

## **EFFECTIVE TRIAL PREPARATION— PROSECUTION’S PERSPECTIVE**

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### **I. INTRODUCTION**

Hong Kong is a modern international city with a well-established legal system based on the common law. The public has a high expectation of its criminal justice system. Prosecutors in Hong Kong serve the public by upholding the rule of law and ensuring that justice is done to all fairly, efficiently and with much transparency. In an adversarial litigation system, a prosecutor should prepare and assemble all relevant evidence well in advance of the trial and present the case in a fair manner. The prosecuting authority should not aim at achieving a high conviction rate by all means but instead be committed to ensuring that the guilty are convicted and the innocent acquitted. Prosecutors are, therefore, entrusted to take on these responsibilities in a fair and professional manner and in accordance with the law.

Most prosecutors, even the very experienced and talented ones, would agree that the key to successful criminal prosecution is good case preparation. This does not make any difference as to whether it is the trial of a summary offence in the magistrates' court or a major corruption case tried before a jury in the Court of First Instance.

It is the burden of the prosecution to prove the charges against an accused, the preparation required of a prosecutor is no doubt different from that of a defence counsel. In fact a prosecutor is often expected to hold more responsibilities in a criminal trial. In this paper, it is intended to discuss the essential preparation work that is required to be carried out by a prosecutor in order that the criminal prosecution can proceed smoothly and effectively. It also covers preparation work required in the prosecution of corruption and bribery cases in Hong Kong.

### **II. CRIMINAL JUSTICE SYSTEM IN HONG KONG**

In Hong Kong there are three major categories of establishments making up the Criminal Justice System, namely, the law enforcement agencies, the prosecuting authority and the judiciary. These institutions have separate powers and each work independently yet inter-dependently in the administration of justice.

#### **A. The Law Enforcement Agencies**

The law enforcement agencies include various law enforcement agencies such as the Hong Kong Police Force, the Independent Commission Against Corruption (ICAC), the Customs and Excise Department and Immigration Department, etc. They are responsible for conducting investigation of crime and gathering evidence and other materials on which the prosecution relies. While investigators and prosecutors play separate and distinct roles in the criminal justice system, they have to work in partnership to enforce the law. A prosecutor

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cannot direct investigation but may request further investigation and advise the investigator on the conduct of the case.

### **B. The Prosecuting Authority**

When the investigation of a criminal case is completed, the matter will then be referred to the Prosecutions Division of the Department of Justice in Hong Kong which is responsible for making decisions as to whether the case should proceed to prosecution. Under article 63 of the Basic Law of Hong Kong, the Department of Justice “shall control criminal prosecutions, free from any interference.” This serves as an important guarantee to prosecutors within the Department that they may make decisions to prosecute or not to prosecute in an independent manner without any political, improper or other undue influence.

To facilitate the promotion of fair, efficient and effective administration of justice, the Department of Justice has formulated policies and practices to guide prosecutors in conducting prosecutions and to ensure that decisions to prosecute are made consistently and justly. The first set of guidelines was issued in 1993. Moving on with the time and keeping in line with the development and changes in the law and criminal jurisprudence, there have been subsequent revisions and updates. In September 2013, the Division released its latest edition of the prosecution guidelines bearing the title “the Prosecution Code”.

Under the Prosecution Code, a prosecutor makes a decision to prosecute or not to prosecute by considering two factors, firstly that the admissible evidence available is sufficient to justify instituting or continuing prosecution and secondly that it is in the public interest that the prosecution be conducted. In considering the first component of sufficiency of evidence, the test to be applied is whether the evidence demonstrates a reasonable prospect of conviction. To make a decision on this issue, a prosecutor should have due regard to matters such as the admissible evidence available, the quality of such evidence, the credibility and reliability of the witnesses concerned and the defence that is likely to be raised. After the first test is satisfied, a prosecutor must then consider the requirement of public interest. There is not a conclusive list of public interest factors but the general principle is that the more serious the offence, the more likely that it is in the public interest to proceed with the prosecution.

