CHAPTER 17

CHARGES

Prosecutors

17.1 Under the Constitutions of Solomon Islands s 91, Kiribati s 42 and Tuvalu s 79, responsibility for prosecutions is allocated to an independent public official: the Director of Public Prosecutions (DPP) in Solomon Islands, the Attorney-General {AG} in Kiribati and Tuvalu. The powers of this official may be delegated to subordinates: SI s 91(5); KI s 42(6); Tu s 79(8). The Constitutions expressly provide that, in exercising prosecutorial powers, the DPP or AG shall not be 'subject to the direction or control of any other person or authority': SI s 91(7); KI s 42(8); Tu s 79(11). An attempt at political influence in a case being handled by the DPP or AG can constitute an offence relating to interference with a legal process

17.2 The prosecutorial powers of the DPP/AG are detailed in the Constitutions SI s 91(4); KI s 42(4); Tu s 79(7). The Solomon Islands version reads:

> The Director of Public Prosecutions shall have power in any case in which he considers it desirable to do so -
>
> *(a)* to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
> *(b)* to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
> *(c)* to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

17.3 In practice, most prosecutions are conducted under authority delegated by the DPP/AG: CPC SI/Ki/Tu ss 69-74. Prosecutions in the High Court are conducted by lawyers from the Office of the DPP/AG who are appointed public prosecutors. Police prosecutors conduct most of the prosecutions in Magistrates' Courts. Both public prosecutors and police prosecutors are subject to the express directions of the DPP/AG when conducting prosecutions: CPC SI/Ki/Tu s 74. Private prosecutions are also permitted, but the DPP/AG may direct a public prosecutor to take over the prosecution: SI/Ki/Tu s 72.

The decision to prosecute

17.4 The threshold standard for a charge and prosecution is belief on 'reasonable and probable cause' that an offence has been committed: CPC SI/Ki/Tu s 76(2). This is sometimes also expressed as a 'prima facie case'. It means that there must be sufficient evidence on all elements of an offence to support a conviction. In *Attorney General v Wong* [1995] SBCA 7, the Solomon Islands Court of Appeal endorsed 'the classic statement' by Hawkins J in *Hicks v. Faulkner* (1881) QBD 167 at 171:

> I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

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

1. Despite there being prima facie evidence of an offence, a prosecution should not be pursued when there are no reasonable prospects of conviction. There are various reasons why a charge that passes the test of a prima facie case may not be pursued or may fail in court. Evidence that would be sufficient for a conviction may be outweighed or undermined by contradictory evidence for the defence or it may be weakened or destroyed by cross-examination in court. Even if it remains convincing on a balance of probabilities, it may fail the test of proof 'beyond reasonable doubt'. Whether there are reasonable prospects of conviction in a particular case is a matter of for the experience and judgment of the prosecutor. The prosecutor will have to make 'an evaluation of the available evidence and the strength of the prosecution case': see Solomon Islands *Prosecution Policy* (2009) at 10.
2. Even when a conviction could be obtained, it has been accepted that the executive has discretion not to prosecute if this course is warranted by a review of the circumstances of the particular case. For example, a prosecution may not be warranted if there are mitigating circumstances to the offence or if the offender is ill or dying. The likely length and expense of a trial are additional factors which could be taken into account. This is sometimes called the 'public interest' test.

17.6 These tests are incorporated in Solomon Islands *Prosecution Policy* (2009), issued by the DPP. The *Policy* states at pp 10-13:

