

# POLICE PROSECUTION PARTNERSHIP

MODULE

RESEARCH SOCIETY OF INTERNATIONAL LAW

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# MODULE DESCRIPTOR

## Module Purpose and Overview

The primary objective of this Module is to familiarize the Prosecution Services of Khyber Pakhtunkhwa with the notion, concept, background and legal framework within which they must operate in issues requiring cooperation with the Police. It is crucial for the Prosecutors to realize that in the interconnected processes that comprise the Criminal Justice System, they cannot operate in a vacuum, and for the proper administration of justice, they must partner with the Police both in order to secure convictions, and for the correct exercise of discretion where such is necessary.

This module hopes to explain the procedures that facilitate such Prosecution-Police exchanges, the statutory powers that enable them, and how best to use them effectively. To this end, the Investigative Phase, the Challan submission phase, and Pre-trial procedures are all discussed at length, with all avenues of possible cooperation explored. As a forward-looking primer, international best practices are also examined, both from common law jurisdictions and from territories further afield, in hopes of providing a more comprehensive and complete picture.

## Module Outline

This Module has been divided into seven Chapters. Chapter 1 starts with an introduction to Police-Prosecution coordination, outlining the aforementioned entities as fundamental pillars of criminal justice, following which it highlights the need for an improved coordination between the two pillars. This Chapter also gives an introduction to Prosecutors and the legal framework containing the powers and duties of Prosecutors in Pakistan.

Chapter 2 of the Module discusses the functions of the Police and the Prosecutors at the commencement of an investigation of a criminal case. This includes the registration of a First Information Report (FIR) and the role of the Prosecutors in inspecting the FIR and suggesting changes to it. Following this, Chapter 3 discusses the investigation process in detail, outlining the role of the Police in such investigation while placing a greater focus on the role of Prosecutors during the course of the investigation, including during arrest, remand and bail.

Chapter 4 of the Module is a comprehensive study of the coordination between the Police and the Prosecutors in preparing the final Police report under Section 173 of the Code of Criminal Procedure, 1898, and scrutinizing it in order to make appropriate changes to it. This Chapter not only highlights

the duty of the Prosecutors to scrutinize the challan, but also draws attention to the other powers granted to the Prosecutor at this stage, as well as the limitations to those powers. The Module's Chapter 5 explains the powers of Prosecutors after the commencement of trial, including the responsibility to act impartially as well as their role in Appeals.

Chapter 6 is an in-depth study of the co-dependence of the Police and Prosecution at all stages of a criminal case, from investigation to the trial process. It discusses the role of Prosecutors at such stages, and also makes suggestions on how Prosecutors can be more involved with the investigation, while concluding with consequences of a failure by the Police or the Prosecutors in discharging their functions.

Finally, Chapter 7 of the Module sheds light on the existing international practices on the cooperation between the Police and Prosecutors, while discussing the laws of the United Kingdom, Canada and India, as well as highlighting the UNAFEI recommendations tackling the topic of 'Cooperation between the Police and Prosecutors'.

## Essential Readings

- Access to Justice in Paksitan, Fazal Karim
- Anti-Terrorism Act, 1997 (Relevant Sections)
- Code of Criminal Procedure, 1898 (Relevant Sections)
- Comparative Analysis of Prosecution Systems: The Role of Prosecution Services in Investigation and Prosecution Principles and Policies, Dr. Despina Kyprianou
- Cooperation Between Police and Prosecutors – 120th UNAFEI International Senior Seminar
- Draft of the Counter Terrorism Department Standard Operating Procedures for Prosecutors
- Guidelines for Prosecutors, Khyber Pakhtunkhwa Prosecution Service.
- Khyber Pakhtunkhwa Police Act, 2017
- Police Rules, 1934 (Relevant Sections)
- Standard Operating Procedures of Coordination Between Police Department and Prosecution Services Khyber Pakhtunkhwa, Government

of Khyber Pakhtunkhwa

- The Constitution of the Islamic Republic of Pakistan, 1973 (Relevant Sections)
- The Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

## How to use this Module?

The chapters in this module have been drafted in a sequential manner. However, each chapter is also self-contained for ease of reference and revision purposes. The beginning of each chapter contains learning outcomes and the essential and/or recommended reading should be done keeping these learning outcomes in mind. Each section further contains activities as well. These are meant to reinforce the learning outcomes set out for each chapter and should be attempted after each section is completed. At the end of each chapter, there is a reflect-and-review questionnaire which should be filled out by the participants of the training, and the training methodology should be tailored according to the feedback received.



# CHAPTER 1

## INTRODUCTION TO POLICE-PROSECUTOR COORDINATION

## Introduction

This Chapter gives an introduction to the module by discussing the coordination between the Police and the Prosecutors as it currently exists during and after the investigation process, following which it draws attention to the need for an improved coordination between the two institutions. This Chapter also outlines the definition of a Public Prosecutor, the appointment of Prosecutors, and the existing legal framework of Pakistan highlighting the powers and responsibilities of Prosecutors in general.

## Learning Outcomes

By the end of this Chapter and the relevant readings you should be able to:

- Recognize that the Police and Prosecution are fundamental pillars of the criminal justice system.
- Identify the need for improved coordination between the Police and the Prosecutors
- Identify the legal framework regulating the functions and powers of Prosecutors in Pakistan.

## Essential Reading

- Code of Criminal Procedure, 1898 (Relevant Sections)
- Cooperation Between Police and Prosecutors – 120th UNAFEI International Senior Seminar
- Draft of the Counter Terrorism Department Standard Operating Procedures for Prosecutors
- Guidelines for Prosecutors, Khyber Pakhtunkhwa Prosecution Service.

