CHAPTER 17

CHARGES

Prosecutors

17.1 Under the Vanuatu Constitution s 55, responsibility for 'the function of prosecution' is allocated to an independent Public Prosecutor appointed by the President on the advice of the Judicial Services Commission. Section 55 expressly provides: 'He shall not be subject to the direction or control of any other person or body in the exercise of his functions.' See also the declaration of the independence of the Public Prosecutor in the Public Prosecutor Act s 7.

17.2 Political interference in a case being handled by the Public Prosecutor can constitute the offence of obstructing a legal process: Penal Code s 79(c). See, for example, *Public Prosecutor v Natuman* [2017] VUSC 210, where the Prime Minister, who was also the Minister of Police, had verbally instructed the Police Commissioner to stop criminal investigations in a matter for which the file had been referred to the Public Prosecutor.

17.3 The functions of the Public Prosecutor are detailed in the Public Prosecutor Act s 8(1):

> (1) The functions of the Public Prosecutor are:
> (a) to institute, prepare and conduct preliminary enquiries; and
> (b) to institute, prepare and conduct on behalf of the State, prosecutions for offences in any court; and
> (c) to institute, prepare and conduct, on behalf of the State appeals in any court in respect of prosecutions; and
> (d) to conduct, on behalf of the State as respondent, any appeal in any court in respect of prosecutions; and
> (e) if requested by the Attorney General to do so, to institute, prepare and conduct on behalf of the State, or be a party to, proceedings under legislation dealing with proceeds of crime, mutual assistance or extradition; and
> (f) to discontinue prosecutions regardless of who instituted them; and
> (g) if requested to do so, to give advice to members of the Vanuatu Police Force and any other investigators in relation to investigations, proposed prosecutions or prosecutions; and

(h) to provide assistance in obtaining search warrants; and
(i) to prosecute breaches of the Leadership Code [Cap. 240]; and
(j) such other functions that are conferred on the Public Prosecutor by this Act or any other law.

17.4 The Public Prosecutor works through the Office of the Public Prosecutor (OPP) and may delegate prosecutorial functions. Legally qualified staff of the Office can include a Deputy Public Prosecutor, Assistant Public Prosecutors and State Prosecutors: Public Prosecutor Act ss 20-22.

- State Prosecutors are certain persons appointed by the Public Prosecutor to conduct any prosecution or class of prosecution: Public Prosecutor Act s 22. Legal practitioners in the OPP are currently appointed as State prosecutors. They can conduct any prosecution but operate mainly in the Supreme Court. In addition to legal practitioners, police officers or public servants can be appointed as state Prosecutors. Police Prosecutors conduct most of the prosecutions in Magistrates' Courts.
- The Public Prosecutor may also permit 'any public officer having legal or administrative responsibility for the enforcement of such law' to conduct a prosecution, even though they have not been appointed a State Prosecutor.
- There can be private prosecutions in Magistrates' Courts but not in the Supreme Court. It has been held that 'any and all prosecutions in the Supreme Court are exclusively vested in the Public Prosecutor consistent with his constitutional function': *Fordham v Colmar* [2017] VUSC 101 at [34].

The decision to prosecute

17.5 The threshold standard for a charge and prosecution is belief on 'reasonable and probable cause' that an offence has been committed: Criminal Procedure Code s 35(1). This is sometimes also expressed as a 'prima facie case'. It means that there must be sufficient evidence on all elements of an offence to support a conviction. In *Attorney General v Wong* [1995] SBCA 7, the Solomon Islands Court of Appeal endorsed 'the classic statement' by Hawkins J in *Hicks v. Faulkner* (1881) QBD 167 at 171:

> I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of estate of circumstances, which, assuming them to be true would reasonably lead an ordinary prudent and cautious man, placed in the

position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

17.6 Two additional tests are applied in decisions about whether to prosecute:

1. Despite there being prima facie evidence of an offence, a prosecution should not be pursued when there are no reasonable prospects of conviction. There are various reasons why a charge which passes the test of a prima facie case may not be pursued or may fail in court. Evidence that would be sufficient for a conviction may be outweighed or undermined by contradictory evidence for the defence or may be weakened or destroyed by cross-examination in court. Even if it remains convincing on a balance of probabilities, it may fail the test of proof 'beyond reasonable doubt'. Whether there are reasonable prospects of conviction in a particular case is a matter of for the experience and judgment of the prosecutor. The prosecutor will have to 'assess the quality and persuasive strength of the evidence as it is likely to be at trial': see Queensland Department of Justice and Attorney-General, *Director's Guidelines* (2016).
2. Even when a conviction could be obtained, it has been accepted that the executive has discretion not to prosecute if this course is warranted by a review of the circumstances of the particular case. For example, a prosecution may not be warranted if there are mitigating circumstances to the offence or if the offender is ill or dying. The likely length and expense of a trial are additional factors which could be taken into account. This is sometimes called the 'public interest' test.