> 7.4 In making the decision to prosecute, the prosecutor must consider the following.
>
> **1. Does the admissible evidence available establish each element of the alleged offence?**
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> This is essentially the prima facie case test; however, it requires the consideration of admissible evidence. This can require the prosecutor to make a determination if evidence would be admissible.
>
> **2. Is there a reasonable prospect of conviction?**
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> This requires an exercise in judgment and an evaluation of the available evidence and the strength of the prosecution case. It will require the consideration of:
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> a) the availability, competence and compellability of witnesses and their likely impression on the Court;
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> b) if a witness has a motive for lying or not telling the whole truth;
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> c) any conflicting statements by a material witness;
>
> d) the admissibility of evidence, including any alleged admission or confession;
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> e] the reliability and strength of any identification evidence;
>
> f) the warnings and directions a Judge must give in the particular case;
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> g) any defences that are available to the accused; and
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> h) any other factors relevant to the merits of the Crown case.
>
> **3. Are there discretionary factors that dictate whether the matter should or should not proceed in the public interest?**
>
> While there may be a prima facie case and a reasonable prospect of conviction there may be discretionary factors that dictate that a matter should not proceed. These factors may be varied and will depend upon the individual cases. Some of the discretionary factors to consider are:
>
> a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;
>
> b) any mitigating or aggravating circumstances;
>
> c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;
>
> d) the alleged offender's antecedents and background;
>
> e) the risk of re-offending by the alleged offender;

f) the staleness of the alleged offence;
g) delay and the effect of such delay, and any reasons for such delay;
h) the degree of culpability of the alleged offender in connection with the offence;
i) the effect on public order and morale;
j) the obsolescence or obscurity of the law;
k) whether the prosecution would be perceived as counterproductive: for example, by bringing the law into disrepute;
l) the availability and efficacy of any alternatives to prosecution;
m) the prevalence of the alleged offence and the need for deterrence, both personal and general;
n) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
o) whether the alleged offence is of considerable public concern;
p) any entitlement of the Crown or other person or body to criminal compensation, reparation, forfeiture or civil remedy if prosecution is taken;
q) the attitude of the victim of the alleged offence to a prosecution and the interests of the victim;
r) the likely length and expense of a trial;
s) special circumstances that would prevent a fair trial being conducted;
t) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
u) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court; and
v) the necessity to maintain public confidence in such basic institutions as the Parliament and the Courts.
The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

Initiation and discontinuance of proceedings

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

17.8 Two steps involving different terminology may be involved in bringing a case to trial.

1. The Criminal Procedure Codes provide alternative pathways for the first step of initiating criminal proceedings before a Magistrates' Court:
    - A *'complaint'* to a magistrate can be made by any person (usually an investigating police officer, although it can be a private person) 'who believes from reasonable and probable cause that an offence has been committed': CPC SI /Ki/Tu s 76(1)-(2); see also the definition of 'complaint' in s 2. The complaint can be made orally or in writing but, if it is oral, it will be reduced to writing by the court: s 76(3)–(4).
    - A person can be brought before a court without a prior charge when there has been an arrest without warrant; however, the police officer must then sign and present a formal charge: s 76(5).
2. If the case is authorised to be tried in the High Court, a preliminary inquiry on the provisional charge is first conducted in the Magistrates' Court. When a case proceeds for trial in the High Court, a new document called an *'information'* is prepared which sets out the charge or charges: CPC SI s 233; Ki/Tu s 232.

Terminology varies between jurisdictions. In some jurisdictions, the term 'information' is used to describe a charge in a lower court. Moreover, 'indictment' was the term used at common law to describe a charge in a superior court. It is still used in many jurisdictions. Hence, offences that can be prosecuted in superior courts are commonly called 'indictable offences'.

17.9 A charge can be amended. An objection to a formal defect on the face of an information must be made at the outset of a trial, immediately after it has been read to the accused person: CPC S! s 151(1); Ki/Tu s 241(1). Otherwise, charges can sometimes be amended during the course of a trial: SI s 251(2); Ki/Tu s 241(2). The amendment must not cause 'injustice.' For example, an accused whose defence is a denial of culpability, but not of the alleged conduct, will not be prejudiced if the location of the conduct is corrected. On the other hand, a corrected location might cause major problems for an accused who has raised an alibi for a defence. The conditions for amending a charge will be more and more difficult to satisfy as the trial progresses. In *Lewis v R* [1994] 1 Qd R 613 at 624, Macrossan CJ said:

> It is fundamental that the court will be concerned for the position of the accused who, under our established criminal procedures, is entitled to full and proper notice of the case which he will be called upon to meet. Amendments made late in a trial can obviously have significance for the defence greater than if ordered earlier.