## 1.1 Police and Prosecution: Fundamental Pillars of Criminal Justice

Crime is an ever-evolving phenomenon, its control and investigation must develop accordingly to meet the challenges posed. The world we live in has seen immense changes due in large part to the advances in technology, understanding of science and evolution of the social dynamic. We have witnessed the emergence of forms and patterns of crime today which hitherto eluded imagination and criminals have flourished on account of their innovation, ingenuity and constant ability to manipulate the system. In their race to stay two steps ahead of the law, they exploit novel techniques and methods and if the law is to keep pace, continuous training and adaptation is necessary.

This does not merely call for an overhaul of the investigative procedures and the introduction of new investigative techniques but requires a detailed consideration and scrutiny of the entire criminal justice process from the moment crime is reported to the time when a Court announces judgment upon the accused. Two of the fundamental pillars of criminal justice are the Police and the Prosecution each of which has clearly defined roles and statutory authority. They play extremely significant roles in the investigation of a criminal case, as will be highlighted during the course of this module.

## 1.2 Need for Improved Coordination between Police and Prosecution

Given Pakistan's political and socio-economic conditions it is no surprise that the Prosecution service and the Police are severely overburdened. The backlog of cases pending before Courts and investigations which are in process is staggering. Moreover, the incidence of crime has shown no signs of waning and new investigations and trials continue to stream in.

Criminals today are more organized than ever and have access to a vast array of resources and means to manipulate the system and to maneuver their way around the law. To effectively combat crime and in particular the menace of terrorism, which has for far too long been a scourge of our nation, and to bring criminals to justice, it appears imperative that the Police and Prosecution must embrace a culture mutual dependence and co-operation.

The coordination between the Prosecution and the Counter Terrorism Department within the Police Department is also pivotal, as has been highlighted by the provincial government in the 46th Special Cabinet meeting. The Cabinet

meeting decided that,

*The Directorate of Prosecution is required to be cognizant that “Business-as-usual” approach will not work in the extraordinary situation and crime transforming into complex organized phenomenon. It has to scale up its resources and develop its capacity to compete and combat the calamity. It should improve coordination among Public Prosecutors and investigators for successful Prosecution of cases. Analysis of crime trends and outcome of Prosecution in Courts shall constitute regular part of quarterly review meetings at the level of Director General. He will ensure literal implementation of the Prosecution Act, the statutory basis for the existence of Directorate.*<sup>1</sup>

Moreover, the Director General KP Prosecution Service has stated the following in context of the significance of the role of Prosecutors,

*A Prosecutor performs a number of diverse functions. In particular, he or she provides legal guidance to Police, determines and advises on the suitability of cases for trial and represent the State in the Court of law. His or her decisions would have impact on the rights of victims, witnesses, accused and the public at large.*<sup>2</sup>

Many of the delays and inefficiencies associated with the criminal justice system can be done away with through establishing a culture of communication and consultation between the Police and the Prosecution. This would lead to fewer instances of failure to lodge FIRs in appropriate cases and resort being made to the justice of peace, lapses in investigation, incorrect or superfluous offences being listed in FIRs, problems with and return of reports under Section 173 Cr.P.C, evidence being discarded due to failure to adhere to protocol and most commonly the Prosecution version not being presented or argued most effectively at trial or at the preliminary stages of remand and bail.

There is also a serious concern that certain cases are registered, investigated and tried in which there exist no prospects of securing a conviction. This not only burdens the investigation agency and the Prosecution department but also clogs the Court and promotes delays. Furthermore, it is a miscarriage of justice for persons to be subjected to the hardship of criminal investigations

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<sup>1</sup>Draft of the Counter Terrorism Department Standard Operating Procedures for Prosecutors (Unapproved)

<sup>2</sup>Message by Director General Prosecution KP, Guidelines for Prosecutors, KP Prosecution Service

and trial in cases which have no prospects of proving guilt.

Hence, effective communication and consultation will ensure that only those cases are investigated and tried which have a legal and evidential basis and in so doing, a synergy would be established between the Police and Prosecution which would result in each benefiting from the qualities and attributes of the other while simultaneously ensuring safe administration of justice.

### 1.3 Introduction to Prosecutors

In order to be able to comprehend the extent of Police-Prosecution coordination required and recommended under Pakistani law, it is important to highlight the definition of criminal Prosecution and Prosecutors, as well as the process of their appointment.

Criminal Prosecution denotes a proceeding instituted on behalf of the public and carried on by due course of law, before a competent forum for the purpose of determining the guilt or innocence of a person charged with crime.<sup>34</sup> A Prosecutor is he who prosecutes another for a crime in the name of the government.<sup>5</sup> Section 4(t) of the Criminal Procedure Code, 1898 defines “Public Prosecutor” as any person appointed under Section 492<sup>6</sup>, and includes,

*any person acting under the directions of a Public Prosecutor and any person conducting a Prosecution on behalf of the State in any High Court in the exercise of its original criminal jurisdiction.*

The appointment of Public Prosecutors is outlined in Section 492 of the Code of Criminal Procedure, 1898. It outlines the power of the Provincial Government to appoint Public Prosecutors in any local area either for specific cases or generally. Moreover, Section 18 of the Anti-terrorism Act, 1997 also specifies that the Government shall appoint “proficient, diligent and professionally competent Public Prosecutors” in relation to each Anti-terrorism Court and may also appoint Additional Prosecutors or Law officers.

Apart from their responsibility to dispose criminal cases for the Prosecution, Prosecutors in every country play some important roles in criminal investigation despite the differences in basic legal principles in each country.<sup>7</sup> In

<sup>34</sup>Black’s Law Dictionary, Tenth Edition by Bryan A. Garner

<sup>4</sup>Harger v. Thomas. 44 Pa. 128, 84 Am. Dec. 422

<sup>5</sup>Black’s Law Dictionary, Tenth Edition by Bryan A. Garner

<sup>6</sup>Criminal Procedure Code, 1898

<sup>7</sup>Cooperation Between Police and Prosecutors – 120th UNAFEI International Senior Seminar

countries like Germany for example, Prosecutors have overall responsibility for investigation. In other countries, like Pakistan, they have historically had a limited role to play in investigation. However, there has in recent times been a realization Prosecutors can and should play a more influential role during investigation of offences in coordination with the Police in order to build legally robust cases and ensure that the rights of all the parties involved in the process are protected.

