ETHICAL ASPECTS OF THE PROSECUTION OF CRIMINAL CASES

INTRODUCTION

"It is quite true that counsel for the prosecution throughout a case ought not to struggle for the verdict against a prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice."

Avory J in R v. Banks [1916] 2 K.B. 621 at 623

This classic statement of the correct attitude and approach of prosecuting counsel to the discharge of their functions, is one with which all right thinking prosecutors will readily agree. If there is any justifiable "struggle" it occurs in the application of the letter and spirit of this statement in the context of a fused profession, an adversarial system of trial, and the unlimited factual situations which confront prosecutors as they attempt to firmly but fairly represent the Crown and serve the interests of justice.

"Ethics" will be given a wide interpretation throughout this paper. In respect of each issue discussed the focus will be more on determining procedural correctness and less on errors of judgment or suspected oblique motives of particular prosecutors in the cases which will be cited for illustration.

In this paper I do not propose to treat with all the ethical issues that can arise in prosecutions, but will attempt to wrestle with some I consider most important.

For ease of analysis the discussion will as far as possible proceed in the order in which ethical concerns in relation to criminal prosecutions are likely to arise.

PRE-TRIAL ISSUES

{A} DISCLOSURE

This has been one of the most fertile areas in the criminal law in recent years. In fact from the time of ***Linton Berry v. R [1992] 2 A.C. 364,*** Lord Lowry delivering the judgment of the

It now appears that the law in England is that, subject to a claim of public interest immunity, (the validity of which must be determined by the Court), it is the duty of the prosecutor to make all unused matter in the Crown's possession material to the issues in the case, available to the defence.

In the Jamaican context it is clear from the cases that the duty to disclose is not as extensive as presently obtains in England and other jurisdictions. This is due to the fact that in the said ***Linton Berry*** case at page 373H the Privy Council made the point that *"in relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused but the practice varies between different jurisdictions in the common law world"*. At page 376G the Privy Council went on to say that *"in a civilized community the most suitable ways of achieving such fairness (which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve that community and are familiar with its problems"*.

The relationship between disclosure and ethics was well stated by Shelley J.A. in ***R v. Barrett (1970) 12 J.L.R. 179*** . In observing that the defence was entitled to see a statement made by a witness whose evidence at trial differed substantially from what had been said in the statement, he opined at page 180:

> The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as minister of justice whose prime concern is its fair and impartial administration.

A somewhat broader statement of the ethical role of the prosecution when it comes to disclosure is found in ***Canon III(h) of the Standards of Professional Etiquette and Professional Conduct for Attorneys-at-Law prescribed by the General Legal Council pursuant to the provisions of Section 12(7) of the Legal Profession Act 1971***. (hereinafter referred to as ***"the Canons"***). It makes clear that there is a duty of disclosure to the Court independent of the duty of disclosure to the defence. ***Canon III(h)*** reads:

> An Attorney engaged in conducting the prosecution of an accused person has a primary duty to see that justice is done and he shall not withhold facts or secrete witness which tend to establish the guilt or innocence of the accused.

It is important to note also that breach of ***Canon III(h)*** constitutes misconduct in a professional

(a) Disclosure of Material Discrepancies

This is one of the earlier principles distilled and one of the most obvious in the quest for fairness. The issue was considered in ***R v. Purvis and Hughes (1968) 13 W.I.R. 507*** where the applicants were convicted of larceny of a motorcar and robbery with aggravation. On appeal the applicants argued inter alia, that the trial judge erred in refusing defence counsel's application to see the statements of certain witnesses who had given the police a description of the driver of the car. In refusing the applications the Court held inter alia, that as there was no suggestion that there was any discrepancy or inconsistency between the evidence of the witnesses at trial and their statements given to the police, the trial judge was right in refusing defence counsel's application to see the statements.

Waddington P (Ag) in treating on the issue said at page 512D

> If there was in fact any such material discrepancy or inconsistency it would have been the duty of Counsel for the Crown to inform the defence of the fact, and indeed the learned trial judge expressly referred to Crown Counsel's duty in this respect. Crown Counsel did not make any offer of the statements and in the circumstances the learned trial judge was entitled to assume that there were no discrepancies or inconsistencies therein and to refuse to order production of the statements. We had no doubt that if there was the slightest suggestion that the statement differed materially from the evidence given by the witnesses the learned trial judge would have called for these statements and examined them himself and if necessary would have made them available to the defence.

