea has been explained to them and that they have been consulted in relation to the process.

Reasons for not Prosecuting

By far the most difficult area for relations between prosecutors and victims has been the policy of not giving reasons for decisions not to prosecute. Briefly, it has always been accepted that there is a significant number of cases in which it is not possible to explain a reason because of the damage such an explanation could cause to a third party. The most extreme example of this may be where giving a reason could disclose the existence or identity of a police source. Other examples might include disclosing private information about the health of a witness or a person involved in the proceedings, or the risk that an explanation as to the reasons for not proceeding with a prosecution would effectively condemn a suspect in the eyes of the public without the opportunity to clear his or her name through the trial process.

However, while such cases are undoubtedly important and their existence cannot be ignored, they represent a relatively small proportion of the total number of cases decided. In a substantial number of cases the reason for a decision not to prosecute is relatively straightforward even though explaining it may not be a simple matter. The overwhelmingly commonest reason not to prosecute is simply because the evidence available is insufficient to provide a realistic prospect of persuading a jury beyond a reasonable doubt that a suspect is guilty of the offence charged. It is not always appreciated that where a jury hears two versions of something it is not their function merely to decide who to believe, but that they have to be satisfied beyond a reasonable doubt. It is quite possible for a jury to believe a crime victim's version of events and yet to acquit the accused because they cannot be sure of its truth beyond a reasonable doubt.

It is sometimes suggested that the prosecutor should simply put up what evidence there is and allow the court to reach a decision. This is not, in my opinion, an approach which any responsible prosecutor could take. In an adversarial system it is the duty of the prosecutor only to prosecute where he or she considers that there is a reasonable prospect of securing a conviction. There has to be a basis upon which a court and the jury can be invited to arrive at the conclusion that they are persuaded of the suspect's guilt beyond a reasonable doubt.

Cases where there is independent evidence to corroborate the complaint of an injured party are of course the most straightforward. However, in many cases there may be no independent evidence. That is not to say that a case dependant solely on the evidence of a single witness can never succeed. Many such cases are prosecuted successfully. Sometimes the account given by a complainant will be very convincing and the explanations offered by a defendant might be quite implausible. But many factors can weaken a case. For example, a complainant may have given contradictory accounts of an incident on different occasions. If this has happened, in the absence of a convincing explanation for any discrepancy it will be difficult to persuade a jury to convict. Or it may even be that independent evidence shows that the complainant's account must be mistaken. A complaint may have an honest but mistaken belief as to key aspects of the evidence. In some cases a possible prosecution may depend on evidence which is

unreliable for some other reasons such as the mental health of a complainant, or where a complainant is very young, or was intoxicated when an offence was committed. All of these factors have to be weighed by the prosecutor in deciding whether to bring charges.

On 22 October 2008 I decided on a pilot basis to give reasons in relation to decisions not to prosecute in cases involving a death which occurred after that date where there was a decision not to prosecute. In doing so I reserved the possibility that if a case fell within a class where it would not be possible to give a reason because it would create an injustice we would not give a reason.

To date we have been asked to and have given reasons for decisions to prosecute in less than a dozen cases. This represents only a relatively small proportion of the cases covered by the pilot scheme in which we made a decision not to prosecute.

At this stage it is not possible to be certain why we have not been asked for reasons in relation to more cases. However, our experience would indicate that there are a substantial number of cases within the scope of the scheme where the reason is in fact fairly obvious. For example, a substantial number of fatal road traffic accidents involve a single vehicle in which the driver is killed. In such a case, there is no living person who could be charged with a criminal offence. In some homicide cases, particularly those with a connection to inter gang violence, there is no prosecution simply because witnesses do not come forward and in a substantial number of such cases the Gardaí do not even have sufficient evidence to send a file to my Office. Obviously such cases do not even arrive at the point of deciding not to prosecute.

The experience of my Office to date is that giving reasons to victims is quite resource intensive. Considerable care has to be taken to set out as clearly and accurately as possible the factors which have militated against a prosecution and to ensure that the reasons are justifiable. The decision has to be made as to what level of detail should be contained in a letter giving reasons, and it has to be drafted in a manner which is clear and avoids legalistic jargon.

It is my intention at this stage to continue this pilot project for a further period. It would be my wish to expand the project to cover other categories of crime and I would like to be able to do so next year. At that stage we will have built up more experience of giving reasons to victims. However, I would be concerned if extending the project's scope were to result in any significant slowing of the process of dealing with the files received in the Office which could be the consequence if we were to do this within existing resources.

