

COMMENT: INVESTIGATING THE DECISIONS TO PROSECUTE IN SEXUAL VIOLENCE CASES – NAVIGATING THE COMPETING DEMANDS OF PROCESS AND OUTCOME

MARY-JANE THOMAS*

The paper by Yvette Tinsley discussing the way in which decisions to prosecute are made in sexual offence cases¹ raises a number of interesting ideas.

From this prosecutor's point of view, it is extremely important that any change to the process does not detrimentally affect the outcome to the extent that it loses sight of the fact that a prosecution is commenced for the purpose of obtaining a conviction (if the evidence proves the charge beyond reasonable doubt).

For a number of years I have become concerned that efforts to make the process easier for the complainant may not only ignore the obvious fact that an accused person is potentially facing a significant period of time in prison if convicted, but also ignores the reality that we currently have an adversarial system. As such, it is not, and in my view cannot, be sanitised to the point where it appears to be less of a court process and more a reality television show where complainants give evidence via video taped interviews without a jury even seeing them in person.

In this brief response to the article I would like to discuss four aspects of it that would have implications for the role of the prosecutor. These are:

- The relationship that a prosecutor has with a complainant;
- The decision of a prosecutor not to prosecute;
- Plea discussions; and
- The idea of specialist prosecutors for sexual offences.

I. PROSECUTOR/COMPLAINANT RELATIONSHIP

The paper shows that although victims may and usually do lose control in the criminal process, it is not correct that under the current adversarial process a complainant is just another witness with no greater interest than that of any other person.²

The paper also rightly points out that the Prosecution Guidelines provide that “[t]he prosecutor should meet with the victim before trial to discuss the giving of evidence and any issues which are likely to arise.”³ Further,

* Crown Solicitor, Invercargill. I would like to thank Riki Donnelly for his input.

1 Yvette Tinsley “Investigating the decisions to prosecute in sexual violence cases – Navigating the competing demands of process and outcome” published in this Issue at 12.

2 Ibid, at 22.

3 Crown Law Office *Victims of Crime – Guidance for Prosecutors* (2010) at [14].

some years ago prosecutors were directed by the Solicitor General to meet with all child sex complainants prior to the day of trial except in exceptional circumstances.

My own office's practice (and that of other Crown Solicitors' offices) is to meet with the complainant prior to trial. My practice is to discuss the process of trial and my role in it, but not to discuss the evidence itself. The reason why I do not discuss the actual evidence is to ensure that the process is not jeopardised by any such discussion. This ensures that if the complainant were asked by a defence lawyer what he or she had been told by the prosecutor to say about the evidence, his or her response would be – "to tell the truth".

II. DECISION TO PROSECUTE

In relation to the role of the Crown Solicitor, indictable offences are tried pursuant to the Crown warrant. One of the most challenging roles I have as a Crown Solicitor is when I assess whether or not to lay an indictment. Although the original decision to lay a charge is the Polices', all serious offences (indictable) make their way to the Crown Solicitor's office.

I must weigh up competing factors including whether there is evidential sufficiency for a charge and also if it is in the public interest to lay the charges.

In assessing whether there is evidential sufficiency to support a charge, there are a number of criteria that the Crown Prosecutor Guidelines stipulate are relevant to making these decisions.

A prosecutor must take into account the likelihood of success. Specifically, a prosecutor must be of the opinion that the "evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction."⁴

Whether we like it or not, the prosecution of sexual cases when it is a he said/she said situation is difficult. Remember, a conviction can only occur when 12 people (or if the circumstances are met, a majority of 11) are sure that the charge has been proved. Twelve people are told that they can only convict if they are sure.

A study undertaken in relation to jury trials where children alleged sexual abuse suggested that if three of nine variables were present then the accused would be convicted.⁵ Any less than three of these variables meant that it could be predicted with statistically significant accuracy that the accused would be acquitted. The nine variables are:⁶

- If the complaint was under 12 at the time of the alleged incident;
- A witness (in other words an eye witness, which is very rare);
- More than one complainant;
- More than four charges;
- Similar fact evidence (for example a prior conviction);

4 Crown Law Office *Prosecution Guidelines* (2010), at [6.1.1] [*Prosecution Guidelines*].

5 S J Y Blackwell "Child Sexual Abuse on Trial" (PhD Thesis, University of Auckland, 2007) at 230

6 Ibid.

- Recent complaint evidence;
- An acknowledgement of guilt;
- Penile penetration; and
- Medical evidence.