In ***R v. Barrett*** (supra) the trial judge refused to allow defence counsel to see the statement of a witness who had identified the applicant at an identification parade held ten days after commission of the offence. The Court of Appeal applied ***R v. Purvis and Hughes*** and made it clear, that if the defence did not accept the assumption that there was no discrepancy stemming from the lack of disclosure by the Crown, defence counsel should invite the judge to exercise his discretionary power under Section 18 of the Evidence Law, (now Section 17 of the Evidence Act), by examining the statement himself and directing that it be used in such manner as justice demands.

The current practice is that requests for statements of witnesses to be called by the Crown are routinely made by the defence and granted where no factors prevent disclosure. Hence it is becoming less and less likely that a trial judge will have to be asked to intervene to determine whether a statement or a portion thereof should be disclosed to the defence, on the basis that it contains a material discrepancy or inconsistency

Carey J.A. delivering the judgment of the Court of Appeal said inter alia, that the matter should have been brought to the attention of the Court and judgment arrested.

In ***R v. Grant and Hewitt 12 J.L.R. 585*** previous inconsistent statements were first disclosed in the Court of Appeal and the conviction depending on identification evidence was set aside.

In ***Audley Milton v. R P.C. Appeal No. 48 of 1995*** judgment delivered 9th June 1996 disclosure occurred even later. The appeal was allowed when statements were disclosed at the Privy Council for the first time on request of the appellants solicitors. This disclosure revealed serious and material discrepancies between the statements of the two main crown witnesses and their evidence at trial. It was unclear whether the prosecutor had been aware of the statement or if so his duty to disclose.

The judgment of Haynes C in the ***State v. Nasrat Ali 26 W.I.R. 99,*** a case on disclosure from the Court of Appeal of Guyana, is instructive on the need for prosecutors to be fully aware of all the material on the case files in the matters they prosecute.

At page 109 he opined:

> [I]f a prosecutor is to discharge his duties completely he must place himself in a position to do so. And so it is his duty to read the police file and all the statements in it. He will be insufficiently equipped to conduct the prosecution satisfactorily in the public interest if he should read only the depositions taken at the preliminary inquiry. In the statements of the witness to be called he might find material evidence in support to his case that was not led on the depositions, which he might be able to put before the tribunal; or a vital inconsistency with the present testimony of the witness which it would be his duty toh disclose. He might find in the statements of the witnesses not called at the preliminary inquiry, facts which should have been led there, which on notice, he might be able to examine on as additional evidence; or he might find material which could assist the defence and which they should have the opportunity to use.

On the point of the continuing duty to disclose please also see ***"Guidelines for Disclosure in Criminal Matters*** issued by the Director of Public Prosecutions on June 14, 1996, (hereinafter referred to as ***"DPP'S Guidelines"***), ***Guideline number 7.***

(b) <u>Disclosure of Material from which evidence will be led</u>

This principle was clearly outlined in the case of ***Linton Berry v. R [1992] 2A.C. 364***. In that

but strongly made the point that these principles did not cover all the situations where fairness would require disclosure.

The case of ***Franklyn and Vincent v. R (1993) 42 WIR 262 PC*** made the point, (approving ***R v. Bidwell (1991) 28 J.L.R. 293*** on this issue), that disclosure is contemplated by Section 20(6) of the Jamaican Constitution and that this principle extends to summary trials. Their Lordships therefore held that upon a request from the defence statements of prosecution witnesses should be provided to them to assist in the preparation of their defence, except for example, in the case of petty offences or where the prosecution is of the view it was necessary to withhold the statement for the protection of a witness, or to otherwise prevent the course of justice being interfered with. In simple and straightforward cases a summary of the material to be relied on would be a sufficient compliance with a request. These principles were re-stated and applied in the case of ***Danhai Williams et al v. R, RMCA Nos. 24-26/95*** judgment delivered 25th June 1996. Please also see ***DPP'S Guidelines numbers 1 & 2.***

(c)Disclosure of statement of a Person on the scene of a crime, not called by the Prosecution

