

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY DEPUTY T.M. PITMAN OF ST. HELIER
ANSWER TO BE TABLED ON TUESDAY 23rd OCTOBER 2012**

Question

When it is decided not to pursue a prosecution due to it not being seen as 'in the public interest', what criteria, if any, are used in making such a decision?

Answer

The decision to prosecute a person for a criminal offence is a serious one and is taken only after a two stage test has been applied. The first part is the "evidentiary" test and the second stage is the "public interest" test. The public interest stage is only reached and the public interest considered if the evidentiary test has been passed.

The evidentiary test is passed if there is sufficient admissible evidence to mean that there is a realistic prospect of securing a conviction on the charge in question. Once the evidentiary test is passed the public interest falls to be considered.

The prosecution decision making process is set out in the Code on the Decision to Prosecute (10th January 2000) and supplemental guidance on Domestic Violence which are public documents and may both be found on the Law Officers' Department website. A copy of both documents is annexed hereto.

Whilst there can be no exhaustive list of matters that may fall to be considered within the public interest test, Paragraph 5 of the Code on the Decision to Prosecute and paragraph 4 of the Domestic Violence guidance deals with the types of matters that may fall to be considered under the public interest test.

CODE ON THE DECISION TO PROSECUTE

1. Introduction

- 1.1 The decision to prosecute (i.e. to charge) an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case a prosecution has serious implications for all involved - the victim, a witness and a defendant. Centeniers are to apply the Code to ensure that they make fair and consistent decisions about prosecutions.
- 1.2 The Code contains important information for those who work in the criminal justice system and the general public. It helps Centeniers to play their part in ensuring that justice is achieved.

2. General principles

- 2.1 Each case is unique and must be considered on its own. There are, however, general principles which apply in all cases.
- 2.2 The duty of the Centenier is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the Court.

- 2.3 Centeniers must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source.

The Code tests

- 3.1 There are two stages in any decision to prosecute. The first stage is the **evidential test**. If the case does not pass the evidential test it must not go ahead no matter how important or serious it may be. If the case does pass the evidential test the Centenier must decide if a prosecution is warranted in the public interest.
- 3.2 The second stage is the **public interest test**. The Centenier will only start or continue a prosecution when the case has passed both tests. The evidential test is explained in section 4 and the public interest test is explained in section 5.

The Evidential test

- 4.1 Centeniers must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.
- 4.2 A realistic prospect of conviction is an objective test. It means that the Magistrate, a jury or bench of Jurats properly directed in accordance with the law is more likely than not to convict the defendant of the charge alleged.
- 4.3 When deciding whether there is sufficient evidence to prosecute, Centeniers must consider whether the evidence can be used and is

reliable. There will be many cases in which the evidence does not give any cause for concern. There will, however, also be cases in which the evidence may not be as strong as it first appears. Centeniers must ask themselves the following questions:

Can the evidence be used in Court?

- (a) Is it likely that the evidence will be excluded by the Court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against using hearsay as evidence? If so, is there enough other evidence to ensure a realistic prospect of conviction?

Is the evidence reliable?

- (b) Is it likely that a confession is unreliable because (for example) of the defendant's age, intelligence or lack of understanding?
- (c) Is the witness's background likely to weaken the prosecution case? For example, does the witness have any dubious motive that may affect his or her attitude to the case or a relevant previous conviction?
- (d) If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?

- 4.4 Centeniers should not ignore evidence because they are not sure whether it can be used or is reliable. They should, however, look closely at it when deciding if there is a realistic prospect of conviction.

- 4.5 Where Centeniers have concerns over the possible exclusion of evidence, they should consult and be guided by the advice of the Police Legal Adviser.

5. **The Public Interest test**

- 5.1 In 1951, Lord Shawcross (Attorney General for England) made a classic statement on public interest which has been supported by Attorneys General ever since:

“It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution” (House of Commons Debates, Volume 483, column 681, 29 January 1951).

- 5.2 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the Court for consideration when sentence is being passed.
- 5.3 Centeniers must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to

prosecute but others may suggest that another course of action would be better. The following lists of some common public interest factors (both for and against prosecution) are not exhaustive. The factors which apply will depend on the facts in each case.

Some common public interest factors in favour of prosecution

5.4 The more serious the offence the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if -

- (a) a conviction is likely to result in a significant sentence;
- (b) a weapon was used or violence was threatened during the commission of the offence;
- (c) the offence was committed against a person serving the public (for example, a police officer, prison officer or a nurse);
- (d) the defendant was in a position of authority or trust;
- (e) the evidence shows that the defendant was a ringleader or an organiser of the offence;

- (f) there is evidence that the offence was premeditated;
- (g) there is evidence that the offence was carried out by a group;
- (h) the victim of the offence was vulnerable, has been put in considerable fear or suffered personal attack, damage or disturbance;
- (i) the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, personal views or sexual preference;
- (j) there is a marked difference between the actual or mental ages of the defendant and the victim or there is any element of corruption;
- (k) the defendant's previous convictions or cautions are relevant to the present offence;

- (l) the defendant is alleged to have committed the offence whilst under an order of the court;
- (m) there are grounds for believing that the offence is likely to be continued or repeated (for example, by a history of recurring conduct); or
- (n) the offence, although not serious in itself, is widespread.