Victim Impact Statements

I want to say a little about victim impact statements. The Criminal Procedure Bill 2009 which was introduced by the Minister for Justice, Equality and Law Reform as part of the "Justice for Victims" initiative launched on 19 June 2008, proposes to make significant changes to the law relating to victim impact statements. The existing law did not make provision for the hearing of victim impact statements on behalf of the families of homicide victims, although the practice developed in the Central Criminal Court of allowing such statements to be made at the discretion of the trial judge. The 2009 Bill proposes to put the right of homicide victims' families to make such statements on a statutory basis. It also proposes to set out detailed rules enabling the judge to determine which member or members of a family may make such a statement.

You will be familiar with the situation which arose after the trial of Wayne O'Donoghue for murder in which he was convicted of the manslaughter of Robert Holohan. Matters were referred to in the victim's mother's statement which had not been given in evidence in court and which made serious allegations against the convicted person which had not formed part of the case proven in the trial.

In its judgment in the *People v Wayne O'Donoghue* (Court of Criminal Appeal, 18 October 2006) the court said the following:

> "It is the view of this court that in the event a sentencing judge, in his or her discretion, permits such a victim impact statement to be made, such a statement should only be permitted on strict conditions. In particular, a copy of the intended victim impact

> statement should be submitted both to the sentencing judge and to the legal representatives of the accused, it being assumed that it will already have been made available to the prosecution. This must be done in advance of the reading or making of the statement itself in court so that both the sentencing judge and the accused's legal representatives may have the opportunity of ensuring that it contains nothing untoward. Assuming that the content of the proposed statement meets this requirement, the person who proposes making the statement should be warned by the sentencing judge that if in the course of making the statement in court they should depart in any material way from the content of the statement as submitted, they may be liable to be found to have been in contempt of court. If it be the case that such departure occurs and involves unfounded or scurrilous allegations against an accused, that fact may be considered by the sentencing judge to be a matter to be taken into account in mitigation of the sentence to be imposed."

The 2009 Bill now proposes a different solution. It will empower the court, in the interests of justice, to order that information relating to evidence given by a victim or part of it should not be published or broadcast. Had this provision been in force at the time of the O'Donoghue trial the trial judge would have been entitled to make an order prohibiting publication of matters which were alleged but which had not in fact been proved in the course of the trial. This solution may not commend itself to everybody, but it does have the advantage of giving the court a procedure to control any matter which it considers is unfair to a party to the case without having to go through the process of censoring a victim impact statement in advance or without holding over a crime victim the threat of being punished for contempt of court which is a prospect that nobody involved in the criminal justice system could regard as a desirable outcome.

Victims' Previous Sexual History

Finally I would like to say a few words about the law concerning the questioning of a victim in a sexual offence case about her or his previous sexual history.

The applicable statutory provision is section 3 of the Criminal Law (Rape) Act, 1981, as amended by section 13 of the Criminal Law (Rape) (Amendment) Act, 1990, which provides as follows:

> "3(1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no questions shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person….
>
> (2)(a) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person.
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> (b) The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied."

Additionally, the section goes on to provide that even where leave is granted the judge may direct that particular questions shall not be asked or if asked shall not be answered except in accordance with his leave.

In the *People v GK* (Court of Criminal Appeal, 5 July 2006) the Court of Criminal Appeal made the following general comment in relation to this section:

> "Having regard to the severely restrictive terminology of the statutory provision, the court is of the view that, in general, a decision to refuse to allow cross examination as to past sexual history may more readily be justified in most cases than the converse. Indeed the Act is quite explicit in so providing. Furthermore, the younger the age of a complainant, the less desirable it is to ever allow cross examination which may well be extremely traumatic for a complainant of tender

> years. Where a form of questioning is allowed, it should be confined only to what is strictly necessary and should never be utilised as a form of character assassination of a complainant."

However, notwithstanding the above views, it is the experience of this Office that applications to cross-examine on previous sexual history are granted in the overwhelming majority of cases in which they are made

As part of a research project to establish the effectiveness of the provisions in section 4A of the Criminal Law (Rape) Act, 1981, inserted by section 34 of the Sex Offenders Act, 2001, (allowing for separate legal representation where an accused applies for leave to adduce evidence of the complainant's prior sexual history) the files in 59 rape cases were reviewed by our Office. The cases were those in which the Legal Aid Board informed us that applications for leave to examine a witness on previous sexual history had been made and they cover a period from 2002 to 2009.

Of those 59 rape cases reviewed, 40 reached trial at the Central Criminal Court. Guilty pleas to the principal offence of rape or to lesser charges were entered in respect of 10 cases, a *nolle prosequi* was entered in four cases, another four of the cases have yet to come to trial. The whereabouts of the accused in the remaining case is unknown.