17.10 The prosecution may wish to withdraw a charge and then begin again with a new charge, in order to prevent an unwelcome verdict that would bar subsequent proceedings under the rules relating to double jeopardy: see **Chapter 19**. This could be for various reasons: For example, there might be a defect in the charge which cannot be amended; or a witness might be unavailable or fail to give expected testimony.

- In any criminal proceedings, a public prosecutor may inform the court in writing at any stage before verdict or judgment that 'the proceedings shall not continue': CPC SI/Ki/Tu ss 68-69. This is called a '*nolle prosequi*'. The defendant is then discharged. However, it is provided that 'such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts'.
- In addition, in the case of a trial in a Magistrates Court, CPC SI s 190(1); Ki/Tu s 188(1) provides that a complaint may be withdrawn by the prosecutor at any time with the consent of the court. However, the withdrawal must occur before the accused is called upon to make his or her defence if the accused is to be discharged and the prosecution permitted to proceed later on a new charge: SI s 190(2); Ki/Tu s 188(2). Otherwise the court must acquit the accused. In most cases the appropriate order will be one of discharge, with an acquittal being appropriate only for a case where 'there is no evidence or the wrong charge has been laid or the wrong person charged': *DPP v Tom* [1988] SBCA 4.

Form of charges

17.11 It is not sufficient for the prosecution to allege that some offence has been committed somewhere at some time. The accused is entitled to a degree of specificity in the charge, so that it is possible to prepare a defence. The Criminal Procedure Codes SI/Ki/Tu s 117 provides:

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

17.12 Generally, the prosecution must prove that the offence charged has been committed as particularised. It may therefore be in the interests of the prosecution to frame the charge loosely so that alternative arguments can be pursued. Conversely, it

can be in the interests of the defence to have the charge framed as tightly as possible, in order to maximise the opportunity for claiming that some part has not been proved. See, for example, the discussion in **14.6–14.7**, on whether a particular mode of secondary participation needs to be charged.

17.13 Obviously, the charge must state the type of offence alleged to have been committed. The Codes SI/Ki/Tu s 120(a)(ii) provides:

> the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

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

17.14 The accused also needs to know something about the occasion and circumstances of the alleged offence. The Codes SI/Ki/Tu s 120(a)(iii) provide that particulars are to be set out in ordinary language. Matters must be indicated with 'reasonable clearness': s 120(f).

17.15 Some matters may be left imprecise or uncertain. For example:

- Where an offence enactment states matters such as acts or intentions in the alternative, they may also be stated in the alternative in a charge: CPC SI/Ki/Tu s 120(b)(i).
- A description or designation of a person must be reasonably sufficient to identify the person but need not state the correct name or personal details; if identification is impracticable, a description or designation can be given that is 'reasonably practicable in the circumstances, or the person may be described as a "person unknown"': CPC SI/Ki/Tu s 120(d).
- In charges of property offences, it is sufficient to specify a gross amount in issue and to specify dates between which acts occurred, without specifying particular dates: CPC SI/Ki/Tu s 120(j).

17.16 An accused who feels disadvantaged by vagueness in a charge can apply to a court for an order directing further particulars to be provided. There has been some

uncertainty about whether additional particulars constitute an amendment to the charge, requiring proof in the same way as the items in the charge itself. In *Cotter v State of Western Australia* [2011] WASCA 202 at [32], the Western Australia Court of Appeal contended that the significance of the particulars could vary, depending on the features of the individual case:

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

17.17 A charge alleging more than one offence will be void for duplicity. Each charge should generally refer to one offence only. Otherwise, a guilty verdict would be ambiguous. An example would be a charge of both breaking and entering property with intent to steal and also stealing therein. In *Nalawa v State* [2021] FJCA 188 at [66], the Fiji Court of Appeal said:

> Such a charge is bad for 'duplicity' because it alleges two separate offences, i.e., 'break and enter with intent' … and 'break and enter and commit' ...

