CAYMAN ISLANDS
LAW REFORM COMMISSION

REGULATION OF QUEEN'S EVIDENCE – IMMUNITY FROM PROSECUTION AND REDUCED SENTENCES

Discussion paper

Monday, September 25, 2017

DISCUSSION PAPER

REGULATION OF QUEEN'S EVIDENCE - IMMUNITY FROM PROSECUTION AND REDUCED SENTENCES

1. The Honourable Attorney General in 2014 noted in the Legislative Assembly that the Cayman Islands are undergoing a changing crime dynamic and cultural shift where violence and the use of firearms have radically impacted the willingness of persons to provide information to the police. On far too many occasions investigations and prosecutions have stalled because witnesses fear reprisals and just refuse to assist in bringing criminals to justice. In one of the recent tragic cases after a witness refused to testify in a murder trial, a local man accused of the murder was released from jail. The former accused met his death on the streets some time later, gunned down near a popular nightclub.[1]

2. In response to the issues regarding the failure to engage witnesses, the Criminal Evidence (Witness Anonymity) Law was passed in 2014. That Law provides for the protection of witnesses by the making of an investigation anonymity order by a magistrate in relation to a person who is willing and able to assist the police with criminal investigations into certain types of crimes, where that person would not otherwise do so for fear of harm. The Law also provides for the making of a witness anonymity order in relation to a person who is able to give evidence in actual criminal proceedings where that person would not otherwise do so for fear of harm. The investigation anonymity order relates to investigations into the following offences -

(a) murder;
(b) attempted murder;
(c) manslaughter;
(d) robbery;
(e) attempted robbery; and
(f) rape.

This Law has successfully been used in two instances involving offences of Murder/Possession of an Unlicensed Firearm and Robbery/Possession of an Imitation Firearm with Intent. Convictions were upheld in the Court of Appeal in *Anglin v. R.* and *Ebanks v. R.* In a third instance, the CICA ruled that in the circumstances of that case, where the witness was said to have been on the fringes of gang association, a witness anonymity order was not appropriate.

3. It has been posited that another means of obtaining evidence would be to follow the lead of the UK and provide for the statutory codification of Queen's Evidence or the use of the plea deals like the USA. Queen's evidence is defined as evidence from someone who has been accused of committing a crime, given against the people who were accused with them, in order to have their own punishment reduced. It is argued that this would allow prosecutors to be more effective, not only in obtaining accomplice evidence but in securing quicker convictions.

4. In most Commonwealth countries, as in the Cayman Islands, a prosecutor has the power to secure the co-operation of potential co-defendants in an informal manner, has power to determine whether or not to bring criminal charges and what charges to bring. The exercise of the discretion includes the following -[2]

[1] *Cayman Compass*, 2nd October, 2016
[2] The Prosecution Service; Legal Guidance, Queen's Evidence

(a) deciding to prosecute only the main offenders and to call peripheral offenders as witnesses;
(b) informing the court, when an accomplice or other witness gives evidence, that the witness will not be prosecuted on the basis of anything he may say in the course of truthful evidence on that occasion. This situation may arise at short notice when the court of its own motion warns the witness against self-incrimination during the course of their testimony; and
(c) where a prosecutor also has regulatory powers, dealing with some of the offenders by way of a civil administrative sanction before calling them as witnesses.

5. Such prosecutorial discretion has been long acknowledged in the UK. According to the former Attorney-General of the UK as far back as 1951, Sir Shawcross KC - [3]

> *"It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases: wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect therefor is required in the public interest. That is still the dominant consideration."*

6. The discretion of the DPP is enshrined in the Cayman Islands Constitution which provides in section 57(2) and (6) as follows -

> "(2) The Director of Public Prosecutions shall have power, *in any case in which he or she considers it desirable to do so* -
>
> (a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in the Cayman Islands;
> (b) to take over and continue any such criminal proceedings that have been instituted 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 herself or any other person or authority….
>
> (6) In the exercise of the powers conferred on him or her by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.".