## 1.4 Legal Framework for Prosecutors in Pakistan

It is also important to highlight the primary legal framework and supporting documents for the powers, duties, expected conduct, and limitations to the powers of Prosecutors in Pakistan. There are Acts promulgated for all provinces that regulate the conduct of Prosecutors, namely the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act 2005, the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006, the Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act 2009, and the Balochistan Prosecution Service (Constitution, Functions and Powers) Act 2003.

In addition to this, Standard Operating Procedures are also in place which regulate the coordination between the Police Department and the Prosecution Service of Khyber Pakhtunkhwa. These SOPs have been promulgated under Section 8(8) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act 2005, as well as Rule 25.14(1) of the Police Rules, 1934. Furthermore, Prosecution Guidelines for Public Prosecutors in Khyber Pakhtunkhwa have also been issued by the Director General of the Khyber Pakhtunkhwa Prosecution Service under Section 8(8) of the aforementioned Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act 2005. The purpose of these Guidelines is to enable the Prosecutors to undertake Prosecutions in a fair, objective and effective manner.<sup>8</sup>

Therefore, there are a number of sources which provide explanations on the general principles regarding Prosecution as well as the specifics of their powers, obligations and limitations, which will be outlined in detail in the subsequent Chapters.

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<sup>8</sup>Section 1.3, Guidelines for Prosecutors, Khyber Pakhtunkhwa Prosecution Service

## 1.5 Summary

- Crime is an ever-evolving phenomenon, due to which its control and investigation must develop accordingly to meet the challenges posed.
- There is a need to improve cooperation between the Police and the Prosecutors to secure more convictions and combat the delays and inefficiencies of the criminal justice system in order to ensure a safe administration of justice.
- Criminal Prosecution denotes a proceeding instituted on behalf of the public and carried on by due course of law, before a competent forum for the purpose of determining the guilt or innocence of a person charged with crime.
- A Prosecutor is he who prosecutes another for a crime in the name of the government.
- The appointment of Public Prosecutors is outlined in Section 492 of the Code of Criminal Procedure, 1898, which states that the Provincial Government has the power to appoint Public Prosecutors in any local area either for specific cases or generally.
- The Acts promulgated in Pakistan regulating the powers and functions of Prosecutors are as follows:
  - Khyber Pakhtunkhwa Prosecution Service (Constitution. Functions and Powers) Act 2005
  - Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006
  - Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act 2009
  - Balochistan Prosecution Service (Constitution, Functions and Powers) Act 2003

## 1.6 Activities

### Self-Assessment Questions

- In your opinion, is there a need to improve cooperation between the Police and the Prosecutors?

- What do you know about Prosecutors and their appointment?
- Can you identify the statutes or guidelines that regulate the powers and functions of the Prosecutor in the context of Police-Prosecutor coordination?



## 1.7 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I can recognize how the Police and Prosecution are fundamental pillars of the criminal justice system.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify why there is a need for an improved coordination between the Police and the Prosecutors.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I understand the definition of a criminal Prosecution, a Prosecutor, and his appointment.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the legal framework regulating the functions and powers of Prosecutors in Pakistan.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

## CHAPTER 2

### COMMENCEMENT OF INVESTIGATION

## Introduction

This Chapter discusses the commencement of investigation, and places focus on role of the Investigating Officer and that of the Prosecutors at this stage of the investigation. It explains the difference between cognizable and non-cognizable offences, and highlights the duty of the Police to file a First Information Report, and the responsibility of the Prosecutors to inspect the FIR as well as to insert or delete sections of law as required in the FIR.

## Learning Outcomes

By the end of this chapter and the relevant readings you should be able to:

- Distinguish between cognizable and non-cognizable offences.
- Identify the duties of the Police at the commencement of investigation and of filing an FIR
- Identify the role of the Prosecutors in the inspection of an FIR

## Essential Reading

- Access to Justice in Pakistan, Fazal Karim
- Code of Criminal Procedure, 1898 (Relevant Sections)
- The Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

## 2.1 Functions of the Police/Investigation Agency

The Police force along with the Courts is one of the most visible features of the criminal justice machinery. The Police are not simply called into action to detect and investigate crimes but their mandate includes the prevention of crime<sup>9</sup> and the maintenance of law and order generally. Under Section 4 of the Police Order, 2002, the Police are obligated to perform a range of duties including but not limited to criminal investigations and arrests of offenders. It is however their investigative domain that most interests' Prosecutors and is intimately connected with their ability to perform their functions in the most efficient manner and to successfully discharge the evidential burden which inevitably rests on them to prove a criminal charge.

The role of the Police certainly cannot be seen in isolation of the Prosecution department and what follows is only an illustration of the statutory duty of the Police in relation to conduct of investigation. It is important for Prosecutors to be well-informed of the investigative processes and to be assertive in exercising their role of scrutinizing the investigative process adopted by the Police.

## 2.2 Registration of FIR

### 2.2.1 Role of Police

Investigation into a criminal offence, unless there is a possibility of losing evidence or when Police arrive at a crime scene in response to a request for help, commences after a First Information Report (FIR) is lodged with the Police station having territorial jurisdiction to investigate the crime. For certain crimes, Police are empowered to register an FIR and to investigate without seeking orders from a Magistrate to do so.<sup>10</sup> These offences are referred to as **cognizable offences**.