Of the 40 cases that went to trial, section 3 applications were granted in a total of 28 cases, or 70 per cent of cases. The application was refused in only four cases (10% of the total). In three cases further information is awaited. In five cases, although a notice of intention to make an application was given, for various reasons the application was not ultimately made at trial.

Of the four cases in which the judge refused leave under section 3, this decision was subsequently overturned on appeal in one case. In that case, leave had been refused on the basis that consent was not an issue.

In a further case in which leave was refused, it was on the basis that the complainant's use of a contraceptive device (about which the defence sought leave to examine) was

irrelevant to the issues in the case. In making the decision not to allow this evidence, the judge referred to public policy considerations, namely the danger that women would be discouraged from making complaints if they thought that contraceptive use would be a factor in the decision to admit such evidence.

In a third case, leave was refused on the grounds that granting the application at a late stage in the trial would not be fair as it would add to the length of the hearing in circumstances where the issue had already been discussed at length. In addition, the trial judge stated that it had not been demonstrated that it would be unfair to the accused person to refuse to grant the application.

Finally, in the fourth case, leave was refused on the basis that the material at issue was irrelevant to the case. In both of those cases, the complainants were of a young age and the Court of Criminal Appeal in *GK* had noted that cross-examination on this topic would be undesirable in such circumstances.

In some cases, the trial judge appears to have granted the section 3 application, but imposed limitations on the precise scope of the questions in relation to prior sexual history to be put the complainant in cross-examination.

In one case, for example, the judge stated that leave extended to certain specific details only, and emphasised that the defence were not allowed to ask "mischievous" questions of the complainant. However, it is difficult to ascertain whether the defence adhered to the restrictions imposed in these cases, as transcripts are prepared only where there is an appeal.

Of the 40 rape cases that went to trial, there were convictions for rape or related offences in only 13 cases (32.5%). Of those 13, five were quashed on appeal (re-trials are pending in two of the five cases). Convictions for other offences were reached in three further cases, and a *nolle* was entered in a fourth, while the jury disagreed in four other cases in which a re-trial is pending (10%). Thus, the outcome reached in nearly half of all those cases which went to trial (19 out of 40) was that of acquittal. This represents an acquittal rate of 47.5 per cent.

It is difficult to see easy solutions to this problem, if indeed there is a problem, although I incline to think there probably is. Clearly there are circumstances in which previous sexual history evidence is relevant, and this is particularly so where the evidence relates to previous sexual history with the accused. As against that, the proportion of cases in which applications are being granted might seem to suggest that the legislation is not functioning in the manner it was intended and that the threshold for an applicant to have this evidence admitted is in practice very low. Without further study of the problem it is difficult to see any obvious legislative solution to the matter. Attempts in Scotland to tighten up on the conditions for the admission of previous sexual history by requiring advance notice in writing of an intention to raise this issue have paradoxically had the effect of increasing the number of applications rather than otherwise. This may well be an issue where a reference to the Law Reform Commission would be appropriate.

Conclusion

The question of the relationship between victims of crime and the prosecutor is a vast one. In this brief paper I have attempted merely to discuss a number of issues which seem to me to be important. I believe that there have been considerable improvements in the recent past in the way we treat victims of crime. But there is still considerable room for improvement. In particular, in the case of my own Office I would like to see a further extension of the policy of giving reasons to victims of crime in cases which are not prosecuted and I believe we need to move further in that direction subject to having the necessary resources. However, no matter what improvements are made, the trial process is always likely to be a bruising one for complainants. The right of an accused person to a fair trial necessarily means that the accused has the right to have the defence case put to the victim of a crime, sometimes in fairly robust terms. There are, however, other issues which still call out for reform. For example, it should not be permissible for a defendant in a case involving a sexual offence to personally defend himself and cross-examine a complainant. In my view this should always be done through a legal representative or the judge. There is also still considerable scope for increasing the extent to which we attempt to resolve as many issues as possible through a pretrial procedure before juries are sworn. The Fennelly Report made recommendations in this

regard some years ago but these have yet to be implemented. Another development which will have increasing significance in the years to come will be the use of videoed evidence from complainants and the procedures, technologies and trained persons are now I understand in place to enable this to be done in far more cases than has been the case up to now. Finally, notwithstanding that the prosecutor appears on behalf of the people as a whole and not on behalf of the victim, we still have to recognize that the victim of crime is central to the trial process and if victims are not properly and fairly treated by the process not only they but society as a whole will be the loser.