### **C. The Judiciary**

Once a decision to prosecute is made, the judiciary will be involved in the conduct of criminal proceedings. Depending on the seriousness of the offences, criminal trials will be conducted in the Magistrates’ Courts, District Court or Court of First Instance in Hong Kong. A criminal trial in the Court of First Instance is conducted in the presence of a jury. In most cases, a magistrate may sentence an offender to a term of 2 years of imprisonment for a single offence and 3 years for more than one offence. A District Court Judge may impose a maximum term of 7 years’ imprisonment. The maximum term of sentence to be imposed in the Court of First Instance is life imprisonment.

## **III. GENERAL PRINCIPLES IN CASE PREPARATION**

### **A. Fairness**

In preparing for criminal trials, it is of paramount importance that prosecutors must not forget they are ministers of justice and acting on behalf of the community impartially. The role of a prosecutor cannot be more succinctly spelt out by Rand J of the Supreme Court of Canada in the case of *Boucher v The Queen* [1955] SCR 16 at 23-24:

“It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which is civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

It is an essential duty for a prosecutor to seek to present the relevant and credible evidence of a case before the criminal court fully and effectively. He or she should assist the court by making accurate and complete submissions of the law in issue and to apply to the set of facts before the court. In the course of the proceedings, the prosecutor must refrain from using language or conduct that may cause any bias against the accused and any defence witnesses. It is also inappropriate for a prosecutor to express any personal opinion regarding the credibility of the witnesses.

## **B. Understanding the Case**

Case preparation should commence with the process of understanding the case. Prosecutors should be furnished with the case file compiled by the investigators of the law enforcement agency concerned. The files should include all relevant materials relating to the case and the prosecutors should pay special attention to the following types of materials:

- Charge sheet
- Witness statements
- Documentary and other relevant exhibits.

### **1. The Charges**

Apart from ensuring that the details on the charge sheet are accurate it is important to check on any recent development in the law concerning the particular charges. This is particularly important for offences which involve areas of the law that are not well settled. If amendments to the charges are required, the defence should be notified as soon as practical in order that they are in a position to reconsider its defence, or in some cases, apply for an adjournment of the proceedings.

### **2. Witness Statements**

The statements of prosecution witnesses usually form the main basis of the case against the accused. It is therefore of utmost importance that a prosecutor should be well conversant with all the contents at the early stage of case preparation. Particular attention is required when there appear to be inconsistencies amongst the evidence of different witnesses. In such cases, it may be useful to have the inconsistencies clarified or to consider the way the prosecution’s case can be presented in order that the issue of inconsistency may be resolved.

It is also important that any irrelevant, inadmissible evidence and/or other prejudicial materials as set out in the statements can be identified at an early stage in order that the prosecutor can avoid eliciting such evidence when the witnesses testify in the trial.

After a prosecutor has become familiar with the evidence to be adduced by each witness, it has to be decided as to the sequence of calling those witnesses. A prosecutor is often seen as a film director or story teller. The trial judge, under an adversarial litigation system, does not have the benefit of knowing the prosecution's case before the witnesses are called. A prosecutor should therefore, aim to work towards the devising of an order of calling witnesses in order that their evidence can be comprehended easily by the court. Afterall, it has always been the burden of the prosecution to prove its case. In the event that the presentation of evidence is confusing and hard to comprehend, it will create a convenient basis for the defence to cast doubt on the prosecution's case.

In Hong Kong, prosecutors do not meet and interview a witness before the trial to avoid the allegation of coaching of witness. The assessment of the credibility and reliability of a witness is left to the investigators. The only exception to the general rule is expert witnesses and more on this topic will be discussed below.

### 3. Documentary Exhibits

Documentary exhibits such as written or recorded confessions of the accused, plans, sketches, accounting records, photographs and bank records may be required to prove the case. If a prosecutor wishes to adduce such evidence in a trial, it is important to check that the chain of evidence is complete and that there is no issue of the admissibility.

The case file that has been delivered to the prosecutor's office usually contains duplicate copies of the documentary exhibits while the original documents are being kept by the investigator for formal production in the trial proceedings. It is desirable that a prosecutor should inspect the original exhibit before the trial as it is not uncommon that useful information previously left unnoticed can be found during the inspection exercise.