7. The DPP engages in a series of tasks in dealing with any possible prosecution. The DPP has to first decide whether the act or omission is a criminal offence, thereafter he or she has to assess the reliability of the evidence on the file, the credibility of the witnesses and the persuasiveness of any potential defence. Charges are recommended where the evidence satisfies the evidential test and the public interest test is met irrespective of whether there is an indication from the accomplice of a desire to provide assistance. The existing practice is that should an accomplice inquire of the police as to any benefit if assistance is provided, the police advise that no agreements or promises can be made and that it is a matter for the Courts on the sentencing of an accomplice whether or not to take into account any assistance provided to the Crown. The police undertake to bring to the attention of the Court any such

[3] Before the House of Commons

assistance by way of a sealed envelope containing a memorandum from a senior officer of police. The sealed envelope procedure endeavours to protect the witness in instances where there may be gang affiliations and the extent of the assistance provided cannot be stated in open Court as it may have implications for the safety of the witness. The Office of the DPP has no contact with accomplices. This in effect was the pre-statutory position in the UK. "Where the evidence of an accomplice is to be used, there is no longer a statutory requirement for corroboration of that evidence" (Evidence Law, section 41). However, at common law the judge is required to consider the circumstances of the case and to give an appropriate warning. (See *R v Makanjoula*[4]).

8. Where the evidence of an accomplice is to be used, there is no requirement in law for the judge to give the jury a warning about it. However, the judge has discretion to give a direction where he or she thinks it is advisable to do so.[5] It is noted that, as a general rule, where sufficient evidence exists to provide a realistic prospect of conviction, the public interest will normally require that an accomplice should be prosecuted whether or not he or she is to be called as a witness.[6]

9. The use of Queen's evidence in the Cayman Islands has been used in recent cases such as *R. v Dillon*[7]. In that case the defendant was charged with two counts of robbery and one count of possession of an imitation firearm. After his arrest, he confessed[8] to his involvement and gave considerable assistance to the police in respect of other parties who had been involved in the robberies (the most serious to have taken place in the Cayman Islands) and a murder in which he had not been involved. The defendant's family were moved abroad to ensure that they would not be subject to retaliation. This assistance led to several high-profile convictions and sentences of between 11 and 14 years' imprisonment for the ringleader and other participants.[9]

10. It was held that the defendant was entitled to a very substantial discount from his sentence as his assistance to the police in identifying the other parties and his contributions to the Crown's case against them had secured their convictions at the cost of placing him and his family at great personal risk. It was further held that, in calculating how much discount would be applied, the court would consider the circumstances of the case, including the degree of assistance provided; the quality, quantity and accuracy of the material disclosed; the defendant's willingness to give evidence at trial; whether the evidence led to convictions that would not otherwise have been obtained; the seriousness of the other parties' offences; whether the convictions led to the break-up or disruption of major criminal gangs; and the amount of risk to which the defendant exposed himself and his family.

11. The court stated that the purpose of the reduction was to encourage and reward defendants for helping to bring other criminals to justice particularly where those criminals may not otherwise have been caught. Although in some extreme cases the court may consider a reduction of three-quarters of the sentence, the court opined that it would never find that the defendant would not be required to serve any sentence at all due to his assistance. The defendant in this case was sentenced to 3 years' imprisonment for the first count of robbery, 18 months' imprisonment for the second count of robbery and 18 months' imprisonment for possession of an imitation firearm, all to run concurrently.

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[4] 1 KB 223
[5] The CPS Legal guidance on Queen's Evidence
[6] ante
[7] 2014 (2) CILR Note 13
[8] There were lengthy arguments from the Defence as to the conduct of the Police and lengthy cross examination as to whether or not promises had been made to him by the Police and if so the nature of those promises.
[9] R v Tamasa, Cole, Mignott, Burton and Edwards, 2012