Yet, the rule against duplicity does not stop the prosecution charging one offence that has several forms in which it may be committed, such as the offence of murder or assault, and then arguing for any of these forms in the alternative.

17.18 A trial can be conducted on one charge only. However, particular offences may be joined together as separate 'counts' within a complaint or information if they are 'founded on the same facts or form, or are part of, a series of offences of the same or a similar character': CPC SI/Ki/Tu s 118(1). They should then be itemised separately, so that separate verdicts can be given: s118(2). In the event that joinder of charges may cause prejudice to an accused, or otherwise be undesirable, the court may order that they be tried separately: s 118(3).

17.19 Joinder is sometimes not only permitted but required. There is a common law rule against unreasonably splitting the prosecution case. Otherwise, the accused may not know when proceedings have finished and the defence might be prejudiced, or there might be inconsistent verdicts on essentially the same matter. In *Collins v R*

[1996] 1 Qd R 631 at 637, it was said: '[T]he courts have laid down the general rule that matters which can be joined without prejudice to the accused ought generally to be.'

17.20 Several persons can be charged together in one complaint or information if the charges relate to the same incident or to a series of offences of the same or a similar character: CPC SI/Ki/Tu s 119.

17.21 Persons charged together will ordinarily be tried together but a court retains discretion to order separate trials. The principles applicable to separating trials were summarised by MacKenzie J in *R v Aboud* [2003] QCA 499 at [35]:

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

Prosecutorial discretion and judicial review

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

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

Prosecutors must also make choices when offences overlap in the ground they cover or stand in a vertical relationship, with one being an aggravated form of another: see, for example, the relationships between murder and manslaughter (Penal Codes SI ss 199-200; Ki/Tu ss 192-193) or between unlawfully causing grievous bodily harm, unlawfully wounding, and assault causing bodily harm (SI ss 225, 229, 245; Ki/Tus s 220, 223, 238).

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

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

- It has always been accepted that the executive has discretion not to prosecute an offence. However, the discretion is subject to certain quasi-constitutional limitations arising from the prohibitions on suspending or dispensing with laws in the English Bill of Rights 1688. See the discussion below at **17.26–17.28**.
- The courts can also intervene when prosecutorial decisions lead to an abuse of process: See the discussion below at **17.29–17.41**. The courts have claimed that, while they may have no direct concern with prosecutorial decisions as such, they can protect themselves against embarrassment arising from the consequences of bad prosecutions being pursued to trial. If the pursuit of a prosecution would amount to an abuse of the process of the court, then the court can intervene: see *DPP v Humphreys* [1976] 2 All ER 497 at 527-528; *Barton v R* (1980) 147 CLR 75; [1980] HCA 45. Judicial intervention usually takes the form of a stay of proceedings, which is a common law remedy. Stays may be temporary or permanent. The general principle is that a permanent stay is to be granted only in exceptional circumstances, where no other remedy will suffice: *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46.

17.25 As noted in **17.4**, the Constitutions SI s 91(4); KI s 42(4); Tu s 79(7) grant the DPP or AG, and persons acting on their instructions, broad powers to initiate, take over and discontinue criminal proceedings. The Fiji Supreme Court has held, with respect to similar provisions in the Fiji Constitution, that such powers must be exercised within constitutional limits, although judicial review must respect prosecutorial discretion. In *Matalulu v DPP* [2003] FJSC 2, it was said:

> [A] purported exercise of power would be reviewable if it were made:
>
> 1. In excess of the DPP's constitutional or statutory grants of power- such as an attempt to institute proceedings in a court established by a disciplinary law...
>
> 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion - if the DPP were to act upon a political instruction the decision could be amenable to review.
>
> 3. In bad faith, for example, dishonesty. An example would arise if a

prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy- eg one that precludes prosecution of a specific class of offences.

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

The decision not to prosecute

17.26 As was discussed at **17.5**-**17.6**, a case need not be prosecuted, despite there being prima facie evidence of an offence, when there are no reasonable prospects of conviction or when a review of the circumstances of the case indicates that a prosecution would not be in the public interest.