Richard Hall v. R P.C.A. 13/96 judgment delivered 15th December 1997 was a case where the deceased was shot to death in his bedroom. Present in the house at the time were the deceased's wife and son. The wife was called as a witness but not the son, as the son had not identified anyone on the identification parade. Neither the statement of the wife nor that of the son was disclosed. The Privy Council held that the wife's statement should have been disclosed as it contained some discrepancies and her evidence was the only evidence against the Accused. Their Lordship's further held that as the son was present at the scene and witnessed a substantial part of the events, his statement should have been disclosed to the defence so defence counsel could have made use of it in cross-examining the wife. Their Lordships rejected the submission of the Crown that the son was "unreliable" under the rule in ***R v. Bryant and Dickson 31 Cr. App. R. 146*** as he had not pointed out anyone at the identification parade. They opined that under that rule a witness could be regarded as unreliable, if the Crown considered he might go into the witness box to give untruthful evidence. The son they considered did not fall within that category

Their Lordships further observed that in ***R v. Mills [1997] 3 W.L.R. 458*** the House of Lords disapproved the rule in ***R v. Bryant and Dickson*** and held that a statement of a witness present at

(d) Previous Convictions of Crown Witnesses

In ***R v. Collister and Warshurst 39 Cr. App. R. 100*** it was held that it is the duty of the prosecution to inform the defence of any known convictions standing on the record of the prosecutor (i.e. prosecution witnesses), but that they are not under the further duty of examining every kind of record to see whether anything exists which might affect their character.

In practice, the exercise of this duty only arises if the witness(es) are known to the police or themselves disclose their antecedents. This is so as criminal record checks can only be made by cross referencing fingerprints, which can only be obtained by a Court order, unless volunteered. It would clearly be a breach of human rights for a witness to be ordered to give his fingerprints, solely that a check can be made to see if he has any criminal record.

(e) Requests for a reward by a crown witness

In ***R v. Rasheed, the Times May 20, 1994 C.A.*** the Appellant was convicted of manslaughter and other offences. The argument on appeal was based on the fact that before the trial the witness had asked to be considered for a reward, a fact known to the police at the time of trial, but not known by prosecuting nor defence counsel. In allowing the appeal it was held that:

> The duty to disclose extended to any material casting doubt upon the reliability of a witness in the proceedings. The classic examples of material tending to undermine the credibility of a witness were other statements and significant convictions of the witness. As a matter of commonsense, a request for a reward by a witness might have a bearing on his motives for coming forward to give evidence. It must therefore always be disclosed by the police to the prosecution and by the prosecution to the defence.

Similarly, in ***R v Taylor and Taylor 98 Cr. App. R.*** where two sisters were convicted of murder, the fact of the key prosecution witness having sought to claim a reward from the victim's employers was known by the police at the time of trial but not by counsel on either side. This fact was first disclosed on appeal as well as major discrepancy where the witness had at one stage said one of the assailants may have been black and then later said both were white. Both

(f) Other Material/Information which should be disclosed:

i. Any exculpatory information which comes to the attention of the prosecution

DPP'S Guidelines numbers 8-10

ii. A statement given by an accused person

DPP'S Guideline number 11(a)

iii. A statement or the relevant portion thereof containing a confession or admission of an accused person

DPP'S Guideline number 11(b)

iv. A statement or the relevant portion thereof containing a description of an accused person where identity is likely to be an issue in the case.

DPP'S Guideline number 11(c)

v. The report/statement of an expert witness

DPP'S Guideline number 12

(g) Material/Information which should not be disclosed

In addition to the situations outlined in the cases of ***Berry, Franklyn and Vincent and Danhai Williams et al,*** in which material is exempted from disclosure, three other situations need to be mentioned.

1. Where the witnesses are not credible for example in ***R v. Elvis McKenzie S.C.C.A. 142/91*** judgment delivered 24th March 1994 where non-disclosure of statements taken from children five and half months after the incident, who were aged four and six at the time of the offence held not to be in breach of the rules.
2. Information which is subject to a claim of public interest immunity
   See ***R v. Franklyn and Vincent*** supra and ***DPP'S Guideline number 3.*** Per ***DPP'S Guideline number 5*** the Court should resolve any dispute as to material withheld.
3. Information which goes only to the credibility/reliability of defence witnesses including previous inconsistent statements and previous convictions of defence witnesses – ***R v. Winston Brown [1995] 1 Cr. App. R. 191.***

The rules of disclosure have gone a far way towards preventing "trial by ambush". Unfortunately however, in Jamaica unlike in other jurisdictions, the obligations to disclose have been imposed

Alibis should be required from accused persons. Far greater balance exists in the United Kingdom for example, where under the ***Criminal Procedure and Investigations Act 1996,*** a defendant is required to give Notice of Alibi and detailed particulars of any alibi witnesses. Also, where the defendant gives a statement to the prosecution and the Court, if he departs from it at trial, adverse comment can be made on that fact by the Court, and by the prosecutor with the leave of the Court.