11. While the co-operation of Mr. Dillon assisted in obtaining convictions, the process the police followed in obtaining Mr. Dillon's co-operation led to an application by a defendant[10] for a stay of judicial proceedings on the ground that the process of the court had been abused. Mr. Dillon had been interviewed four times, and he resiled from his initial story after threats had been made by the police officer in the process of interrogation. In considering the application, the judge found that the Judge's Rules had been violated. The court therefore had to consider whether the process had been so tainted by unfairness that the court's sense of justice and propriety would be offended by allowing the trials of the defendants to continue. The court acknowledged that the practice of putting pressure on defendants to get them to incriminate their co-conspirators was a wide spread one in western democracies and held that the conduct of the police officer did not go so far that the integrity of the justice system would be damaged by allowing the trial. It is posited that if there had been a clear and transparent system of dealing with accomplice evidence, the process of obtaining evidence in this case may not have led to an application which could have seen the dismissal of charges against all of the defendants in this case.

12. More recently in *R v Justin Ebanks*[11] the accused faced a mandatory minimum sentence of seven years for being in possession of an unlicensed Berretta semi-automatic pistol and three rounds of .25 ammunition. He had pled guilty to the charge. He received a sentence of 18 months after being one of only two witnesses to give evidence against two accused in a murder trial. There had been about 15 witnesses to the shooting. The judge took into account not only his early plea of guilty but his courage in giving evidence when it had been dangerous for him to do so. The court also noted that a judge must tailor the sentence so as to punish the defendant for his own offence but to reward him as far as possible for the help he has given in order to demonstrate to offenders that it was worth their while to disclose the criminal activities of others for the benefit of the law-abiding public in general.[12]

13. There are however, challenges to the exercise of the discretion and it has been argued that such broad discretion can lead to inconsistent decisions and abuses. While there is no evidence of such inconsistency in this jurisdiction, there is a need for more visibility and accountability in particular from the first stage at which an accomplice offers to provide assistance as well as through to the conclusion of any given case. The central challenge therefore is providing for a more formal system that would address greater transparency in the process. A further challenge is to ensure that the expression of the public interest remains in keeping and in touch with prevailing social trends and views. Under the common law rules there is a two-part approach which must be taken in the exercise of the discretion. The prosecutor must first ask whether there is enough evidence to provide a realistic prospect of success in each case. The second part is to decide whether the prosecution is in the public interest.

14. In its fight against serious organised crime in the UK and the dismantling of organised criminal groups, the UK passed the Serious Organised Crime and Police Act in 2005 ("the SOCA"). Under Part 2 of the Act, which deals with investigations and prosecutions, the common law practice of Queen's Evidence was put on a statutory footing, thereby providing for sentence reductions for defendants who plead guilty and co-operate with the prosecution of others. In 2005, Jamaica enacted the Criminal Justice (Plea Negotiations and Agreements) Act, 2005 which bears more similarity to the USA plea bargain system.

15. The term "plea deal" or "plea bargain" is more used in the United States, where many cases are settled through that method than by trials. The plea deal system in the USA is far more entrenched than

[10] Andre Burton defendant in R v Tamasa, Cole, Mignott, Burton and Edwards
[11] Unreported, 13th September, 2016
[12] Cayman Compass, 16th September, 2016

the use of Queen's Evidence in the Commonwealth. It is not as limited in its scope as the use of Queen's Evidence and does not necessarily have to relate to a need to obtain accomplice evidence. It can, for example, simply be a means to avoid a lengthy criminal trial, to reduce caseloads in order to deal with more serious crimes or to ensure that a criminal defendant does not obtain a conviction on a more serious charge, thereby obtaining a criminal record which may prevent him or her from obtaining employment, from travelling, etc. For example, a criminal defendant charged with a felony theft charge, the conviction of which would require imprisonment in state prison, may be offered the opportunity to plead guilty to a misdemeanor theft charge, which may not carry a custodial sentence.

16. The plea bargaining procedure is a formal part of the American criminal procedure system at state and federal level. Federal regulation can be found in the Federal Rules of Criminal Procedure and Federal Sentencing Guidelines. It should be noted however that plea bargaining is not allowed in all states. While it is argued that the use of plea bargains, among other things, eliminate a case's uncertainty, brings a greater possibility to finding the accused guilty, it has been argued by some that such pleas do not enhance the justice system and, indeed, place accused persons at risk of being convicted of crimes they did not commit.