17.7 These tests are incorporated in *Prosecution Guidelines for the Republic of Vanuatu 2018*, issued by the Public Prosecutor under the authority of the Public Prosecutor Act s 11. The Guidelines state:

> 5.The Decision to Prosecute
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> The decision to prosecute is ultimately that of the Public Prosecutor or his or her delegate. The decision to prosecute is a discretionary one and will involve the consideration of a number of factors. These factors are part of a two stage process:
>
> 1. Does the evidence offer a reasonable prospect of conviction?
> 2. Is it in the public interest to proceed?
>
> The decision to prosecute must be made impartially and without the control of any other person or body.

5.1 SUFFICIENT EVIDENCE

A prosecution should not be started, whether after summons or arrest, or continued unless there is reliable evidence, admissible in a court of law, that a criminal offence was committed by the accused person. The evidence must support each element of the offence and must provide reasonable prospects of a conviction. If the evidence is not of sufficient strength, any prosecution would be unfair to the accused and a waste of public funds. Unless a prosecutor can view or be reliably informed of the existence of that evidence they MUST NOT under any circumstances place an information before the Court unless the matter falls under the 'minimum evidence test' and is approved by the Public Prosecutor. In deciding whether there are reasonable prospects of a conviction, there must be an evaluation of the strength of the prosecution case, bearing in mind that the prosecution must prove all elements beyond reasonable doubt. The following matters must be considered: a) The availability, competence and compellability of witnesses and their likely impression on the court. b) Any conflicting statements by any material witnesses. c) The admissibility of evidence including any alleged confession. d) Any defence that has been advised by the accused or is obvious on the facts.

5.2 PUBLIC INTEREST

If a prosecutor forms the view that there are reasonable prospects of a conviction, he or she, must then consider whether it is in the public interest to proceed. In many cases the public interest is served by the deterrent effect of a prosecution and in many cases mitigating factors are most appropriately dealt with by a sentencing court. The more serious an offence the more likely it will be in the public interest to proceed. Nevertheless, the Public Prosecutor is vested with significant discretion and in appropriate cases must give serious consideration as to whether it is in the public interest to proceed. These discretionary factors may include:

a) The level of seriousness or triviality of the alleged offence, or whether or not it is of a technical nature only.

b) The existence of any mitigating or aggravating factors.

c) The youth, age, physical or mental health or special vulnerability of the alleged offender or any necessary witness.

d) Any previous criminal history.

e) The time since an offence was committed and any delay.

f) The degree of culpability of the offender in connection with the offence.

g) The prevalence of the alleged offence and the need for either personal or general deterrence.
h) The attitude of the victim of the alleged offence to a prosecution.
i) The length and expense of a hearing or trial.
j) The likely sentence in the event of a conviction.
k) The necessity to maintain public confidence in the Office, Parliament and the Courts.
l) The effect on public order and morale.

The list is not exhaustive and the significance of these factors, and others, will depend on the individual circumstances of a case.

Initiation and discontinuance of proceedings

17.8 Criminal proceedings before a court are conducted on a charge which alleges the commission of an offence. A charge will usually be communicated orally to the accused by an investigating officer and then be put in writing to initiate court proceedings.

17.9 Two steps involving different terminology may be involved in bringing a criminal case for trial.

1. The Criminal Procedure Code provides alternative pathways for initiating criminal proceedings before a Magistrates' Court:
    - A *'complaint'* to a judicial officer (usually a magistrate) can be made by any person (usually an investigating police officer, although it can be a private person) 'who believes from reasonable and probable cause that an offence has been committed': Code s 35(1). A complaint is made on oath and may be made orally or in writing: Code s 35(2). If it is done orally, the judicial officer will put it in writing.
    - A person who is arrested without warrant can be brought before a court without a prior complaint: Code s 37(1). A charge in writing will then be presented by the prosecutor or formulated by the judicial officer.
2. If the case is authorised to be tried in the Supreme Court, a preliminary inquiry on the provisional charge is first conducted in the Magistrates' Court. When a case proceeds for trial in the Supreme Court, a new document called an *'information'* is prepared which sets out the charge or charges: Code ss 144, 146.