These instances cited are only examples of the way in which the development of the law of disclosure in the United Kingdom is moving towards balancing the scales between the prosecution and the defence. It is hoped that we here in Jamaica will soon follow that laudable trend.

{B} INTERVIEWING WITNESSES

This is one area in which the fusion of our legal profession has caused a great diversion in the practice in Jamaica compared with the law and practice in the United Kingdom and other jurisdictions which have a divided profession.

In England the ***Code of Conduct for the Bar of England and Wales 1990*** makes it clear that it is only in exceptional cases that a barrister should interview any witnesses, including investigators, as it is the responsibility of solicitors to perform that task. The reasons stated for this rule include:

(i) to remove suspicions of coaching,
(ii) to prevent the subconscious influencing of lay witnesses and;
(iii to prevent the barrister being placed in a position of professional embarrassment, for example, if he himself becomes a witness in the case.

See ***Archbold 1997 Appendix B 31.***

However in Jamaica advocates perform both the solicitors' and barristers' function and ***section 5(c)*** of the ***Legal Profession Act 1971*** makes it clear that every attorney-at-Law shall *"when acting as a lawyer, be subject to all such liabilities as attach by law to a solicitor".*

Therefore it is the responsibility of prosecuting counsel in his role as solicitor to interview the Crown's witnesses, always bearing in mind the concerns identified above, and his need to be scrupulously fair and to act with the highest degree of probity. (Despite its arguably limited

It is submitted that prosecuting counsel in interviewing civilian witnesses should always do so in the presence of police personnel and depending on the circumstances of each case should aim to:

a) explain to witnesses court room procedure;
b) have the witnesses' memories refreshed from their statements and /or depositions;
c) obtain clarifications from witnesses in respect of information/material in the witnesses' statements or depositions which the prosecutor does not understand;
d) advise witnesses of inadmissible evidence in their statements/depositions which they should not repeat in their testimony;
e) assess the reliability of a witness whom the prosecutor is uncertain whether or not to call, tender for cross-examination or make available to the defence. (See ***R v. Kneebone[1] 1989 – 1999 47 NSWLR 450 at page 469 side note 99)***

To prevent collusion witnesses to the facts should never be interviewed together.

If any significant new material which is proposed to be led comes to the knowledge of the prosecutor during the interview, a further statement should be recorded from the witness and a Notice to Adduce this evidence served on the defence.

{C} OFFERING NO EVIDENCE

This is an area in which prosecuting counsel need to be scrupulously careful, as the consequences of a wrong decision are that a guilty person will go free. The role of prosecuting counsel and the trial judge, when the prosecutor indicates an intention to offer no evidence, has been viewed differently by the English Court of Appeal at various times.

In ***R v. Broad 68 Cr. App. R. 281*** counsel for the prosecution wished to offer no evidence on an indictment charging theft and handling stolen goods. The trial judge refused to allow the prosecutor to offer no evidence and the applicant was convicted on one count of handling stolen goods and sentenced to two years imprisonment. On appeal the conviction was upheld and the sentence varied to one of fifteen months. The ratio decidendi as stated in the head note reads as follows:

> Where an accused person has been charged on indictment with an offence and counsel for the prosecution invites the trial judge to approve that the prosecution do not proceed, the

convicted of criminal damage. The appeal was allowed on the basis that the recorder's refusal was wrong as it was part of the personal responsibility of prosecuting counsel conducting a case, having consulted the prosecuting authority, to decide whether to offer no evidence against a defendant, and although he should be ready to explain that decision to the trial judge, and to reconsider it in the light of the judge's observation, the ultimate decision remains with him. In arriving at its decision the Court of Appeal endorsed the ***"Guidance to Prosecution Counsel"*** dated May 24,1984 issued by the Bar Committee of the four Inns of Court. The point was not discussed however, of what would have been the position if the prosecutor had invited the recorder's approval of the proposed course and then the recorder had expressed his disapproval.

This unanswered question was dealt with by the ***Farquharson Committee***, set up by the Bar in England in 1986, to report on the duties and obligations of prosecuting counsel. In the summary of their opinion in paragraph 5, they made it clear that the ultimate decision whether to offer no evidence or to accept pleas to a lesser offence was for prosecuting counsel to make, but if he invited the judge to approve the course he was proposing to take then he must abide by the judge's decision. The Committee went on to state that without invitation the judge could express his views to the contrary and that in an extreme case where the judge believed serious injustice would occur if counsel took the course indicated, the judge could decline to proceed with the case until counsel had consulted the Director or Attorney General.