Under the Code of Criminal Procedure (Cr.P.C) 1898, there are two types of offences. Cognizable offences, as defined in the Cr.P.C. as those alleged crimes which are of such a nature that the Police can arrest the accused, in accordance with the second schedule to the Cr.P.C or under any law for the time being in force, without the need for a warrant.<sup>11</sup> Non-cognizable offences are such where the Police are not empowered to investigate or affect

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<sup>9</sup>Section 149 and 151 of the Code of Criminal Procedure, 1898

<sup>10</sup>Section 154 of the Code of Criminal Procedure, 1898

<sup>11</sup>Section 4(1)(f) of the Code of Criminal Procedure, 1898

the arrest of an accused without a warrant from a Magistrate having power to try such a case.<sup>12</sup>

It would be illuminating to reproduce Section 154 of the Criminal Procedure Code, 1898:

*Section 154. Information in cognizable cases: Every information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a Police-station, shall be reduced to writing by him or under his direction, and be read over to the informant, and ever such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the provincial government may prescribe in this behalf.*

In the case of non-cognizable offences, Section 155 of the Cr.P.C dictates that entries are to be made into the **Roznamcha** (Station Diary) and referred to a Magistrate for the issuance of a warrant.<sup>13</sup> After the receiving of said warrant, the Police may exercise the exact same investigatory powers and processes (except the power to arrest without a warrant), as they would in the case of a cognizable offence.<sup>14</sup>

There are no set principles that have been followed in marking the distinction between cognizable and non-cognizable offences. ‘Heinousness’ of the offence is often thought to be the dividing line, however, such offences as ‘sedition’ and ‘waging war against the state’ do not warrant status as ‘cognizable offences, while minor offences such as the offence of ‘causing danger, obstruction, or injury in any public way or line of navigation’ which is punishable with a small fine, does warrant such categorization.<sup>15</sup> There does not, then, appear to be any solid criterion upon which such divisions are made.

In view of Section 11-EEEE of the Anti-Terrorism Act, 1997, all offences under the Act are prima facie cognizable offences and the Police is empowered to register FIR upon receipt of information regarding the commission of a scheduled offence under the Act.

An FIR constitutes the conveyance and recording of information regarding

<sup>12</sup>Section 155(2) of the Code of Criminal Procedure, 1898

<sup>13</sup>2005 YLR 1879

<sup>14</sup>Section 155 (3) of the Code of Criminal Procedure, 1898

<sup>15</sup>Access to Justice in Pakistan, Fazal Karim (Pg. 177)

an alleged cognizable offence to the Police authorities by any person.<sup>16</sup> The Officer in charge should be aware of the law on the subject, and it is his legal obligation to assess whether the information so conveyed constitutes a cognizable offence<sup>17</sup>, and failure to do so could invite penal action against the officer under Section 29 of the Police Rules, 1861.<sup>18</sup> Where a case is registered that entails the commission of both cognizable and non-cognizable offences, the provisions of Section 155(2) of the Cr.P.C are not attracted, and the Police may register an FIR and investigate both offences without the permission of a Magistrate.<sup>19</sup>

An FIR is a public document<sup>20</sup> on the basis of which, the Police machinery is activated and set into motion.<sup>21</sup> If the information is orally received by officer, he must reduce it into writing, and read it back to the informant to verify its accuracy.<sup>22</sup> The Police must register an FIR in the case of cognizable offences, and cannot delay or refuse such registration<sup>23</sup>, however this requirement of registration also applies to non-cognizable offences.<sup>24</sup> The right to register an FIR is therefore absolute and cannot be curtailed.<sup>25</sup>

The registration process of an FIR does not empower the Police to hold inquiries into the correctness or falsity of the information received prior to having registered the FIR. The investigative powers of the Police only spring into action after the registration of the FIR.<sup>26</sup> Registration of an FIR by itself is only an unsubstantiated allegation, questions of guilt or innocence would be settled through the collection of evidence through a Police investigation and the subsequent trial.<sup>27</sup>

The Police are empowered to investigate every allegation of a cognizable offence through the operation of Section 156 of the Cr.P.C, and arrest individuals if tangible evidence is found that links them to the commission of the offence.<sup>28</sup>

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<sup>16</sup>1999 P.Cr.L.J 694

<sup>17</sup>PLD 2012 Pesh 46

<sup>18</sup>PLD 1999 Lah 417

<sup>19</sup>1998 P.Cr.L.J 1718

<sup>20</sup>PLD 1994 Pesh 214, PLD 2007 Kar 415

<sup>21</sup>2012 P.Cr.L.J 452 (S.C. AJ&K)

<sup>22</sup>2011 P.Cr.L.J 1860

<sup>23</sup>2010 P.Cr.L.J 231, 2002 P.Cr.L.J 2007, PLD 2012 Lah 188

<sup>24</sup>2000 P.Cr.L.J 320, 1999 P.Cr.L.J 781

<sup>25</sup>PLD 2014 Isl 71, 2011 MLD 223, PLD 2007 SC 539

<sup>26</sup>2013 P.Cr.L.J 117

<sup>27</sup>NLR 1998 Cr. (Quetta) 161

<sup>28</sup>2014 YLR 2152, PLD 2005 Kar 375

### 2.2.2 Role of Prosecutors: Inspection of FIR

The powers and functions of Public Prosecutors are specified in Sections 4, 5, 7 and 8 of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005 (hereinafter referred to as the “KPPS Act”). The role of Prosecutors in coordination with the Police begins immediately after the registration of an FIR. The Police Officer is required to send a copy of the FIR to the District Public Prosecutor who then inspects the same<sup>29</sup> and issues necessary directions to the Head of Investigation, and also inspects, scrutinizes and supervises the whole investigation process.<sup>30</sup>

Therefore, the Prosecutors have been given the power of scrutinizing the case under the KPPS Act, and any insertion or deletion of offences and sections of law in the FIR falls within the exclusive domain of the Investigating Officer and the Prosecutor.<sup>31</sup>

## 2.3 Summary

- The Police are not simply called into action to detect and investigate crimes but their mandate includes the prevention of crime and the maintenance of law and order generally.
- For cognizable offences, the Police is empowered to make arrests, register an FIR and investigate without seeking orders from a Magistrate to do so.
- In the case of non-cognizable offences, the Police is not empowered to arrest anybody without a warrant, due to which Section 155 of the Cr.P.C dictates that entries are to be made into the ‘Roznamcha’ (Station Diary) and referred to a Magistrate for the issuance of a warrant.
- An FIR is a public document on the basis of which, the Police machinery is activated and set into motion.
- The powers and functions of Public Prosecutors are specified in Sections 4, 5, 7 and 8 of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005.
- The Police Officer is required to send a copy of the FIR to the District Public Prosecutor who then inspects the same and issues necessary

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<sup>29</sup>2008 PLD 28 Peshawar

<sup>30</sup>Section 8(2) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

<sup>31</sup>2016 PCrLJ 1096 Peshawar

directions to the Head of Investigation, and also inspects, scrutinizes and supervises the whole investigation process.