Terminology varies between jurisdictions. In some jurisdictions, the term 'information' is used to describe a charge in a lower court. Moreover, 'indictment' was the term used

at common law to describe a charge in a superior court. It is still used in many jurisdictions. Hence, offences that can be prosecuted in superior courts are commonly called 'indictable offences'.

17.10 The Public Prosecutor has a supervisory role over all prosecutions, including those conducted by Police Prosecutors and public servants. The Public Prosecutor can take over the prosecution, and either pursue it or discontinue it: Public Prosecutor Act s 10.

17.11 A charge can be amended before a trial or during the course of a trial before the close of the case for the prosecution: Code s 139. This provision only concerns trials in the Magistrates' Court but the same should apply in Supreme Court trials. Presumably, the amendment must not be allowed to cause injustice. For example, an accused whose defence is a denial of culpability, but not of the alleged conduct, will not be prejudiced if the location of the conduct is corrected. On the other hand, a corrected location might cause major problems for an accused who has planned an alibi for a defence. In such a case, an adjournment may be needed or the amendment may be denied as being too prejudicial.

17.12 The prosecution may wish to withdraw a charge in order to prevent an unwelcome verdict and then begin again with a new charge. This could be for various reasons: for example, because of a defect in the charge which cannot be amended; or because a witness is unavailable or has given unexpected testimony. Under the Public Prosecutor Act s 8((1)(f), the Public Prosecutor is authorised to discontinue prosecutions whoever instituted them. In the Supreme Court, discontinuance is called a '*nolle prosequi*'. The defendant is then discharged. The discharge does not operate as a bar to subsequent proceedings in the same matter, although leave of the court for a new charge may be required. In principle, charges can be withdrawn at any time before a verdict. However, a court could refuse to allow the withdrawal if this would cause injustice to the accused: for example, if the accused had commenced a defence in which some concessions were made. If withdrawal is denied, and the case proceeds to a verdict and the accused is acquitted, the rules against double jeopardy will prevent any further proceedings in the matter: see **Chapter 19**.

Form of charges

17.13 It is not sufficient for the prosecution to allege that some offence has been

committed somewhere at some time. The accused is entitled to a degree of specificity in the charge, so that it is possible to prepare a defence. The Criminal Procedure Code s 71 provides:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

17.14 Generally, the prosecution must prove that the offence charged has been committed as particularised. It may therefore be in the interests of the prosecution to frame the charge loosely so that alternative arguments can be pursued. Conversely, it can be in the interests of the defence to have the charge framed as tightly as possible, in order to maximise the opportunity for claiming that some part has not been proved. See, for example, the discussion in **14.6–14.8** on whether a particular mode of secondary participation needs to be charged.

17.15 Obviously, a charge must state the type of offence alleged to have been committed. The Code s 74(b) provides:

> the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

For example, it is sufficient to charge 'murder' or 'theft' without stating the elements of these offences. The charge must, however, state the relevant statutory section.

17.16 The accused also needs to know something about the occasion and circumstances of the alleged offence. The Code s 74(c) provides that particulars are to be set out in ordinary language.

17.17 An accused who feels disadvantaged by vagueness in a charge can apply to a court for an order directing further particulars to be provided. There has been some uncertainty about whether additional particulars constitute an amendment to the charge, requiring proof in the same way as the items in the charge itself. In *Cotter v State of Western Australia* [2011] WASCA 202 at [32], the Western Australia Court of Appeal contended that the significance of the particulars could vary, depending on the features of the individual case:

> It is sometimes suggested that the prosecution is confined by the particulars that it provides … However, those statements need to be understood as being an expression of the underlying requirement that a criminal trial be fair, not as expressing a rule of pleading. In cases where a departure from the particularised case would be unfair the prosecution would, in practical terms, be confined by the particulars. In other cases a departure may be immaterial …

17.18 A charge alleging more than one offence will be void for duplicity. Each charge should generally refer to one offence only. Otherwise, a guilty verdict would be ambiguous. Yet, the rule against duplicity does not stop the prosecution charging one offence that has several forms in which it may be committed, such as the offence of intentional homicide or assault, and then arguing for any of these forms in the alternative.

17.19 Several offences may be joined together as separate 'counts' within a charge or information and tried together if they are 'founded on the same facts or form, or are part of, a series of offences of the same or a similar character': Criminal Procedure Code s 72(1). They should then be itemised separately, so that separate verdicts can be given. In the event that joinder of charges may cause prejudice to an accused, or otherwise be undesirable, the court may order that they be tried separately: s 72(3).