The English Court of Appeal relied on the ***Farquharson Committee Report*** in ***R v. Renshaw (1989) Crim. L. R. 811*** a case where the prosecution wished to offer no evidence because of the reluctance of the virtual complainant to proceed owing to threats. The Crown was allowed to offer no evidence but the virtual complainant was charged with and convicted for contempt. On appeal in allowing her appeal, the Court stressed that it was important for the judge to listen to the reasons given by the prosecution for proposing to offer no evidence and that the judge should keep in mind that the prosecution would have more information than he did.

In the case ***R v. Grafton 96 Cr. App. R. 156*** the English Court of Appeal again relied on the ***Farquharson Report*** in deciding that the trial judge was wrong not to have allowed the Crown to offer no further evidence after a crown witness had supported the appellant's claim of self-defence. The trial judge himself called the remaining witness, a police officer, the import of whose evidence linked the appellant to the offence. The appellant having been convicted, in allowing the appeal it was held that up to the end of the Crown's case it was the Crown's

The Jamaican position in relation to discontinuation of a prosecution[1] would seem to be that outlined in ***Grafton's*** case. Of course if after the close of the prosecution's case the Judge refuses leave for the prosecution to be discontinued, in an appropriate case, the Director of Public Prosecutions could enter a nolle prosequi under the powers vested in him by virtue of section 94 of the Constitution and section 4 of the Criminal Justice (Administration) Act.

The danger of injudiciously offering no evidence is starkly demonstrated by the case of ***R v. Mark Andrew Broomfield (1997) 1 Cr. App. R. 135***. In that case the defendant having been charged with a drug offence, at a plea and directions hearing, inexperienced prosecuting counsel indicated to defence counsel that the Crown wished to offer no evidence as it was accepted that the defendant had been "set up". This decision was communicated to the judge in Chambers by counsel. To avoid embarrassing certain persons present in Court, in open Court the matter was set for another date. Ahead of that date, new prosecuting counsel having been instructed, the defence were informed that the Crown intended to proceed. At the trial, an application to stay the proceedings as an abuse of process, having failed, the defendant pleaded guilty and was sentenced. On appeal, it was held allowing the appeal :

(i) that whether or not there was any prejudice to the defendant, it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason being given as to what was wrong with it, particularly as it was made Coram judice in the presence of the judge; and

(ii) that neither the Court nor the defendant could be expected to enquire whether prosecuting counsel had authority to conduct a case in court in any particular way and were therefore entitled to assume in ordinary circumstances that counsel did have such authority.

In the Jamaican context, it is submitted that while the second conclusion is entirely reasonable, some serious concerns arise about the first. The defendant with the benefit of counsel, having pleaded guilty, (thereby clearly indicating that the Crown's original decision was wrong), it is difficult to see how the administration of justice would have been brought into disrepute by a change to the correct decision, but not brought into disrepute by allowing a confessed guilty defendant to go free.

Before parting with ***Bloomfield's*** case it is important to note that Staughton L.J. giving the judgment of the English Court of Appeal was careful to note in concluding ***"...we are not seeking to establish any precedent or any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was done to this***

{D} PLEA BARGAINING/ACCEPTING PLEAS TO LESSER OFFENCES

The heavy lists before the Criminal Courts and the uncertainties of especially jury trials are factors which often prompt both counsel for the prosecution and the defence to engage in "plea bargaining". There is no organized system of plea bargaining recognized by the English common law such as exists in the American Legal System. It is clear however that it occurs in an informal way. In ***R v. Coward 70 Cr. App. R. 70*** the English Court of Appeal gave some guidance on the subject. In ***Coward's*** case the Appellant having been charged with Rape, Attempted Rape and other lesser offences, both defence and prosecuting counsel went to the judge to see if the judge would accept a plea of attempted unlawful sexual intercourse, as the prosecution had doubts whether it would be able to prove the charges of rape and attempted rape. Defence counsel sought an indication as to sentence and crown counsel sought the judge's views about accepting that plea. Defence counsel having pressed the judge for an indication as to sentence was told by the judge that he would give no indication but that counsel would have to trust his judgment. The appellant having pleaded guilty to unlawful sexual intercourse was sentenced to six months imprisonment. On appeal against sentence, defence counsel argued that the clear inference of the judge's words were that a non-custodial sentence would follow. The Court of Appeal held that a custodial sentence was right in principle, but based on the facts varied the sentence from six months to three months imprisonment.