The Judiciary of Hong Kong has from time to time issued Practice Directions to regulate the practices and procedures in bring criminal proceedings at different levels of courts. It is important that prosecutors are familiar with these practice directions in order that they can satisfactorily discharge their duties as ministers of justice.

## C. More Pre-Trial Preparation

### 1. Use of Admitted Facts

In a criminal trial, it is unlikely that each and every part of the prosecution's case is in dispute. In Hong Kong, parties in a criminal proceeding may agree to adduce undisputed evidence in the form of admitted facts. The relevant statutory provision is section 65 C of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong.

Section 65(1) provides that "*Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.*"

This provision has proved to be a useful tool for a prosecutor as it is his or her duty to prove each element of the offence charged against an accused. In the event that certain elements of an offence are not in dispute, instead of adducing evidence to prove such undisputed part of the prosecution's case, that can be agreed by way of admitted facts. The trial can no doubt be conducted in a more efficient manner and the parties will focus on

the disputed areas. For example, in the prosecution of a wounding case, if there is no dispute that the victim has sustained a wound and to agree the injuries by way of admitted facts, the prosecution may be dispensed with the need to call the doctor who attended the victim to testify in the trial. The use of admitted facts is also commonly seen in proving the chain of exhibits, bank records and other formal evidence. Prosecutors should be encouraged to make good use of this statutory provision for good case management.

## 2. Case Conference with Expert Witnesses

As mentioned above, either party to a proceeding may meet to discuss the case with a witness who is to testify in the capacity of an expert witness. In fact, in cases which an expert is required to furnish the court with expert opinion, it is desirable to meet with the expert to have a better understanding of the technical aspect of the evidence, basis on which the expert has formulated his or her opinion and the methodology that has been used. It is essential that experts are encouraged to explain his or her evidence in layman's terms and to avoid the use of jargon in order that the Court and/or the jury will have a better grasp of the expert evidence.

## 3. Consider Possible Lines of Defence

In a criminal trial, the burden of proving the accused's guilt lies on the prosecution and the prosecution is required to prove its case beyond reasonable doubt. While the defence is not under any duty to disclose its line of defence in advance, it is likely that the defence will challenge certain parts of the prosecution's case if there appears to be "weaknesses" in the evidence in that area. Besides, defence counsel are likely to challenge areas which they refuse to adduce such part of the prosecution case by way of admitted facts.

## 4. Early Inspection of Unused Materials

Not all the materials and witness statements collected in the course of the criminal investigation are included in the case file for the purpose of adducing such evidence in the trial. They usually form the unused material bundle(s). All unused materials relevant to the case should also be served to the defence. This is part of the prosecution's duty of disclosure. It is not uncommon that defence would make considerable effort in perusing the unused materials in the hope that they contain evidence that may undermine the prosecution case or advance the defence case. Prosecutors should go through the same process and not leave the unused material bundle unattended until shortly before the commencement of trial.

## 5. Inspection of Exhibits and the Crime Site

Prosecutors should seek to inspect the real exhibits which they intend to produce in the trial before the proceedings. It is often desirable to arrange a site visit to be carried out to have a better understanding of the crime scene and the evidence of witnesses.

## **D. Disclosure**

### 1. The Principles

Article 87 of the Basic Law of Hong Kong gives an accused the right to a fair trial. The fair disclosure of relevant materials to the defence is an integral part of a fair trial. The duty to disclose is a positive duty placed upon the prosecution, and it is a continuing duty and extends throughout the trial and after conviction, on to appeal. The prosecution is, however, not under an obligation to disclose to the defence information or material that is relevant to the credibility of a defence witness.