- Any insertion or deletion of offences and sections of law in the FIR falls within the exclusive domain of the Investigating Officer and the Prosecutor.

## 2.4 Activities

### Self-Assessment Questions

- In your experience, do Prosecutors generally aid the Investigating Officer in the inspection of an FIR?
- Do you think the Police would benefit from the Prosecutor's advice on insertion or deletion of offences in an FIR?



## 2.5 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I can distinguish between cognizable and non-cognizable offences.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the duties of the Police at the commencement of investigation and of filing an FIR.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the role of the Prosecutors in the inspection of an FIR.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

## CHAPTER 3

# INVESTIGATION PROCESS

## Introduction

This Chapter discusses the investigation process in great detail. It discusses the coordination between the Police and the Prosecutors during investigation, where the Prosecutors can issue any legal advice to the Police as required. It further discusses inculpatory and exculpatory evidence, arrest and remand, as well as the role of the Prosecutor in challenging an order of remand if it violates the law. Furthermore, the Chapter discusses the recording of confessional statements, as well as case-diaries and the Prosecutor's access to them. Finally, it discusses Police-Prosecutor coordination at the bail stage of a criminal case as well.

## Learning Outcomes

By the end of this chapter and the relevant readings you should be able to:

- Identify the role of the Police during the investigation of a criminal case.
- Identify the functions of the Prosecutor in guiding the Police during the investigation process
- Distinguish between inculpatory and exculpatory evidence
- Recognize the role of Police and Prosecutor in arrest and remand
- Identify the duty of Police to record confessional and witness statements
- Identify the role of Police in and the access to Prosecutors of case-diaries
- Recognize the Police-Prosecutor coordination in bail proceedings

## Essential Reading

- Code of Criminal Procedure, 1898 (Relevant Sections)
- Khyber Pakhtunkhwa Police Act, 2017
- Anti-Terrorism Act, 1997 (Relevant Sections)
- Standard Operating Procedures of Coordination Between Police Department and Prosecution Services Khyber Pakhtunkhwa, Government of Khyber Pakhtunkhwa

## 3.1 Investigation of Case

### 3.1.1 Role of Police

Under Section 4(1)(b) of the Khyber Pakhtunkhwa Police Act, 2017, it shall be the duty of every Police Officer to detect, investigate and bring offenders to justice. ‘Investigation’ is defined in Section 4(1)(I) of the Cr.P.C as including all the proceedings under this Code for the collection of evidence conducted by a Police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. Such an investigation only entails the collection of evidence, determinations of guilt or innocence of the accused is vested with the Courts, and is not a task that can be delegated to the Police.<sup>32</sup> However, it remains the duty of a Police Officer to lay information before a competent Court and to apply for summons, warrant, search warrant or such other legal process as may, by law, be issued against any person suspected of committing an offence.<sup>33</sup>

The case is only started if investigation by the Police reveals that an offence has been committed by the accused and there is sufficient proof.<sup>34</sup> It can be seen from the above that an investigation consists of steps taken by a Police Officer to ascertain whether any offence has been committed at all and, if so, by whom, and the evidence on which a possible Prosecution can be based. In this investigative phase, the Police are duty-bound to act justly and fairly, without being influenced by higher officers.<sup>35</sup>

Sections 155, 156, 157, and 174 of the Cr.P.C permit the Police to investigate a case, so long as any investigation remains within the definition of ‘investigation’ as stipulated in Section 4(1)(I) of the Cr.P.C, the role of the Police is thus limited to the placing of evidence before the relevant Court<sup>36</sup>, and not as an expert proffering opinions or conclusions based on such evidence.<sup>37</sup>

Under Section 19 of the Anti-Terrorism Act, 1997, investigations in offences under the Act shall be conducted by a Police Officer not below the rank of Inspector. Where necessary, the government may constitute a Joint Investigation Team (JIT) comprising of officers from other law enforcing agencies including intelligence agencies for assisting the Investigating Officer. The Investigating Officer is obligated to conclude investigation within ninety (90)

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<sup>32</sup>PLD 2008 Lah 171

<sup>33</sup>Section 4(3) Khyber Pakhtunkhwa Police Act, 2017

<sup>34</sup>1999 P.Cr.L.J 1357

<sup>35</sup>1999 P.Cr.L.J 1193

<sup>36</sup>2011 P.Cr.L.J 895

<sup>37</sup>2010 SCMR 660

days and forward a report under section 173 Cr.P.C to the Police.

Where the investigation is not completed within a period of ninety days from the date of recording the FIR, the Investigating Officer or the Joint Investigation Team shall within three days of the expiry of the period, forward an interim report through the Public Prosecutor to the Anti-Terrorism Court stating the result of the investigation until then and the Court shall commence trial upon the interim report unless it has reasons not to do so.<sup>38</sup>

### 3.1.2 Role of Prosecutor: Guidance

During the investigation, whenever any legal guidance or opinion is required by the Head of Investigation, it is sought from the District Public Prosecutor, who then issues such guidance or opinion, which is then required to be followed by the Investigating Officer.<sup>39</sup> A Public Prosecutor also has the power to issue general guidelines to the Police regarding investigation necessary for an effective Prosecution.<sup>40</sup>

The [Khyber Pakhtunkhwa] Prosecution Service (Constitution, Functions and Powers) Act, 2005, lays out the general advice/guidance delivery process between the Police and Prosecution in Khyber Pakhtunkhwa.