In the course of the judgment delivered by Lawton L.J. two important points were made. Firstly that defence counsel should not expect a trial judge save in wholly exceptional circumstances to give any guidance whatsoever as to sentence. The reason given at pages 75-76 of the judgment was "*what seemed on paper to be a case for a non-custodial sentence may in Court assume greater gravity. The public are entitled to know the reasoning behind the judges sentence and if there has been some discussion behind the scenes as to what the sentence is going to be, the public in open Court may well be deprived of information which they are entitled to have*".
Secondly the point was made that it was for prosecuting counsel to make up their own minds what pleas to accept. If the judge did not approve, he could say so in open court and the prosecution would have to decide what course to take. It was bad practice for counsel as a matter of course to go and see the judge behind the scenes in order to get advice on pleas.

found the applicant guilty of infanticide the trial judge had been correct, as where nothing appears on the depositions[1] which can be said to reduce the offence charged in the indictment to some lesser offence for which a verdict may be returned, the duty of counsel for the crown is to present the offence charged in the indictment. Though in reference to the jury it was stated by the Court of Appeal at page 139 that *"...it is difficult to see on what evidence they could find that the balance of the applicant's mind was disturbed at the time as a result of her confinement"*, there must have been some evidence however infinitesimal upon which the trial judge left the lesser verdict of infanticide to the jury.

This issue was also addressed in ***Lloydell Richards v. R. [1993] A.C. 217*** where on an indictment charging the applicant with murder, a plea of guilty to manslaughter was accepted by Crown counsel and sentence postponed. Before sentence the Director of Public Prosecutions entered a nolle prosequi on the basis that a verdict of manslaughter did not arise on the facts. The applicant was re-arraigned, tried and convicted of murder. On appeal, it was held that the plea of autrefois convict failed as since sentence had not been passed, there had been no final adjudication on the first indictment. The applicant had therefore been rightly convicted of murder on the second indictment.

In accordance with the decision in ***Soanes'*** case supra, the Judge before whom the plea of guilty to manslaughter was made in ***Lloydell Richards,*** could have properly refused to accept the plea, it being unsupported by the facts. On the face of it, it may seem inconsistent that in respect of the same matter before him a Judge cannot interfere in the exercise of a prosecutor's discretion if he decides to offer no evidence, but he can properly refuse to accept a plea to a lesser offence. The rationale for this state of affairs seems to be that when the Crown decides not to proceed, the Judge does not have to adjudicate on the facts of the case and as the Court stated in ***R v. Renshaw*** supra, the prosecutor would have more information than the Judge which would be guiding the prosecutor's decision. In short, it is the Crown's duty to prosecute and if it declines to do so that is the exclusive prerogative of the Crown.. On the other hand, if the Crown is proceeding the Judge has a duty in the public interest, to ensure that the trial proceeds in a way that is true to the facts and issues which arise and should only agree or refuse to accept a plea to a lesser offence, in accordance with those facts and issues. It is in respect of this position relating to the Judges' role in the acceptance of pleas to lesser offences, that Jamaican law diverges from that stated in ***Grafton*** supra.

had been an aggressor and had inflicted the injuries with the victim lying on the ground. Sentence having been postponed a subsequent judge declined to abide by the agreement and held a "***Newton***" [1] hearing to resolve the factual issues. These having been resolved adverse to the appellant he was sentenced to fifteen months imprisonment. On appeal against sentence, sentence was varied to twelve months imprisonment on the basis that the trial judge had relied on material he had previously said he would put out of his mind.

In the course of delivering the judgment of the Court of Appeal Jowitt J. outlined five important principles to guide counsel and Courts in situations of this nature. These are as follows: *(1), on a plea of guilty the prosecution should not lend itself to any agreement with the defence founded on unreal or untrue facts; that (2), if this happened, the judge was entitled to direct a trial of the issue to determine the true factual basis upon which he had to sentence; that (3), this did not create a ground which allowed a defendant to vacate his plea of guilty when it was clear that he admitted guilt of the offence in question; that (4), the judge was entitled to expect prosecuting counsel to assist him by presenting the prosecution evidence and testing evidence called on behalf of the defence. In so far as an agreement existed between the prosecution and the defence it had to be considered conditional upon the approval of the judge, and the defence without that approval could not seek to hold the prosecution to it; that (5), before the trial of the issue was embarked upon, consideration should be given to whether there was any part of the agreement between the prosecution and defence to which the prosecution should be held and it was important to clarify the issues and agree on which witness statements bore on those issues and whether the witnesses were to be called or their statements read.*