Some common public interest factors against prosecution

5.5 a prosecution is less likely to be needed if:

- (a) the Court is likely to impose a very small or nominal penalty;
- (b) the offence was committed as a result of genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);

- (c) the loss or harm can be described as minor and was the result of a single incident (particularly if it was caused by a misjudgment);
- (d) there has been a long delay between the offence taking place and the date of the trial, unless -
- the offence is serious;
 - the delay has been caused in part by the defendant;
 - the offence has only recently come to light; or
 - the complexity of the offence has meant that there has been a long investigation;
- (e) a prosecution is likely to have a very bad effect on the victim's physical or mental health (always bearing in mind the seriousness of the offence);
- (f) the defendant is elderly or is (or was at the time of the offence) suffering

from significant mental or physical ill-health (unless the offence is serious or there is a real possibility that it may be repeated). Centeniers must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill-health with the need to safeguard the general public;

- (g) the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or
- (h) details may be made public which could harm sources of information, international relations or national security.

5.6 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Centeniers must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

The relationship between the victim and the public interest

5.7 Centeniers act in the public interest and not just in the interests of any one individual. But, Centeniers must always think very carefully about the interests of the victim, which are an important factor when

deciding where the public interest lies and, accordingly, whether a prosecution should be brought.

Young offenders

- 5.8 Centeniers must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a young offender or a young adult. Young offenders can sometimes be dealt with at a Parish Hall Enquiry without the need for a Court appearance. However, Centeniers should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the offender's past behaviour may make prosecution necessary.

Charges

- 6.1 Centeniers should select charges which -
- (a) reflect the seriousness of the offending;
 - (b) give the Court adequate sentencing powers; and
 - (c) enable the case to be presented in a clear and simple way.

This means that Centeniers may not always continue with the most serious charge where there is a choice. Further, Centeniers should not continue with more charges than are necessary.

- 6.2 Centeniers should never go ahead with more charges than are necessary simply to encourage a defendant to plead guilty to a few. In the same way they should never proceed with a more serious charge simply to encourage a defendant to plead guilty to a less serious one.

7. **Accepting guilty pleas**

- 7.1 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Centeniers should only accept a defendant's plea if they think the Court is able to pass a sentence which matches the seriousness of the offending. Centeniers must never accept a plea just because it is convenient.

8. **Power of the Attorney General to overrule a Centenier's decision**

- 8.1 Members of the public should be able to rely upon decisions taken by Centeniers. Normally, if a Centenier tells a person that there will not be a prosecution that is the end of the matter. However the Attorney General is the ultimate authority in respect of all prosecutions in the Island and has the power to overrule a Centenier's decision not to prosecute. In exercise of this power he may direct a Centenier to lay a charge. Where appropriate Centeniers should inform a person whom they have decided not to charge of this possibility.
- 8.2 Similarly the Attorney General may direct a Centenier not to proceed with a prosecution which has been commenced.

9. **Conclusion**

- 9.1 Centeniers form part of the Honorary Police. They are answerable to the Attorney General.

9.2 The Code for Centeniers is designed to make sure that everyone knows the principles which Centeniers apply when carrying out their work. Centeniers should take account of the principles of the Code when they are deciding whether to charge a defendant with an offence. By applying the same principles Centeniers are helping the criminal justice system to treat victims fairly and to prosecute defendants fairly and effectively.

9.3 The Code is issued by the Attorney General and is available from all Parish Halls and:

The Law Officers' Department
Morier House
St. Helier
Jersey. JE1 1DD.

9.4 It is also available at the States of Jersey Police Headquarters.

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H.M. Attorney General

10th January, 2000.

Guidance on the Decision to Prosecute:

Supplementary Guidance:

Domestic Violence

1. INTRODUCTION

- 1.1 This guidance is supplementary to the Code on the Decision to Prosecute dated 10th January, 2000 ("the Code"). It does not modify or amend the Code but is rather guidance as to how the Code might be applied in relation to allegations of domestic violence.
- 1.2 The purpose of issuing this Guidance is to ensure consistency of approach and clarity regarding the approach to evidential and public interest considerations in relation to allegations of domestic violence.

2. GUIDANCE

2.1 Definition of Domestic Violence:

Any incident of threatening behaviour, violence, abuse or harassment between adults who are or have been intimate partners or family members, regardless of gender or sexuality.

- 2.2 An **adult** defined as any person aged 18 years and over and **family members** are defined as mother, father, son, daughter, brother, sister and grandparents.
- 2.3 The same evidentiary and public interest considerations apply irrespective of the gender of the parties.
- 2.4 The definition of domestic violence refers to “adults” but this policy will also apply to criminal allegations which occur in a domestic context involving victims and abusers **whatever their age**.