The Investigation Officer (IO) may hold consultations with the duty Prosecutor in all cases at the initial stages of an investigation; however, all evidential material collected by the Investigation Officer (IO) must be mandatorily provided to the Prosecutor along with the Police file when seeking advice from the Prosecution Office.

Advice so given will deal primarily with admissibility of evidence, evidential sufficiency, probable lines of inquiry, possible defenses, and reliability/credibility of witnesses. The Prosecutor will then further aid in identifying and rectifying any evidential weaknesses in the case if it is required.

Each consultation conducted between the Police and the Prosecutor's Office may be recorded in 'Form B', which will lay out the problems encountered, possible solutions, and actions taken to rectify the problems. This will then be allocated a reference number, which can then be used (only) internally by both the Police and the Prosecutor throughout the life of the case.

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<sup>38</sup>Section 19, Anti-Terrorism Act, 1997

<sup>39</sup>Section 8(4) and 8(5) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

<sup>40</sup>Section 5(d) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

Each consultation conducted between the Police and the Prosecutor's Office may be recorded in 'Form B', which will lay out the problems encountered, possible solutions, and actions taken to rectify the problems. This will then be allocated a reference number, which can then be used (only) internally by both the Police and the Prosecutor throughout the life of the case.

In addition to this, the Police Rules, 1934 also state that,

*Investigating Officers are expected to take steps to secure expert technical assistance and advice, whenever such appears desirable in the course of an investigation for purposes of evidence or for demonstration in Court.*<sup>41</sup>

This rule further emphasizes on the responsibility of the Investigating Officers to seek the guidance of Prosecutors in technical legal advice.

### 3.2 Inculpatory and Exculpatory Evidence

Inculpatory evidence is that which implies guilt or tends to incriminate the accused. It is evidence that shows, or tends to show, a person's involvement in an act in order to establish guilt. On the other hand, exculpatory evidence is defined as evidence,

*...which tends to justify, excuse or clear the defendant from alleged fault or guilt.*<sup>42</sup>

It is the basic duty of the Investigating Officer to place on record all the relevant documents or other evidence collected during investigation; whether it favored accused or Prosecution.<sup>43</sup> The phrase "collection of evidence" used in the definition of investigation cannot be confined to such evidence which only favors the Prosecution.<sup>44</sup> Therefore, the Investigating Officer is duty-bound to collect some positive evidence either in support of the incident or in negation of the same. If some concrete evidence were collected by the Police to negate the occurrence, then it could be said that the reported incident was maliciously false.<sup>45</sup> Such investigation shall not be one-sided or tainted with malice. The investigation does not and cannot mean that by hook or by crook material only against the accused has to be gathered. At the same time, it also means that where a suspicion arises with regard to the guilt of

<sup>41</sup>Section 25.14, Police Rules, 1934

<sup>42</sup>Black's Law Dictionary 566 (6th ed. 1990).

<sup>43</sup>2018 PCrLJ 1337 Shariat Court Azad Kashmir

<sup>44</sup>1998 PCrLJ 216

<sup>45</sup>2018 PCrLJ 1230 Karachi

the accused, it becomes that duty of the investigating agency to probe all avenues with an aim to reach the truth.<sup>46</sup>

The duty of the Investigating Officer is to objectively collect all relevant evidence and present an informed opinion to the Court and also to the Prosecutor since the Prosecutor would also rely on all the evidence unearthed during the investigation when deciding whether to prosecute or not and in so doing save innocent persons from the agony of endless investigation and trial.<sup>47</sup>

If during the course of investigation, the accused presents his own version or narration of events, the Investigating Officer is bound to record it. Failure of the Police to record the accused's version or evidence sought to be adduced by him amounts to frustrating the constitutional guarantee under Articles 4, 10 & 10-A of the Constitution of the Islamic Republic of Pakistan.<sup>48</sup>

It is of critical importance for Prosecutors to ensure that investigation is conducted fairly and it shall be examined in this module how they have to form an informed opinion on the basis of the investigation whether it would be prudent to proceed with a trial or to discharge the accused.

## 3.3 Arrest and Remand

### 3.3.1 Role of Police

Arrest and detention are arguably the most conspicuous aspects of investigation. Under Section 54 of Cr.P.C, the Police may arrest without warrant,

*...any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned.*

These are indeed wide powers in relation to arrest that have been afforded to the Police under Section 54 Cr.P.C and to the armed forces and civil armed forces in terrorism cases under Section 5(2)(ii) but the powers are subject to limitations mentioned within the sections. Section 54 Cr.P.C for example in no way implies that the Police of their own sweet will could arrest anyone they wish. The "reasonable suspicion" mentioned should at least be founded on some definite facts tending to throw suspicion on the person arrested and

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<sup>46</sup>2007 YLR 2559

<sup>47</sup>2003 PCrLJ 56

<sup>48</sup>1998 PCrLJ 216

not on a vague surmise. If the Police Officer had no such material against the accused, the arrest would be illegal.<sup>49</sup>

For offences under the Anti-Terrorism Act, Section 11-EEEE of the Act provides for preventive detention for inquiry which operates under the same conditions as those mentioned in Section 54 of the Cr.P.C for arrest of accused persons. However, the period of preventive detention provided for by Section 11-EEEE is a maximum of ninety days which, as the Act provides, shall not be challenged in any Court. However, where rights and freedoms of individuals guaranteed under the Constitution are involved<sup>50</sup>, the superior Courts have restrained themselves to bars contained in legislative enactments and interpret the issue in its broader constitutional perspective and grant relief wherever appropriate.<sup>51</sup>