17.27 The discretion not to prosecute is, however, subject to certain quasi-constitutional limitations respecting suspensions and dispensations. A *suspension* of a law is a decision by the executive not to enforce it at all. A *dispensation* is a decision by the executive not to enforce a law against a particular person or group. Either practice violates the constitutional separation of powers, with the executive abrogating to itself a matter on which the legislature has spoken. Suspending and dispensing with laws were declared illegal by the English Bill of Rights 1688 (1 Will & Mary, sess 2, c 2). The Bill of Rights is part of the body of English statute law that was received into British dependencies including Solomon Islands, Kiribati and Tuvalu.

17.28 The ban on dispensations does not mean that a prosecution must always be launched when there is sufficient evidence of an offence. It is proper to make a decision that a prosecution would be unwarranted, based on a review of the circumstances of the particular case. However, a dispensation is not based on a review of an offence

which has already been committed. It is a decision not to prosecute someone for an offence regardless of its circumstances, usually in the form of a promise not to prosecute for an offence to be committed in the future. As such, it is in conflict with the decision of parliament to pass the Act creating the offence. A dispensation was at issue in *D'Arrigo v R* [1994] 1 Qd R 603. The Queensland Attorney-General had granted an indemnity against prosecution to a police agent who would be participating in offences in order to gather information about a car-stealing operation. The court held that the indemnity amounted to an illegal dispensation.

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

Abuse of process

17.30 In *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77, Mason CJ, Deane and Dawson JJ at [23] said:

> The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.

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

> [11] The authorities of *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 and *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 describe the remedy as being available only in "...exceptional circumstances".

[12] In terms of being satisfied of the jurisdiction of this Court to entertain this application, there is no need to look further than the authorities of *Connelly v DPP* [1964] AC 1254, *Moevao v Department of Labour* (1980) 1 NZLR 464 and *R v Horseferry Magistrate's Court ex p. Bennett* [1994] 1 AC 42.

[13] This Court has a discretion to stay any criminal proceedings on the grounds of abuse where: (i) it would be impossible to give the accused a fair trial; or (ii) where it would amount to a misuse of process because it offends the court's sense of fairness and propriety to be asked to try the accused in the circumstances of the particular case: see *R v Horseferry.*

[14] The authority of *R v Derby Crown Court, ex p. Brooks* [1985] 80 Cr App R 164 determined a stay to be appropriate where the prosecution manipulated or misused Court processes for an unfair advantage, and in circumstances where the accused's preparation or defence was prejudiced by unjustifiable delay. The Court commented: "The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."

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

[15] In general terms, it is for a prosecuting agency, not the Courts, to determine whether a prosecution ought to be commenced, and once commenced whether it should continue to its natural conclusion: *Environment Agency v Stanford* [1998] C.O.D. 373.

[16] There is a significant public interest in permitting criminal prosecutions to run their full course. In *R v Crawley* [2014] EWCA Crim 1028 the Court stated: "[t]here is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."

Oppressive prosecutions

17.33 A prosecution may amount to an abuse of process because it is unjustifiably oppressive. For example, delay in prosecuting an offence might make it too difficult for the accused to mount a defence. A potential witness for the defence could have died or forgotten what happened, or crucial evidence could have been lost or destroyed. A prosecution might then be unfair and therefore an abuse of process: see, for example, *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77, where a potentially critical

witness had died during the period of delay. In *Robu v R* [2006] SBCA 14 at [15], it was said:

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

17.34 A prosecution can be oppressive if it occurs after the accused has been led to reasonably believe that the matter will be taken no further. Statutory rules against double jeopardy provide the law's primary protection for reasonable expectations of finality in criminal proceedings. These rules, however, focus on the technical relationships between verdicts in different proceedings. For cases that fall outside the scope of strict double jeopardy, the remedy may be a stay of proceedings on grounds of abuse of process. See **Chapter 19**. This was another ground for the stay in *Walton v Gardiner*, above at **17.33**. The case involved proceedings in a medical disciplinary tribunal many years after the failure of other disciplinary proceedings involving separate complaints but stemming from the same program of treatment. Criminal proceedings for manslaughter against another doctor involved in the program were stayed in *Gill v Director of Public Prosecutions* (1992) 64 A Crim R 82 (NSWSC). Various reasons were given for the stay in *Gill*, including the difficulty of getting a fair trial after the passage of such a length of time. It was also said, at A Crim R 98, that reviving the matter years after the earlier proceedings amounted to 'persecution':