17.20 Joinder is sometimes not only permitted but required. There is a common law rule against unreasonably splitting the prosecution case. Otherwise, the accused may not know when proceedings have finished and the defence might be prejudiced, or there might be inconsistent verdicts on essentially the same matter. In *Collins v R* [1996] 1 Qd R 631 at 637, it was said: '[T]he courts have laid down the general rule that matters which can be joined without prejudice to the accused ought generally to be.'

17.21 Several persons can be charged together in one charge or information if the charges relate to the same transaction or transactions: Code s 73. Persons charged together will ordinarily be tried together but a court retains discretion to order separate trials. The principles applicable to separating trials were summarised by MacKenzie J in *R v Aboud* [2003] QCA 499 at [35]:

> When making a decision at trial, typically, cases where separate trials are allowed are ones where one case is significantly weaker than the other, where there is a real risk that the weaker prosecution case will be immeasurably stronger by reason of prejudicial material in the case of the other accused and where the degree of prejudice from evidence admissible only in the case of one accused to the case of the other is so great as to make it unfair to try the accused together.

Prosecutorial discretion and judicial review

17.22 There is extensive scope for the exercise of prosecutorial discretion over charges. Decisions to be made include:

- whether or not to prosecute,
- what to charge and how to frame the charge,
- when to commence proceedings
- whether or not to launch another prosecution in the event that the first attempt has been inconclusive.

Prosecutors must also make choices when offences overlap in the ground they cover or stand in a vertical relationship, with one being an aggravated form of another: see, for example, the relationships between rape and unlawful sexual intercourse (Penal Code ss 90, 97) or between intentional homicide (s 106) and intentional assault causing death: ss 106, 107(d).

17.23 Courts have taken the view that decisions about charges are essentially executive decisions that should not ordinarily be subject to judicial review: *DPP v Humphreys* [1976] 2 All ER 497 at 527-528; *Barton v R* (1980) 147 CLR 75; [1980] HCA 45; *Matalulu v DPP* [2003] FJSC 2.

17.24 In some exceptional circumstances, courts do intervene in prosecutorial decisions:

- It has always been accepted that the executive has discretion not to prosecute an offence. However, the discretion is subject to certain quasi-constitutional limitations arising from the prohibitions on suspending or dispensing with laws in the English Bill of Rights 1688. See the discussion below at **17.26–17.29**.
- The courts can also intervene when prosecutorial decisions lead to an abuse of the process of the courts. The courts have claimed that, while they may have no direct concern with prosecutorial decisions as such, they can protect themselves against embarrassment arising from the consequences of bad prosecutions being pursued to trial. If the pursuit of a prosecution would amount to an abuse of the process of the court, then the court can intervene: see *DPP v Humphreys* [1976] 2 All ER 497 at 527-528; *Barton v R* (1980) 147 CLR 75; [1980] HCA 45. Judicial intervention usually takes the form of a stay of proceedings, which is a common law remedy. The general principle is that a permanent stay is to be granted only in exceptional circumstances, where no other remedy will suffice: *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46.

17.25 As noted in **17.1**, the Vanuatu Constitution s 55 grants the Public Prosecutor broad power over 'the function of prosecution' and declares the independence of the office. The Fiji Supreme Court has held, with respect to similar provisions in the Fiji Constitution, that prosecutorial powers must be exercised within constitutional limits, although judicial review must also respect prosecutorial discretion. In *Matalulu v DPP* [2003] FJSC 2, it was said:

> [A] purported exercise of power would be reviewable if it were made:
>
> 1. In excess of the DPP's constitutional or statutory grants of power- such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).
> 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion- if the DPP were to act upon a political instruction the decision could be amenable to review.
> 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
> 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
> 5. Where the DPP has fettered his or her discretion by a rigid policy- eg one that precludes prosecution of a specific class of offences.
>
> There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

The decision not to prosecute

17.26 As was discussed at **17.6**-**17.7**, a case need not be prosecuted, despite there being prima facie evidence of an offence, when there are no reasonable prospects of

conviction or when a review of the circumstances of the case indicates that a prosecution would not be in the public interest.

17.27 The discretion not to prosecute is, however, subject to certain quasi-constitutional limitations respecting suspensions and dispensations. A *suspension* of a law is a decision by the executive not to enforce it at all. A *dispensation* is a decision by the executive not to enforce a law against a particular person or group. Either practice violates the constitutional separation of powers, with the executive abrogating to itself a matter on which the legislature has spoken.