The leading authority on disclosure in Hong Kong is the Court of Final Appeal decision in *HKSAR v Lee Ming Tee* (No. 2 ) (2003) HKCFAR 336, in which the Court of Final Appeal set out the following main principles on the subject of disclosure:

- (i) The prosecution is under a duty of disclosure to the defence and such duty extends to materials or information in the possession or control of the prosecution (including the investigating agency) which may undermine the prosecution case or advance to the defence case.
- (ii) The duty is imposed on the prosecution only and there is no general duty to disclose on the part of the defence.
- (iii) In order to discharge the duty satisfactorily, the prosecution should instruct the investigating agency to bring to the attention of the prosecuting counsel any materials that may be disclosable.
- (iv) The duty is not limited to the disclosure of admissible evidence. Materials which are inadmissible may be relevant and useful for the purpose of cross-examination of a prosecution witness on the issue of credibility;
- (v) The fact that a prosecution witness is a subject of a disciplinary or other inquiry may also be disclosable as this may also be relevant to the issue of credibility or reliability of the witness.

## 2. Common Disclosable Materials

In practice, materials to be disclosed by the prosecution in most cases include:

- (i) All evidence sought to be relied upon by the prosecution (materials and information forming part of the witness statement bundle(s), documentary exhibits bundle(s) and unused material bundle(s));
- (ii) The previous criminal convictions of an accused and/or co-accused, of the complainant and other prosecution witnesses;
- (iii) Known disciplinary records or other record of misconduct of any prosecution witness that may reasonably affect his or her credibility; and
- (iv) Materials known to the prosecution that may assist the defence in the proceedings.

## 3. Effects of Non-Compliance of Disclosure Duty

Late disclosure or failure to comply with the duty to disclose is a procedural irregularity and may cause detrimental effects to the prosecution. The Court may reprimand the prosecution and may order an adjournment of the proceedings. In an extreme case, the court may allow a permanent stay of proceedings if the Court takes the view that no fair trial can take place due to non-disclosure of relevant materials which may assist the defence.

# IV. PROSECUTION OF CORRUPTION AND BRIBERY CASES

## A. The Use of Accomplice Witnesses

Under the corruption laws in Hong Kong, both an acceptor and offeror of unauthorised advantages are criminally liable. As such insidious dealings are difficult to detect, investigating agency (ie the ICAC) often resort to engage informers and/or accomplice witnesses in the detection and combat of corruption. The use of informers as prosecution witnesses, particularly when these witnesses are also involved in criminal activities, is a matter requiring careful and balanced consideration. Sometimes an informer may be granted an immunity from prosecution and to testify in the capacity of an accomplice witness. In

other cases, an accomplice witness may, after pleading guilty, cooperate with the investigating agency and testify against other culprits. In doing so, the accomplice witness may receive a substantial discount in sentence.

In all cases where an informer is used as a witness, the prosecutor must ascertain whether the informer has been promised any reward for giving evidence or hopes to gain any benefit from testifying. The prosecutor must scrutinize the evidence of the informer with great care to look for any motive of lying. If the prosecutor takes a view that the evidence is tainted, he or she may consider not to use such evidence at all. In ensuring that the trial may proceed fairly, the court and the defence should be made aware of any matter which might affect the assessment of the evidence of an informer.

An immunity from prosecution should only be given if it is in the interest of the public to do so. In Hong Kong an immunity in written form will be granted by a senior member of the prosecution authority in return for the undertakings of the accomplice witness to give true and frank evidence on behalf of the prosecution. A copy of the immunity will be served to the defence and produced before the court at trial.

#### **B. Confession of an Accused**

It is not uncommon that the prosecution will rely on the confession of an accused made to the investigating agency in proving bribery offences. In preparing the trial, a prosecutor should carefully assess the quality of the confession. For a confession to be admitted in a criminal trial to be used against the accused, the prosecution is required to establish beyond reasonable doubt that the statement was made voluntarily and there has been no unfairness to the accused which would move the court to exercise its residual discretion in excluding the statement. A voluntary confession is one that is not obtained by way of threat of violence or inducement or oppression.

Previously confessions were recorded in the written form while it is more common nowadays that the confessions are video-recorded. This provides a higher degree of accuracy and the court can conveniently view the demeanour of the accused at the time of the interview. In all cases, transcripts of the video-recorded interview will be produced as evidence. A prosecutor should carefully view the video tapes before the trial and not rely solely on the transcripts. A prosecutor should also obtain in advance records of the movement of the accused when he or she was being held in the custody of the investigating agency during which the confession had been made to ensure that all relevant officers who had handled the accused are available to testify.