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

17.35 The Constitutions of Solomon Islands, Kiribati and Tuvalu guarantee any person charged with a criminal offence 'a right to a fair hearing within a reasonable time': SI/Ki s 10(1); Tu s 22(2). This provision incorporates two separate rights: the right to a fair hearing and the right to a hearing within a reasonable time. A stay of proceedings for abuse of process may be an appropriate remedy for breach of either of these rights.

In *Robu v R* [2006] SBCA 14 [17], it was said:

> Factors to be taken into account in determining whether a defendant has been afforded a fair hearing within a reasonable time include the length of the delay; the reason for the delay; the defendant's assertion of his right; and any prejudice to the defence.

17.36 In *DPP v Kamisi* [1991] SBCA 6, it was held that the relevant period for the constitutional right to a hearing within a reasonable time starts when the person is charged. Earlier delay is immaterial. However, the Criminal Procedure Codes prescribe a limitation period of six months from the time of the matter for charging an offence punishable by up to six months imprisonment or a fine: CPC SI s 206; Ki/Tu s 204.

17.37 In *Kamisi*, it was also held that delay in charging could be taken into account in relation to the right to a fair hearing, if passage of time prejudiced the opportunity to make a defence and was unjustifiable. In *Kamisi*, the defendant was acquitted at trial rather than the proceedings being stayed, but the effect was the same. In upholding the acquittal because delay made a trial unfair, the Court of Appeal emphasised the exceptional nature of the case:

> The circumstances here are exceptional. In most instances an accused person would not be faced with unfairness of the kind that exists here because of the passage of time. The law ordinarily permits a person to be charged with offences committed years before, and there may be many justifiable reasons for the delay. Obvious ones, for example, are that the very offence is not discovered for years or that a witness disappears.

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

Unlawful or improper conduct

17.39 An abuse of process has sometimes been diagnosed from unlawful or improper conduct in the investigation of an offence or the process of bringing an accused before a court.

17.40 In *Moti v R* (2011) 245 CLR 456; 283 ALR 393; [2011] HCA 50, a permanent stay was granted by the High Court of Australia due to illegality in the extradition of an Australian citizen from the Solomon Islands to face charges in Australia of sexual activity with a child in Vanuatu. The unlawful extradition was carried out by Solomon Islands authorities but could be attributed to the local Australian representatives because they had cooperated by supplying travel documents, knowing of the illegality of the operation. The High Court said that the end of prosecution did not justify adopting 'any and every means for securing the presence of the accused': at [60]. However, the High Court determined that payments made by the Australian Federal Police to potential prosecution witnesses, where they were not designed to procure evidence and were not unlawful, were not an abuse of process as they were not an affront to the public conscience. Further, 'if the payments were said to bear upon the evidence witnesses gave at trial, that issue could be explored fully in evidence and could be the subject of suitable instructions to the jury that would prevent unfairness to the appellant': at [15]. A stay was therefore not available on that ground.

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

17.42 In *State v Pal* [2008] FJCA 13, the Fiji Court of Appeal upheld a permanent stay which had been granted because incriminating statements by an official accused of corruption had been surreptitiously recorded by persons who were themselves involved in the offences, for reasons of self-interest rather than exposing corruption. The Court agreed with the trial judge that there had been 'bad faith' in obtaining the

evidence which made the resulting prosecution an abuse of process. It was said that abuse of process was not necessarily confined to the conduct of public officials.

17.43 *Pal* was not a case of entrapment. Nevertheless, the trial judge drew upon principles espoused in English cases which have held that a permanent stay of proceedings is the appropriate response to entrapment. See especially *R v Loosely* [2000] 1 Cr App R 29, [2001] UKHL 53.