The power of the Police to arrest an accused for investigation encroaches upon his liberty and has to be construed, interpreted and defined strictly.<sup>52</sup> This is because the presumption of innocence remains intact till such time as a finding of guilt is arrived at by the Court. Article 10 of the Constitution<sup>53</sup> provides for safeguards against arrest and detention and states in unequivocal terms that,

*...no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.*

Both Article 10(2) of the Constitution<sup>54</sup> and Section 61 of the Cr.P.C state that every person who is arrested and detained shall be produced before a magistrate within a period of twenty four hours of such arrest and no person shall be detained longer than this period without the authority of a Magistrate passed under Section 167 Cr.P.C. As for cases under the Anti-Terrorism Act, 1997, the authority vests in the Anti-Terrorism Court under Section 21-E(3) of the said Act which states that for purposes of making such orders, the Anti-Terrorism Court shall be deemed to be a Magistrate. The orders thus passed are referred to as physical remand, Police remand or remand. For ordinary cases triable under the general law i.e. the Magistrate may allow remand for

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<sup>49</sup>2005 YLR 915

<sup>50</sup>The Constitution of the Islamic Republic of Pakistan, 1973

<sup>51</sup>PLD 2008 Lahore 74

<sup>52</sup>PLJ 1993 (Cr.) Lahore 9

<sup>53</sup>The Constitution of the Islamic Republic of Pakistan, 1973

<sup>54</sup>ibid



a maximum period of detention of fifteen days.<sup>55</sup> An Anti-Terrorism Court may allow a maximum period of remand for ninety days from the date of arrest.

Remand is only to be granted in cases of real necessity.<sup>56</sup> The Magistrate or Anti-Terrorism Court which grants remand is under a legal duty to satisfy itself if under the given circumstances remand is to be granted or otherwise. Liberty of a person cannot be curtailed unnecessarily and it is a sacred duty of the Magistrate/Court to safeguard the rights of the people. Rule 25.56 of the Police Rules, 1934 suggest some of the grounds for requesting Police remand, and although the list is not exhaustive, it is certainly helpful not only to the Police but also to the Prosecutor who finds himself contesting an application for grant of Police remand. Crucially, remand could not be granted on the mere ground that presence of accused was necessary to conclude investigation or that through longer detention a confessional statement could be obtained or recoveries could be affected. Equally, remand could not be grounded on the mere expectation that time would show the guilt of accused.<sup>57</sup>

The guidelines governing the grant or refusal of remand have been laid out in Ghulam Sarwar's case<sup>58</sup> and under Rule 84, Chapter 11, Part-B, Volume III, Rules & Orders of the High Court of Judicature at Lahore. A decision granting or refusing remand follows a process of hearing in which the accused can object to the grant of further remand. Usually the Investigating Officer has been found to be well-versed with the law in order to be able to contest remand before the Court. However, in more complex cases, it has been observed that Prosecutor's assistance is valuable since the arrested persons are inevitably represented by legal counsels who by virtue of their knowledge of law and jurisprudence appear more convincing than the Policeman.

### **3.3.2 Role of Prosecutor: Duty to Challenge Order of Remand**

There is no doubt that Prosecutors would be interested in contesting remand themselves in appropriate cases since the extended detention of the accused, if utilized properly, can aid investigation and support the Prosecutor's case. It is therefore critical that Prosecutors be well-versed with these provisions and be able to use them effectively wherever appropriate.

<sup>55</sup>Sections 167(2) & 344(1) Criminal Procedure Code, 1898

<sup>56</sup>Rule 4, Chapter 11, Part-B, Volume III, Rules & Orders of the High Court of Judicature at Lahore

<sup>57</sup>2005 YLR 915

<sup>58</sup>1984 PCrLJ 2588

However, it is pertinent to mention that according to the SOPs of the KP Prosecution Service, where the Prosecutor is of the opinion that the order ‘refusing remand’ is in violation of the law, or serves as an unwarranted restriction of access to justice, the Prosecutor shall challenge the order through a revision petition in the competent Court.<sup>59</sup> The Police will render all reasonable assistance to the Prosecutor in the filing and pursuit of the petition, ensuring attendance of Court hearings and that all necessary documents are provided to the Prosecutor’s Office.

### 3.4 Recording of Confessional Statements and Witness Statements

Witness statements recorded by Police (S.161 Cr.P.C):

*(1) Any Police-officer making an investigation under this Chapter or any Police-officer not below such rank as the Provincial Government may by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*

Since Article 38 of the Qanun-e-Shahadat makes it abundantly clear that no confession made before the Police during investigation is admissible<sup>60</sup>, the statements recorded under Section 161 of the Cr.P.C are not substantive pieces of evidence. However, they can be used for the purpose of contradiction<sup>61</sup> and to test the veracity of a witness at trial. It is imperative that witness statements under this Section be recorded with reasonable promptitude. Any unreasonable and unexplained delay erodes the credibility of the witness and casts suspicions on the truthfulness of the evidence which would adversely affect the Prosecution case<sup>62</sup> and the Supreme Court has taken the consistent view that delay in recording statement under Section 161 of the Cr.P.C without plausible explanation is fatal to the evidence led therein and the Prosecution witness cannot be relied upon.

It is therefore an area of investigation that Prosecutors should remain involved in and should guide the Police appropriately where they feel that the

<sup>59</sup>Section 7.7, Standard Operating Procedures of Coordination Between Police Department and Prosecution Service, Khyber Pakhtunkhwa, Government of Khyber Pakhtunkhwa

<sup>60</sup>2000 PCrLJ 562

<sup>61</sup>2005 PCrLJ 988; 1968 SCMR 161

<sup>62</sup>2008 PCrLJ 881

Prosecution's case could be prejudiced due to any neglect or oversight of the Police.