The reality of most allegations of sexual offending is that there are no witnesses. Very rarely will medical evidence support a finding of forced sexual contact (the presence of semen, for example, does not refute consensual sexual activity) and it will all really come down to the word of the complainant. One of my concerns with the real push now for having adult complainants of sexual offending give their evidence via pre-recorded video interview is that, whilst undoubtedly making the process easier on the complainant, it may in the end lead to his or her feeling “re-victimised” if conviction rates fall even lower. (A recent study regarding sexual offending in New Zealand found that 31 percent of reported sexual offences are prosecuted and of these 42 percent (13 percent overall) lead to a conviction.)⁷

A study undertaken by Rose, Nadler and Clark on the emotional norms and perception of crime victims concluded that the emotional response of a victim has a significant impact on how they are perceived.⁸ Following on from this, if the process at a jury trial is such that the jurors cannot assess the emotions of a victim (due in part to efforts made to make the complainant feel comfortable when giving his or her account) then my fear is that this may alter the way in which he or she is viewed, as well as the evidence given.

Where a prosecutor (as opposed to a Police Officer) decides not to continue with charges, I agree that they should ensure that a complainant is fully informed.

The paper also rightly points out that there is no specific duty to tell a complainant why a decision not to prosecute has been made. In reality however, at least from my perspective as a Crown Solicitor, in the rare cases I have decided not to proceed, I have ensured that the complainant is fully informed.

III. PLEA DISCUSSIONS

A significant addition to the most recent Prosecution Guidelines is the acceptance that it is within a prosecutor’s power to have these discussions because a guilty plea will relieve a complainant from the “burden of the trial process”.⁹

This is a tangible acknowledgement by the Crown that the trial process can be difficult and sometimes the balancing act between various factors can weigh in favour of saving a complainant from undergoing what can often be a very difficult process.

7 Elaine Mossman, Jan Jordan and Venezia Kingi *Responding to sexual violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Women’s Affairs, Wellington, 2009) at viii.

8 Mary R Rose, Janice Nadler and Jim Clark *Appropriately Upset? Emotion Norms and Perceptions of Crime Victims* (2006) 30 *Law & Hum Behav* 203.

9 Crown Law Office *Prosecution Guidelines*, above n 5, at [16.1.1].

I believe, however, it is vital that complainants are spoken to before any significant decrease in the seriousness or number of legitimately laid charges occurs. In my view a complainant has the right to say to a prosecutor – “no this happened and I am prepared to stand up in court and say it happened”. I cannot agree with any proposition that the complainant has the “final word” since I am of the view that the system depends upon the decision maker being objective. I do agree however that the complainant’s input into any plea discussions is vital.

IV. SPECIAL PROSECUTORS

An area of great interest in the paper was the discussion concerning the use by several jurisdictions of special prosecutor units for sexual offences. The figures discussed in this area are fairly impressive. However, although the rates of conviction and guilty pleas are significantly higher when these special units are involved than when they are not, it is pertinent to note that details of the charges are not given.

For example, if a special unit were more inclined to downgrade charges due to the available evidence, compared with a non-specialised unit who had less knowledge of the requirements of proving the higher charge, there will be a higher chance of a successful prosecution or an early guilty plea.

I do agree that a prosecutor dealing with sexual offences should have a vast array of skills. In my experience it is accepted by Crown Solicitors that trials involving sexual offending are amongst the most (if not the most) difficult type of work and senior prosecutors are assigned.

Further, in my experience, in most offices there will be prosecutors who have developed an additional expertise in prosecuting sexual offending and therefore will tend to do more sexual trials.

V. CONCLUSION

The paper concludes that the better the investigation into a sexual related offence is conducted, the more likely that a successful outcome can be achieved, and I agree with this statement. However it should never be forgotten that our system is based upon two fundamental ideas:

- A defendant is innocent until proven guilty; and
- The standard of proof is beyond reasonable doubt.

A victim should be dealt with and listened to with empathy and compassion. However the bottom line is that no legal system based upon the adversarial system will invariably provide victims of sexual offending with what they ultimately look for when they decide to give evidence before a jury – a conviction. If the quest is for a process that validates and heals victims of sexual offending I am not sure that the adversarial process is the answer.