17.28 The ban on dispensations does not mean that a prosecution must always be launched when there is sufficient evidence of an offence. It is proper to make a decision that a prosecution would be unwarranted, based on a review of the circumstances of the particular case. However, a dispensation is not based on a review of an offence which has already been committed. It is a decision not to prosecute someone for an offence regardless of its circumstances, usually in the form of a promise not to prosecute for an offence to be committed in the future. As such, it is in conflict with the decision of parliament to pass the Act creating the offence. A dispensation was at issue in *D'Arrigo v R* [1994] 1 Qd R 603. The Queensland Attorney-General had granted an indemnity against prosecution to a police agent who would be participating in offences in order to gather information about a car-stealing operation. The court held that the indemnity amounted to an illegal dispensation.

17.29 Several consequences follow from the illegality of suspensions and dispensations. First, because a suspension or dispensation is invalid, it offers no protection against a criminal charge. A person who relies on a suspension or dispensation commits an offence and is liable to prosecution. In the circumstances of *D'Arrigo*, this meant that evidence relating to the car thefts had been illegally obtained by the police agent and was, therefore, liable to exclusion. Second, the official who issues a suspension or dispensation may be liable as a secondary party who has counselled or procured any resulting offence. Third, it may be possible to obtain an order from a court mandating the prosecution of an offence: see the discussion in *Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118; 1 All ER 763.

Abuse of process

17.30 In *Public Prosecutor v Emelee* [2008] VUCA 18 at (24], the Court of Appeal said that both the Magistrates' Court and the Supreme Court have 'a general and inherent power to protect their processes from abuse'. The Court continued at [26]:

This power to stay for abuse of process is available to the Court throughout the trial process and may be exercised by the Court on its own motion or on the application of an accused.

17.31 In *Tabimasmas v Public Prosecutor* [2020] VUSC 114, Andree Wiltens J detailed some of the circumstances in which a prosecution has been held by English and New Zealand courts to be an abuse of process:

> [11] The authorities of *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 and *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72 describe the remedy as being available only in "...exceptional circumstances".
> [12] In terms of being satisfied of the jurisdiction of this Court to entertain this application, there is no need to look further than the authorities of *Connelly v DPP* [1964] AC 1254, *Moevao v Department of Labour* (1980) 1 NZLR 464 and *R v Horseferry Magistrate's Court ex p. Bennett* [1994] 1 AC 42.
> [13] This Court has a discretion to stay any criminal proceedings on the grounds of abuse where: (i) it would be impossible to give the accused a fair trial; or (ii) where it would amount to a misuse of process because it offends the court's sense of fairness and propriety to be asked to try the accused in the circumstances of the particular case: see *R v Horseferry.*
> [14] The authority of *R v Derby Crown Court, ex p. Brooks* [1985] 80 Cr App R 164 determined a stay to be appropriate where the prosecution manipulated or misused Court processes for an unfair advantage, and in circumstances where the accused's preparation or defence was prejudiced by unjustifiable delay. The Court commented: "The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."

17.32 Andree Wiltens J stressed, however, the limitations of the doctrine of abuse of process:

> [15] In general terms, it is for a prosecuting agency, not the Courts, to determine whether a prosecution ought to be commenced, and once commenced whether it should continue to its natural conclusion: *Environment Agency v Stanford* [1998] C.O.D. 373.
> [16] There is a significant public interest in permitting criminal prosecutions to run their full course. In *R v Crawley* [2014] EWCA Crim 1028 the Court stated: "[t]here is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of

proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."

In the *Tabimasmas* case, an application for a stay of proceedings on a case at the stage of a preliminary inquiry was unsuccessful

Oppressive prosecutions

17.33 A prosecution may amount to an abuse of process because it is unjustifiably oppressive. An example would be an ill-conceived prosecution that is foredoomed to fail. In *Public Prosecutor v Emelee* [2008] VUCA 18 at [23], the Court of Appeal quoted the following passage from Lord Salmon in *DPP v Humphreys* [1977] AC 1 at 46C-F:

> I respectfully agree with [Lord Dilhorne] that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and be put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred.

See also *Public Prosecutor v Usamoli* [2021] VUCA 23 at [177].

17.34 A prosecution may also be oppressive because it would make the trial unfair and risk a wrongful conviction. In *Robu v R* [2006] SBCA 14 at [15], it was said:

> It is well established and not disputed a trial judge may order a stay of proceedings either before or during trial provided an accused can show on balance of probabilities the delay complained of has resulted or will result in his suffering serious prejudice to the extent that he has not or will not receive a fair trial. In other words the continuation of the proceedings amount to an abuse of the process of the Court.