3. Evidence

- 3.1 In all cases, including cases involving allegations of domestic violence, before a suspect is charged, the evidential test must be passed before consideration is given to whether a prosecution is in the public interest. The fact that the allegation involves domestic violence does not mean that the evidential threshold for prosecution is any lower.
- 3.2 When considering whether the evidential test is passed, the fact that the victim of domestic violence has not made a statement of complaint will not, in itself, be conclusive. Serious consideration must be given to what other evidence is present.

- 3.3 Evidence that can be used to prove a case includes, **but is not limited to**, the victim's account, that of a friend, neighbour or child or young person who may have been nearby, any admissions by the suspect, calls to the emergency services (which may include evidence of admission) medical evidence, photographs and other forensic evidence.

Assessing the Evidential Test when a Victim who has made a written Statement of Complaint subsequently withdraws that complaint.

- 3.4 Sometimes complainants will withdraw their complaints. That does not necessarily mean that the offence did not take place and subject to the evidentiary test continuing to be passed, the case should be prosecuted. In cases where there is sufficient other evidence it might be possible to proceed without relying on the evidence of the victim at all.
- 3.5 If this happens, the reason why the victim has asked the case to be stopped must be ascertained. The victim should be invited to make a written statement which explains the reasons for wishing to withdraw support for the prosecution, indicating whether they have been pressurised to withdraw support and providing any other relevant information. The victim should also be invited to indicate whether the contents of their original statement were true. The victim should also state whether, notwithstanding their wish to drop

the case, they will attend court to give evidence if a decision is made that the case should proceed.

3.5 In circumstances where the victim states that their original complaint was true, for the purposes of assessing the evidential test, it should be assumed that the witness would attend court and give evidence in accordance with the contents of their original complaint.

3.6 If in a subsequent statement a victim indicates that the contents of their original statement were untrue in whole or in part, the effect of any inconsistency needs to be assessed in determining whether the evidential test is passed.

3.7 If it is suspected that the victim has been pressured or frightened into withdrawing the complaint, the police shall investigate further. If it is found that the victim's withdrawal was based on fear or intimidation, the evidence will be considered and it will be decided whether further charges should be brought.

4. Public Interest

4.1 In cases involving an allegation of domestic violence, if the evidential test is passed, the public interest will be generally in favour of a prosecution even if, for example, the injury was minor or

the parties have reconciled. A Parish Hall disposal will rarely be appropriate.

- 4.2 In assessing the public interest the impact the domestic violence has had on the family and any children is to be considered as is the future safety of the victim and any children and/or other young people.
- 4.3 Care should be taken to differentiate between public and private interest considerations. For example, the fact that, if charged and/or convicted a suspect may lose their employment is a private rather than a public interest consideration. The personal consequences to a suspect should not provide him or her with any immunity against prosecution.
- 4.4 In all cases, information should be obtained by the Police about family circumstances and the likely effect of a prosecution on the victim, children and any young person. The receipt of this information should not delay the decision to charge where the evidentiary test is passed.

Continuing with a prosecution against a victim's wishes

- 4.5 In cases where the evidential test is passed and the victim does not want the prosecution to continue, officers should consult with a

legal adviser in order to assess whether a prosecution remains in the public interest.

5. Diversion

- 5.1 Cases should only be considered for disposal at a Parish Hall enquiry when the evidential test is passed. It is not appropriate for the Parish Hall enquiry to consider imposing sanctions in cases where there is insufficient evidence.
- 5.2 There will be exceptional cases when disposal at a Parish Hall Enquiry may be appropriate. This would normally only be the case when a person other than the complainant or a member of the complainant's household reports the matter to the Police, there is no previous history of domestic violence or allegations of such, the use or threat or force is not serious and where the victim has indicated that he or she does not wish to support a prosecution and there is no suggestion that the absence of support for the prosecution is as a result of pressure from the suspect or others acting on their behalf.
- 5.3 If, in exceptional circumstances, a case is considered appropriate for disposal at the Parish Hall, consideration should be given to deferring the proceedings before the Parish Hall to allow a suspect to address their offending behaviour by means of, for example, an anger management course or the ADAPT programme.

5.4 It will seldom be the case that where an individual has a previous conviction for an offence of violence or has received a Parish Hall disposal, that it would be appropriate to deal with the matter at Parish Hall level.

6. Bail

6.1 Where a suspect has been arrested for an offence of alleged domestic violence and the evidential test is passed, serious consideration must be given as to whether it is appropriate to ensure that they are charged and detained in custody so that a court may impose bail conditions in order to prevent further offending and/or interference with the alleged victim or any other members of the household. The risks inherent in releasing a suspect unconditionally must always be considered. In this regard the interests of the victim and any children of the family should take precedence over interests of the suspect.

6.2 Cases involving an allegation of domestic violence should be brought before the Magistrate's Court at the first available opportunity which will not necessarily be the normal day for an offence committed in that Parish. It is important for the protection of the victims of domestic violence and other members of the household that the Court should be seized of the case at the earliest practical opportunity.