17. Some legal scholars state that plea bargaining is unconstitutional because it takes away a person's right to a trial by jury. One Justice[13] has noted that, in America, the defendant "has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources". Throughout the process, the defendant has a fundamental right to remain silent, in effect challenging the State at every point to 'Prove it!' By limiting the powers of the police and prosecutors, the Bill of Rights safeguards freedom.[14]

18. Plea bargaining has also been criticized on the grounds that its close relationship with rewards, threats and coercion potentially endangers the correct legal outcome.

19. The SOCA does not seek to go beyond the powers which prosecutors have had for decades in the UK and relates to indictable offences and offences triable either way and to accomplice evidence. The Act provides for full immunity from prosecution[15], restricted use undertakings[16], agreements for plea and reduction in sentences[17] and subsequent reviews of sentences[18]. A restricted use undertaking is an undertaking to a person by a prosecutor that, for the purpose of an investigation or prosecution of any offence, information of any description will not be used in any criminal or confiscation proceedings or civil recovery relating to that person.

20. The CPS guidance[19] on the use of the provisions notes that -

> "As a general rule, where sufficient evidence exists to provide a realistic prospect of conviction, the public interest will normally require that an accomplice should be prosecuted, whether or not he or she is to be called as a witness. Therefore, a written agreement under section 73 (or section 74, where assistance is to be given after sentence) rather than a restricted use undertaking should

[13] Justice Hugo Black, served as an Associate Justice of the Supreme Court from 1937 to 1971
[14] "The Case Against Plea Bargaining", Timothy Lynch, 2003
[15] Section 71
[16] Section 72
[17] Section 73
[18] Section 74
[19] www.cps.gov.uk

be the first option considered by investigators and prosecutors. Only in the most exceptional cases will it be appropriate to offer full immunity.

The need to protect an informant will not justify per se the grant of immunity or the giving of a restricted use undertaking. The same principle applies to protected assisting offenders (sources who are in some form of custody). Offenders of this kind are always prosecuted before being used as witnesses. There are two main reasons for doing so. First, it is nearly always in the public interest to prosecute a person responsible for a large number of major crimes; and secondly, if such a person were not prosecuted, allegations of a "deal" could reduce their credibility as a witness and, hence the weight of their evidence.".

21. The Jamaican Act is wider as it seems to relate to all defendants (principal offenders and accomplices) and to all types of offences. It provides for plea negotiations for the purpose of reaching a plea agreement prior to judgement. The Act emphasizes in section 3 that nothing in the Act affects the right of an accused to plead guilty to a charge without entering into plea negotiations or a plea agreement. The Act prescribes the information which must be in a plea agreement and provides for other matters such as informing a victim of a plea agreement, notification to the Crown of the existence of a plea agreement and the reservation of the powers of the court to reject a plea agreement. However, the legislation does not extend to review of sentences after a judgment to facilitate a convicted person who wishes to assist with an investigation or trial.[20]

22. Under the Act, before accepting a plea agreement, a judge or parish judge must[21]make a determination in open court, that -

(a) no improper inducement was offered to the accused to encourage him to enter into the plea agreement;
(b) the accused understands the nature, substance and consequence of the plea agreement;
(c) there is a factual basis upon which the plea agreement has been made; and
(d) acceptance of the plea agreement would not be contrary to the interests of justice.

23. Where a judge determines that a person has an interest in the outcome of the case, the judge shall -

(a) warn himself and the jury, if applicable, that it is dangerous to convict the accused on the uncorroborated evidence of that person; and
(b) identify what independent evidence, if any, is capable of confirming in some material particular the fact that the crime of which the accused has been charged was committed and that the accused committed the crime.

24. The rejection of a plea agreement does not operate as a bar to the conduct of subsequent plea negotiations and the conclusion of a subsequent plea agreement in respect of the same case.