For example, delay in prosecuting an offence might make it too difficult for the accused to mount a defence. A potential witness for the defence could have died or forgotten what happened, or crucial evidence could have been lost or destroyed. A prosecution might then be unfair and therefore an abuse of process. For example, in *Walton*

v Gardiner (1993) 177 CLR 378; [1993] HCA 77, a potentially critical witness had died during the period of delay.

17.35 A prosecution can be oppressive if it occurs after the accused has been led to reasonably believe that the matter will be taken no further. Statutory rules against double jeopardy provide the law's primary protection for reasonable expectations of finality in criminal proceedings. These rules, however, focus on the technical relationships between verdicts in different proceedings. For cases that fall outside the scope of strict double jeopardy, the remedy may be a stay of proceedings on grounds of abuse of process: see **19.11**.

17.36 *Walton v Gardiner* involved proceedings in a medical disciplinary tribunal many years after the failure of other disciplinary proceedings involving separate complaints but stemming from the same program of treatment. Criminal proceedings for manslaughter against another doctor involved in the program were stayed in *Gill v Director of Public Prosecutions* (1992) 64 A Crim R 82 (NSWSC). Various reasons were given for the stay in *Gill*, including the difficulty of getting a fair trial after the passage of such a length of time. It was also said, at A Crim R 98, that reviving the matter years after the earlier proceedings amounted to 'persecution':

> The Crown has allowed the matter to die, to go to sleep for years, but then resuscitated it. How long must a man wait to be able to say: 'Now it has ended?' How long must he suffer the anxiety? How long must his enjoyment of life be threatened by what may happen in his career, to his reputation, in the future?

17.37 Repeated prosecutions following inconclusive proceedings do not amount to an abuse of process unless there are exceptional circumstances. An acquittal is the end of the matter, with the double jeopardy rules barring further proceedings. However, there is no general barrier to a prosecution being repeated after an inconclusive result; for example, where a trial has miscarried or a conviction has been quashed on appeal. Presumably, successive prosecutions could eventually become oppressive, but this would depend on the reasons for laying new charges.

Unlawful conduct by public officials

17.38 In *Moti v R* (2011) 245 CLR 456; 283 ALR 393; [2011] HCA 50, a permanent stay was granted by the High Court of Australia due to illegality in the extradition of an Australian citizen from the Solomon Islands to face charges in Australia of sexual activity with a child in Vanuatu. The unlawful extradition was carried out by Solomon Islands

authorities but could be attributed to the local Australian representatives because they had cooperated by supplying travel documents, knowing of the illegality of the operation. The High court said that the end of prosecution did not justify adopting 'any and every means for securing the presence of the accused': at [60]. However, the High Court determined that payments made by the Australian Federal Police to potential prosecution witnesses, where they were not designed to procure evidence and were not unlawful, were not an abuse of process as they were not an affront to the public conscience. Further, 'if the payments were said to bear upon the evidence witnesses gave at trial, that issue could be explored fully in evidence and could be the subject of suitable instructions to the jury that would prevent unfairness to the appellant': at [15]. A stay was therefore not available on that ground.

17.39 In *Strickland v CDPP* (2018) 361 ALR 23; [2018] HCA 53, the High Court stayed prosecutions in a case where the defendants had previously been subjected to compulsory examinations by the Australian Crime Commission, in breach of safeguards written into the ACC Act. Admissions were unlawfully extracted and then unlawfully disseminated to investigating officers. The admissions made in the examinations would have given the prosecution an improper advantage in preparing for any trial. They would also have placed the defendants at a forensic disadvantage at trial because they would have locked them into a version of events from which they could not credibly depart. The High Court split 5-2 on whether a stay of proceedings was necessary to remedy the consequences of unlawful action by law enforcement agencies. The majority further split on what made the stay necessary, For Edelman J and Keane J, it was sufficient that a prosecution on evidence derived through the unlawful conduct would bring the administration of justice into disrepute. However, for Keifel CJ, Bell and Nettle JJ, the balance was tipped by the addition of the forensic disadvantage the defendants would suffer at trial.

Improper prosecutions

17.40 The proper purpose of a prosecution is to obtain conviction and sentence: see the discussion of stays of proceedings in *Ridgeway v R* (1995) 184 CLR 19 at 40; [1995] HCA 66. Initiating criminal proceedings for a purpose for which they were not designed would constitute an abuse of process: see *Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34. A court might then be justified in staying proceedings, subject to the general principle that a permanent stay is to be granted only in exceptional circumstances: *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46.