Improper prosecutions

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

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

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

> [34] …To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to

> bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
> [35] Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

17.47 Selective prosecutions are ordinarily acceptable. In *Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538; 109 ALR 449, the complaint was that the accused had been selected for prosecution for a tax offence because he was a public figure and the prosecution was being pursued for publicity. The matter was left unresolved for procedural reasons. Presumably, publicity is a factor which may legitimately be taken into consideration. As long as a conviction is genuinely sought, there would be no abuse of process. The general propriety of selective prosecutions, with unavoidable elements of inconsistency and unfairness as between dishonest taxpayers, was upheld in an English case: *Inland Revenue Commission; Ex parte Mead* [1993] 1 All ER 772.

17.48 The propriety of some prosecutions for tax evasion has been challenged on the ground that the line between legitimate selectivity and illegitimate discrimination was crossed. In *Inland Revenue Commission; Ex parte Mead*, it was indicated that selective prosecutions would be reviewable if they discriminated on grounds of, for example, skin colour. Presumably, such discrimination would be an abuse even if the immediate purpose of prosecuting the offenders who were discriminated against was to have them convicted and punished. In Solomon Islands, discrimination may also be an abuse of process because it violates a direction under the *Prosecution Policy* (2009): see the discussion below, at **17.51**-**17.52**.

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

secure a collateral advantage, even though the prospect of obtaining conviction and punishment provides additional or alternative motivation.

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

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

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

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

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

Breach of Prosecution Policies in Solomon Islands

17.51 The Solomon Islands Constitution s 91(5) authorises the DPP to exercise prosecutorial powers 'through other persons acting in accordance with his general or specific instructions'. The Prosecution Policy (2009) constitutes a set of such instructions. It can argued that a particular prosecution conducted in breach of a published policy would be unconstitutional and constitute an abuse of process.

17.52 The P*rosecution Policy* (2009) at 7.4(4) contains a clear direction concerning impartiality:

> 7.4 In making the decision to prosecute, the prosecutor must consider the following…
>
> 4. A decision whether or not to proceed must not be influenced by:
> a) the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively);
> b) personal feelings of the prosecutor concerning the offence, the alleged offender or a victim; and
> c) possible political advantage or disadvantage to the government or any political party, group or individual.

This direction on impartiality prohibits any form of discrimination or personal agenda in prosecutorial decisions. It also insulates prosecutorial decisions from any political influence. A political instruction to a prosecutor would in any event violate the guarantee of the independence of the DPP in the Constitution s 91(7). However, Policy 7.4(4) goes much further, prohibiting prosecutors from taking any account of political considerations in their decision-making. Political considerations need not be the only or even the predominant consideration. They must not *influence* the decision in any way.

Charge bargains

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

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

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

17.54 The terms ‘plea bargaining’ or ‘plea negotiation’ are loosely used to describe the various types of agreement. A distinction can be drawn between ‘charge bargaining’ and ‘sentence bargaining’. The former involves bargaining over the charge which the accused will face; the latter involves bargaining over the position the prosecutor will take with respect to the sentence. The *Prosecution Policy* (2009) 21.1-21.7 accepts the legitimacy of charge bargaining, subject to certain safeguards including consultation with investigating officers and victims or their relatives and also the maintenance of a record of the decision and the reasons for it. However, the *Policy* is silent on the issue of sentence bargaining.

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

17.56 Sentence bargains present more difficult problems because the primary responsibility for sentencing lies with the judge. The significance of sentence bargains was examined by the High Court of Australia in *Malvaso v R* (1989) 168 CLR 227; [1989] HCA 58. The High Court insisted that the judge’s sentencing discretion cannot be fettered by any agreement between the prosecution and the defence and, further, that such an agreement cannot restrict the exercise of any statutory rights of appeal against a sentence. Nevertheless, it was suggested that an appeal court could properly have regard to the terms of an agreement in deciding whether or not to allow an appeal against sentence. In other words, an appeal court might look unfavourably upon a prosecution appeal against a sentence which it had not opposed at trial.