It is also important to note that the first principle outlined in ***Beswick's*** case is in keeping with ***Canon VI(cc)*** of the ***Canons*** which reads *"An attorney shall not knowingly represent falsely to a Judge, a Court or other tribunal or an official of a Court or other tribunal, that a particular state of facts exists"*. Breach of this Canon is misconduct in a professional respect and would render the offender liable to disciplinary proceedings.

{E} OPENING THE FACTS TO THE JUDGE AFTER A PLEA OF GUILTY

Where there has been a plea of guilty prosecuting counsel even though addressing the Judge and not the jury, still has a duty to be fair and to observe the rules of disclosure.

facts to the judge Crown counsel stated several effects of the emotional trauma which the children had suffered. These allegations were not supported by any material disclosed to the defence before trial, but were taken into account by the judge in sentencing the appellant to four years imprisonment on each count. On appeal the sentence was reduced to three years, as it was held that counsel in opening a case on a plea of guilty should not refer to the effect of the offence on the victim, unless appropriate evidence had been served on the defence. This evidence would then form a part of the judge's papers and the defence would also have the opportunity to prepare to address the judge on that evidence. This reasoning was approved and applied in ***R v. Peter O's (1993) 14 Cr. App. R. 633.***

It is submitted that the principle in ***Hobstaff*** should be interpreted subject to certain practical considerations. For example it may not be necessary to specifically disclose physical effects of an assault on a victim where those are manifest and can be seen on the complainant in Court. Where however the effects are non-physical, or the extent or possibility of permanent disability unclear, then it is submitted, appropriate disclosure would be necessary.

ISSUES AT TRIAL

{F} PROSECUTION ADDRESSES TO THE JURY

The general purpose of the prosecution opening is to outline the evidence upon which the prosecution intend to rely and to explain the nature of the charges to the jury. It has also become customary to explain to the jury the various roles of the parties in the trial process and the burden and standard of proof.

It is thought to be highly undesirable for prosecuting counsel in addressing the jury to use unnecessarily emotive language to excite sympathy for the victim or prejudice against the accused. In fact, where the allegations may cause either or both results, it is desirable for prosecuting counsel to warn the jury not to be influenced by either sympathy or prejudice but only by the cold evidence. In ***R v. Banks (1916) 2 K.B.621,*** the case from which the opening quotation for this paper was taken, the appellant was convicted of carnally knowing a girl under 16 years. Counsel for the prosecution in his final address, appealed to the jury to protect young girls from offences of this sort. On appeal one ground of appeal complained about that observation. In dismissing the appeal the Court of Criminal Appeal though holding on this point that it was impossible to suggest that the jury were misled by those observations into finding the

always be a question of fact and an issue of degree that determine whether or not a matter is notorious and can therefore be addressed on without the calling of evidence.

{G} CALLING OF WITNESSES

One of the most challenging areas in the criminal law concerns the discretion of the prosecution to determine which witnesses it will call on its case. In the adversarial system, prosecuting counsel has to balance his role as a minister of justice required to be scrupulously fair, with the fact that he is not both prosecutor and defence counsel. Thus wherever and whenever possible he should place his case as coherently as possible before the Court. Often there is some inherent tension in those two roles, especially if fairness is interpreted as requiring the prosecutor to call a witness whom he later wishes to ask the Court to disbelieve.

This issue has received anxious consideration by several Courts over the years. The consideration of the issue reached a high water mark in England in 1994 in the case of ***R v. Kenneth Russell-Jones (1995) 1 Cr. App. R. 538.*** In this case the appellant was convicted at a re-trial, for arson and attempting to obtain property by deception. A witness called by the Crown at the first trial was not called by the Crown at the re-trial. The reason was, by then it was apparent that his evidence when compared with known facts was unreliable. On appeal challenging that decision, it was held dismissing the appeal that in the circumstances the prosecutor was entitled to conclude that the calling of the witness or tendering him for cross-examination would not further the interests of justice. Several authorities were reviewed by the English Court of Appeal, and seven principles distilled from these authorities and previous practice. The Court however was careful to state that these principles should not be regarding as covering all cases in which a prosecutor is called upon to exercise this discretion.