17.41 In *Williams v Spautz*, a private prosecution had been commenced for criminal defamation and conspiracy, primarily to exert pressure for a favourable settlement in an employment dispute. The prosecution was stayed by the High Court of Australia. The court indicated that there can be an abuse of process arising from an improper purpose for prosecuting even if there are reasonable grounds for a prosecution. In other words, the impropriety lies in the subjective purpose of the prosecutor and not in the objective justifiability of the prosecution.

17.42 Proper and improper purposes are not always clearly separate. One problem is that conviction and sentence may be sought for vindictive reasons or for collateral advantage rather than for any reasons of public interest: conviction and punishment are sought as a means to the achievement of some personal end. This does not necessarily make the prosecution an abuse of process. As long as the immediate purpose of the prosecution is to obtain conviction and sentence, any ultimate purpose is ordinarily immaterial. In *Williams v Spautz*, it was said:

> [34] …To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
> [35] Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

17.43 Selective prosecutions are ordinarily acceptable. In *Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538; 109 ALR 449, the complaint was that the accused had been selected for prosecution for a tax offence because he was a public figure and the prosecution was being pursued for publicity. The matter was left unresolved for procedural reasons. Presumably, publicity is a factor which may legitimately be taken

into consideration. As long as a conviction is genuinely sought, there would be no abuse of process. The general propriety of selective prosecutions, with unavoidable elements of inconsistency and unfairness as between dishonest taxpayers, was upheld in an English case: *Inland Revenue Commission; Ex parte Mead* [1993] 1 All ER 772.

17.44 The propriety of some prosecutions for tax evasion has been challenged on the ground that the line between legitimate selectivity and illegitimate discrimination was crossed. In *Inland Revenue Commission; Ex parte Mead*, it was indicated that selective prosecutions would be reviewable if they discriminated on grounds of, for example, skin colour. Presumably, such discrimination would be an abuse even if the immediate purpose of prosecuting the offenders who were discriminated against was to have them convicted and punished. In Solomon Islands, discrimination may also be an abuse of process because it violates a direction under the *Prosecution Guidelines 2018*: see the discussion below, at **17.48**.

17.45 A prosecutor may have mixed immediate purposes, with the motivation to prosecute stemming from the prospect either of obtaining conviction and punishment or, alternatively, of securing some collateral advantage. In this situation, the High Court of Australia has said that a test of 'predominant purpose' should apply: *Williams v Spautz* at [42]. Accordingly, there will be an abuse of process if the predominant purpose is to secure a collateral advantage, even though the prospect of obtaining conviction and punishment provides additional or alternative motivation.

17.46 When, as in most cases, a prosecution is conducted by a State Prosecutor, an issue arises as to who is the 'prosecutor' to whom an improper motive can be attributed. In dealing with a tort of malicious prosecution, the High Court of Australia noted in *A v NSW* (2007) 230 CLR 500; [2007] HCA 10 at [3]:

> [D]ifferent factual considerations arise where in the administration of criminal justice the information is laid by a particular police officer who is in charge of the prosecution and responsible if it is held to be malicious, but it is, as a matter of police organisation, obvious that he must act upon the advice and often upon the instruction of his superior officers and the legal department, and, it may be added, where the prosecutor is acting upon information given to him by a member of the public. In that context, the concept of 'belief', as a fact relevant to the question whether a defendant had reasonable and probable cause to institute a prosecution, bears a different aspect.

The court in *A v NSW* also noted at [42]:

> In the case of a private prosecution, it may be easier to prove that a prosecutor was acting for a purpose other than the purpose of carrying the law into effect than in a case of a prosecution instituted in a bureaucratic setting, where the prosecutor's decision is subject to layers of scrutiny and to potential review.

This suggests that there will be difficulties for an accused to establish that a prosecution instituted by a State Prosecutor is brought for an improper purpose. An ulterior motive on the part of a witness or police officer does not mean that the prosecutor has an ulterior motive: *Christianos and Sakanovic v DPP (WA)* (1993) 9 WAR 345.

Breach of Prosecutorial Directions and Guidelines

17.47 The Public Prosecutor Act s 11 authorises the Public Prosecutor to issue directions and guidelines respecting prosecutions to Prosecutors and criminal investigators. These are to be in writing and must be published in the Gazette. Section 11(3) states: 'To avoid doubt, directions are binding and guidelines are advisory.' It can argued that a particular prosecution conducted in breach of a published direction or guideline would be unfair and constitute an abuse of process. The argument would be particularly strong for a direction, since its breach would make the prosecution unlawful under s 11(3).