25. The Schedule to the Act sets out the requirements of a plea agreement. Every agreement must, among other things, specify -

(a) the nature of the offence - the elements of the various offences to which the accused is pleading shall be set out;

[20] The Minister of Justice has announced plans to amend the Act to deal with this as well as with other matters - *The Gleaner* 8th May, 2015
[21] Section 11

(b) the statutory maximum penalty for the offence to which the accused is pleading guilty;
(c) the substantial facts relevant to any admissions made by the accused. A statement of facts may be attached and incorporated by reference. Any document containing any promise, agreement, understanding or inducement which has been incorporated into the agreement shall be attached;
(d) a statement that the accused was informed of, and has waived, the following rights -
    (i) the right not to be compelled to give self-incriminating evidence;
    (ii) the right to persist in a plea of not guilty;
    (iii) the right to confront and cross-examine witnesses against the accused;
    (iv) the right to pursue pre-trial motions and appeal preliminary points;
(e) a statement that the provisions of the agreement are not binding on the court and any other specified agencies of Government named in the agreement;
(f) the obligations of the accused under the agreement;
(g) the charges that are to be withdrawn or discontinued and the obligations of the Director of Public Prosecutions under the Agreement in relation thereto;
(h) a statement that the Director of Public Prosecutions is free to prosecute the accused for any other unlawful past conduct or any unlawful conduct that occurs after the date of the agreement;
(i) a statement that the Director of Public Prosecutions may, in any case where the DPP considers it desirable so to do, discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by the DPP or any other person or authority;
(j) the grounds for withdrawal from the agreement;
(k) consequences of any breach of the agreement;
(l) provisions relating to a right of appeal; and
(m) a statement that the agreement applies only to offences committed by the accused, has no effect on any proceedings against the accused not expressly mentioned therein, and shall not preclude any past, present, or future forfeiture actions.

26. Notwithstanding the apparent clarity of the Jamaican legislation, there have been many complaints about its use and amendments to the Act are currently being considered by the Jamaican Government. Ten years after the legislation was enacted up to May 2015 only ten plea deals had been struck[22]. Defence attorneys have argued that the legislation is not being utilized due to its complexity and lack of consistency. They argue that the process to give a plea is too lengthy and that inconsistencies in sentencing was a major hindrance to most clients deciding to go the route of plea bargaining[23].

27. The purpose of this scoping study is to determine whether, in the fight against crime in the Islands, the Government should consider the enactment of legislation similar to that of the UK, Jamaica or the USA. How often is the common law practice of Queen's Evidence used, how effective is it and can it be enhanced by statutory codification? In the alternative, should we follow the USA plea deals system which not only facilitates the gathering of evidence from accomplices but shortens the trial process?

28. In order to assist discussion, a draft of the Criminal Justice (Offenders Assisting Investigations and Prosecutions) Law, 2017 is provided. The main precedent is the UK legislation. The Bill provides for similar agreements relating to immunity, restricted use undertakings, reduced sentences and review

[22] *The Gleaner* 8th May, 2015
[23] *The Gleaner*, 5th April, 2015

of sentences. The offences to which the Bill relates are Category A and Category B offences. It is made clear that a person is not obligated to enter into a plea agreement.

29. Clause 9 provides that the Director of Public Prosecutions shall, before commencing negotiations with any person for any immunity, reduced sentence or undertaking as to use of evidence, inform the person of the person's right to representation by an attorney-at-law and of the person's right to apply for legal aid in respect of such negotiations. It is also proposed by that clause that negotiations shall be held by the Director of Public Prosecutions with a person only through that person's attorney-at-law.

30. It is further proposed that a judge or magistrate shall not be bound to accept a restricted use undertaking or an agreement for a reduced sentence.

31. The Commission is seeking feedback from the Criminal Defence Bar Association and the judiciary on the above and would welcome responses by 15th November, 2017. Responses should be sent to cheryl.neblett@gov.ky.

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APPENDIX

THE CRIMINAL JUSTICE (OFFENDERS ASSISTING INVESTIGATIONS AND PROSECUTIONS) BILL, 2017