#### **C. Use of Technology Court for Trial Proceedings**

The trials of complex commercial fraud or corruption cases often involve a large volume of documentary exhibits. The Technology Court, situated inside the High Court Building in Hong Kong, has been made available for both civil and criminal proceedings since 2008. The Technology Court offers an electronic Documentary and Exhibits Handling System which is an information retrieval system and is capable of indexing and storing large volumes of documents on the court's computer. Documents can be retrieved and displayed simultaneously in computer monitors for use in the course of a hearing. It also allows the judge and parties to the proceedings to make private notes relating to particular documents. If parties of the proceedings take the view that the use of Technology Court in the presentation of evidence may promote the fair and efficient disposal of the proceedings and is

also likely to be cost effective, they may consider applying for the use of Technology Court at the early stage of trial preparation.

#### **D. Applications and Collateral Challenges**

In recent years, in the trials of complex commercial crimes and corruption cases, it has become fashionable for the defence to make preliminary applications and collateral challenges before the commencement or in the course of the criminal trials. Commonly seen applications included judicial review of decisions relating to refusal of stay of proceedings, admissibility of evidence, decisions of not to prosecute and venue of trial. As pointed out by the Court of Final Appeal in Hong Kong in the case of *Yeung Chun-pong & others v Secretary for Justice* (2006) 9 HKCFAR 836, the applications to stay proceedings and applications for judicial review would “*lead to a serious fragmentation of the criminal trial process. The fragmentation of that process, involving an increasing number of interlocutory applications and judicial review applications which delay the hearing of trials and necessitate the vacation of dates fixed for hearing, is a growing problem in the criminal justice system.*”

Although the Judiciary in Hong Kong is generally of the view that the purpose of such applications is to attempt to disrupt the progress of the criminal trial and is an abuse of the process of the court, this does not deter the defence making the applications. While the Prosecution is often left in a passive position in resisting such applications, it should stay vigilant as to the possible collateral challenges and not be ambushed by the defence.

#### **E. Recovery of Proceeds of Crime**

Under the Organized and Serious Crimes Ordinance, Chapter 445 of the Laws of Hong Kong and the Drug Trafficking (Recovery of Proceeds) Ordinance, Chapter 405, restraints and confiscation orders are available with the aim of preventing an accused from benefitting from proceeds of drug trafficking and organized and serious crimes. The Prevention of Bribery Ordinance, Chapter 201 provides confiscation power to forfeit assets where a person is convicted on indictment of an offence being a prescribed officer possessing unexplained property, contrary to section 10(1)(b) of the said ordinance.

Application for a restraint order will normally be applied at the outset of the criminal proceedings, otherwise, the accused may cause the properties to be dissipated and therefore no longer available to satisfy the confiscation order subsequently made. Confiscation orders are conviction based. An application for a confiscation order should be made at the District Court or the Court of First Instance after conviction and before the sentence is imposed.

### **V. ROLE OF A PROSECUTOR IN SENTENCING**

A prosecutor in Hong Kong should not attempt by advocacy to influence the court in respect of the sentence to be imposed on a convicted person. It is, however, one of his or her duties to assist the court to impose the appropriate penalty.

If there has been a trial, a prosecutor is obliged to adduce all relevant evidence, include mitigating or aggravating features, which may impact upon sentence. In the case of a guilty plea, the set of facts furnished by the prosecution and forming the basis for sentencing should also contain sufficient relevant information.

While sentencing is entirely a matter for the court, a prosecutor can furnish the court with information on matters such as the prevalence of the offence, the effect of the crime on the victim and the background of the accused. The court also expects a prosecutor to know the maximum sentence the court can impose and to provide information from relevant court decisions, relevant sentencing guidelines or guideline cases and relevant official statistics. The prosecutor should also assist the court to avoid errors that may be subjected to subsequent appeal.

It is also not appropriate for a prosecutor to make representations about the attitude of the prosecuting authority which may in any way fetter its discretion in possible review of the sentence.

At the conclusion of the trial, a prosecutor should also give careful consideration to apply for other suitable orders such as compensation or restitution orders or disqualification from driving orders.