17.48 As authorised by the Act, the Public Prosecutor has issued *Prosecution Guidelines for the Republic of Vanuatu 2018*. Its guidelines respecting sufficiency of evidence and the public interest are detailed at **17.7**. Part 5 also contains a clear direction concerning impartiality:

> 5.3 IMPARTIALITY
> A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. A decision to prosecute MUST NEVER be influenced by:
> a) Race, religion, sex, national origin or political views.
> b) Personal feelings of the prosecutor concerning the offender or the victim.
> c) Possible political advantage or disadvantage to the government or any political group or party.
> d) The possible effect the decision will have on the personal or professional circumstances of those responsible for the prosecution.
> e) Threats or inducements.

The direction on impartiality prohibits any form of discrimination or personal agenda in prosecutorial decisions. It also insulates prosecutorial decisions from any political influence. A political instruction to a prosecutor would in any event violate the guarantee of the independence of the Public Prosecutor in the Constitution s 55. However, Direction 5.3 goes much further, prohibiting prosecutors from taking any account of political considerations in their decision-making. Political considerations need not be the only or even the predominant consideration. They must not *influence* the decision in any way.

17.49 Consider, for example, the scenario alleged in *Tabimasmas v Public Prosecutor* [2020] VUSC 114. In that case, a claim for abuse of process was made was made with respect to the prosecution of the previous Prime Minister and other Members of Parliament for offences of bribery and corruption. The prosecutions were alleged to be unfair in part because they had been instigated for political advantage by the then Leader of the Opposition. Andree Wiltens J at [52] dismissed the complaint on the ground that different considerations had been taken into account in the decision of the Public Prosecutor to prosecute. Suppose, however, that the decision to prosecute had been influenced in part by political considerations. The immediate purpose of the prosecution would still be to achieve the conviction and punishment of the defendants. The prosecutions would therefore not be improper under the authority of *Williams v Spautz*. However, they would constitute an abuse of process as a breach of Direction 5.3. There would be no need for a political instruction to prosecute in order to constitute an abuse of process. However, in the event of such an instruction, there would also be a breach of the guarantee of the independence of the Public Prosecutor in the Constitution s 55.

Charge negotiation

17.50 An accused will sometimes agree to plead guilty to an offence in return for some benefit from the prosecutor, such as:

- charges may be dropped;
- a lesser offence may be charged when there is evidence to support a more serious charge; or
- the prosecutor may agree to make certain favourable submissions on sentence or at least not to oppose the defence submissions.

The prosecutor may agree to the course of action in order to save the time and resources that would be consumed by a disputed trial.

17.51 The terms 'plea bargaining' or 'plea negotiation' are sometimes loosely used to describe the various types of agreement. A distinction can be drawn between 'charge negotiation' and 'sentence negotiation'. The former involves negotiation over the charge or charges that the accused will face; the latter involves negotiation over the position the prosecutor will take with respect to the sentence.

17.52 The Public Prosecutor's *Prosecution Guidelines for the Republic of Vanuatu* acknowledge and regulate charge negotiation but prohibit sentence negotiation. Guideline 10 states:

> Such negotiations may result in the accused pleading guilty to a fewer number of charges, or to a less serious charge or charges. In some cases it may involve agreement about the content of the statement of facts to be put before the court… Negotiations between the defence and the prosecution are encouraged. They may occur at any stage and may be initiated by the prosecution or the defence.

However, Guideline 10.4 rules out negotiation over sentencing matters,

> Sentencing of offenders is a matter for the court. It is not to be the subject of agreement or purported agreement between the prosecution and defence.

Presumably this distinction between charging and sentencing matters is drawn because sentencing is primarily a matter for the discretion of the judge, whereas charges are primarily the responsibility of the prosecutors.

17.53 Guideline 10.1 details matters to be considered by the prosecutor in decided whether to agree to terms for a plea of guilty:

> a) Whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing.
> b) Whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial.
> c) The desirability of prompt and certain finalisation of the case.
> d) The need to avoid delay in the finalisation of other pending cases.
> e) The time and expense involved in a trial and any appeal proceedings.
> f) Any deficiencies in the available evidence.

g) In cases where there has been a financial loss to any person, whether the defendant has made restitution or arrangements for restitution.

h) The views of the police or other referring agency, and

i) The views of the victim, where those views are available and if it is appropriate to take those views into account.

j) Whether custom reconciliation has taken place and the benefit, both emotionally and financially, the victim and the community has received.

17.54 Charge agreements are largely immune from judicial review because of the doctrine that prosecutorial decisions are no concern of the courts: see above at **17.23**. However, a prosecution which is pursued in breach of a charge bargain may constitute an abuse of process if the defendant has acted on the bargain to his or her detriment.