The seven principles with commentaries thereon are outlined as follows:

(1) Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intend to rely), if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served.

(2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.

prosecutor acted out of malice, but would if he were motivated by an irrelevant consideration - in that sense an oblique motive.

The case of ***R. v. Sterk (1972) Crim. L.R. 391*** would seem to fall under this third principle where it was held that prosecuting counsel having actually opened the evidence of the witness to the jury, the judge should have directed the prosecution to tender him for cross-examination by the defence.

> ***(4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.***

This principle is the one that potentially can be the most troubling as it raises several implications as to the number of witnesses which should be called and for what purpose(s). It is submitted that it is important that one of the cases used to amplify principle (4) was ***Seneviratene v. R. (1936) 3 ALL E. R. 36*** where at page 49 Lord Roche said that the Privy Council could not:

> Approve of an idea that the prosecution must call witnesses irrespective of consideration of number and of reliability, or that the prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must of course be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution.

This fourth principle and those following were considered by the New South Wales Court of Criminal Appeal in ***R v. Kneebone 1998 – 1999 47 NSWLR 450.*** In that case the appellant was convicted of two sexual offences against his de facto stepdaughter. In her evidence the complainant stated that her mother who was the common law wife of the appellant had seen the appellant in the act of molesting her and had spoken to him. The Crown did not call the mother. After the appellant was found guilty the mother when testifying at the sentencing hearing, denied the complainant's assertions. On appeal the conviction was quashed and a new trial ordered. It was held that given the way the complainant had testified, even if the evidence of the mother was not necessary to the unfolding of the narrative, (Greg James J said it was, Smart A J doubted it was and Spigelman, CJ said he agreed with them both), it was crucial on the issue of credibility and the mother should have been called. The Crown was faulted for having apparently formed the view that the witness was unreliable without having conducted a conference with the witness to see if the witness was really in the Accused's "camp". In the peculiar circumstances of this case the learned judges were of the view that even if the mother was unreliable she should have been called, especially as under their Evidence Act the crown could if necessary apply to cross-examine her before the defence did. In recognizing the difficulties this and other such cases pose Smart A J in his concluding paragraph opined *"The task confronting the prosecutor is a formidable and lonely one."*

> ***(5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.***
>
> ***(6) The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others.***

It is submitted a prosecutor would be entitled to view witnesses as incredible if as for example in ***R v. Oliva (1965) 49 Cr. App. R. 298*** the witnesses repudiate their earlier statements, or as in ***R v. Mills [1998] A.C. 383*** the witnesses are adjudged to be untruthful and likely to tailor their evidence to suit the defence.

These principles outlined in ***Russell-Jones*** were considered and applied in ***R v. Japheth Johnson SCCA No. 118/98*** judgment delivered December 3,1999

{H} <u>Other Ethical Considerations</u>

The following sections of the ***Canons*** should be bourne in mind at all times.

Canon V(e)

An attorney who holds a public office[1] shall not use his public position to influence or attempt to influence a Tribunal to act in favour of himself or his client.

The State, the virtual complainant and the family and associates of a deceased person could be seen as the "clients" of the prosecutor

Canon V(f)

An attorney shall not accept private employment in a matter upon the merits of which he previously acted in a Judicial capacity or for which he had substantial responsibility while he was in public employment.

This canon speaks inter alia to the continuing duty of a former prosecutor in relation to matters that he handled before leaving the public service.

Canon V(h)

An attorney shall not give, lend or promise anything of value to a Judge, juror or official or a tribunal before which there is a pending matter in which he is engaged.

Canon V(i)

In any proceeding in Court an attorney shall not communicate or cause any other person to communicate with a juror as to the merits of such proceedings, and shall only do so with a Judge or person exercising Judicial functions:

Breach of any of these Canons constitutes misconduct in a professional respect rendering the attorney in breach, liable to disciplinary proceedings.

CONCLUSION

Prosecuting is a challenging task involving great responsibility. The prosecutor is called upon to balance different roles and competing interests, fearlessly but fairly. A prosecutor should however always bear in mind that, subject to the elements of the trial process over which he has no control, a conviction or acquittal is only justifiable if it has been achieved by "proper means". This standard should also be applied to defence counsel in the context of their obligations.

It is hoped that this paper will have better equipped those of us who practice at the criminal bar to make the right "judgment calls" in the several difficult situations that often confront us.

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