Power to record statements and confessions (S.164 Cr.P.C):

*Any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he is not a Police-officer, record any statement or confession made to him in the course of investigation under this Chapter or at any time afterwards before the commencement of inquiry or trial.*

The power of the Magistrate under Section 164 of the Cr.P.C allows the recording of statement of the Complainant himself, Prosecution witnesses and even the accused persons.<sup>63</sup> Statements of witnesses recorded under Section 164 Cr.P.C have no evidentiary value until and unless the maker of the statement was confronted by the defence at trial.<sup>64</sup> This is in keeping with the requirement under Article 47 of the Qanun-e-Shahadat, 1984 that a party against whom any statement is made or evidence produced must be provided an opportunity of cross-examination.<sup>65</sup>

Where the statement of an accused, usually in the form of confession, is to be recorded, it is done so and signed in the manner provided in Section 364 of the Cr.P.C. Confessional statements are a corroboratory piece of evidence which can be used against the maker of the statement provided it finds support from other evidence.<sup>66</sup> It must meet the two prerequisites to be admissible; First, that the confession was made voluntarily and Second, that it was based on a true account of facts which was ultimately proved at trial.<sup>67</sup> Since a confession made before the Police is not admissible, where the Police during the course of investigation believe that an accused is ready to confess, they have the confession recorded by a Magistrate so that it can be used to the extent to which it may be admissible under the Qanun-e-Shahadat, 1984.<sup>68</sup> Moreover, the superior Courts have from time to time issued guidelines which must be observed for the recording of confessional statements and failure to adhere to these guidelines may result in the confessional statement being inadmissible.

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<sup>63</sup>PLJ 2002 Lahore 533

<sup>64</sup>2016 PCrLJ 187

<sup>65</sup>PLD 1991 FSC 131; 1991 MLD 1951

<sup>66</sup>2005 PCrLJ 1294

<sup>67</sup>2017 SCMR 986

<sup>68</sup>Rule 2, Chapter 13, Volume-III, Rules & Orders of the High Court of Judicature at Lahore

Conditional Admissibility of Confession in Terrorism Cases (S. 21-H, Anti-Terrorism Act, 1997):

*Notwithstanding anything contained in the Qanoon-e- Shahadat, 1984 (President's Order No. 10 of 1984) or any other law for the time being in force, where in any Court proceedings held under this Act the evidence (which includes circumstantial and other evidence) produced raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation without being compelled, before a Police Officer not below the rank of a Distt. Superintendent of Police, may be admissible in evidence against him, if the Court so deems fit. . .*

In the case of offences under the Anti-Terrorism Act, 1997, the legislature has seen fit to relax the guidelines to be observed while recording confessional statements of accused persons. Section 21-H of the Act therefore provides that in Court proceedings held under this Act, notwithstanding anything contained in the Qanun-e-Shahadat, 1984 or any other law, where the evidence produced raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation without being compelled, before a Police Officer not below the rank of a District Superintendent of Police (DSP), may be admissible in evidence against him.

There is, however, a condition that prior to recording any such confession the DSP shall explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him. Moreover, no DSP shall record such evidence unless he had reason to believe that it was made voluntarily and he shall make a memorandum at the foot of such record that it was made voluntarily and after having made the maker of the statement that he was not bound to make the confession.

Understandably it is the Police which directs an accused to a magistrate for recording of a confessional statement but at this stage the Prosecutor should remain involved and not only guide the Police on the material points to be covered in the statement but also observe if there is any procedural impropriety and if so, immediately bring it to light so that the credibility of the evidence remains intact.

## 3.5 Case Diaries

### 3.5.1 Role of Police

Section 172 of the Cr.P.C makes it mandatory for an Investigating Officer to enter day to day proceedings of the investigation in a case diary (Zimni) which contains details such as the time of receipt of information, places visited, statements of circumstances ascertained and collection of evidence and mode of collection etc. While the content of these diaries cannot be used as evidence<sup>69</sup>, a Court may use them to aid it during an inquiry or trial for the purpose of elucidation of certain facts, seeing time of investigation and for clearing up obscurities.<sup>70</sup>

Neither the accused nor his counsel is allowed access to the case diaries merely on the ground that the Court uses them. Where a Police Officer who made the case diary uses it to refresh his memory, he may be contradicted by the Court by using the case diary in accordance with Articles 140 & 156 of the Qanun-e-Shahadat, 1984.

### 3.5.2 Prosecutor Access to Case Diaries

Crucially, the Prosecutor is allowed access to the case diaries. Prosecutors should therefore avail the advantage allowed to them under the law in order to be better prepared for trial and to be better equipped than the defense counsel and the private complainant counsel and therefore be more influential in proceedings.

## 3.6 Bail:Police-Prosecutor Coordination

When a Prosecutor receives a notice of a Bail Petition having been filed, he shall requisition the Police file, and may also require the Investigation Officer (IO) to brief him about the relevant facts of the case. In all cases, the IO shall brief the Prosecutor on the following matters prior to a bail hearing:

- Evidence that has been collected.
- Evidence that is likely to be collected in the future (e.g. pending forensic reports)
- Antecedents of the accused.

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<sup>69</sup>1976 SCMR 506

<sup>70</sup>2005 PCrLJ 1970

- Likelihood of absconding.
- Likelihood of obstruction of justice.
- Age, health, and gender of the Accused.<sup>71</sup>

The Prosecutor will consider the following facts in deciding whether or not to apply for cancellation of bail:

- The Court did not have the requisite jurisdiction.
- There were serious flaws in the Court's decision-making process.
- Bail was obtained through misrepresentation.
- Person granted bail has misused the provision of bail.
- Person granted bail has not fulfilled the essential conditions on which bail was granted.
- New material has come to light which weighs against the grant of bail.<sup>72</sup>

Where an IO or the Prosecutor considers a bail granting order against the facts of the case or law, the matter will be referred to the District Public Prosecutor (DPP) for advice. The DPP shall determine whether an application for cancellation of bail is warranted or not.<sup>73</sup>

If the application for cancellation of bail moves forward, the Police and Prosecutor shall have a duty to disclose all material information to the Court, unless it is necessary for that information to remain protected for the carrying out of an effective investigation. In all cases, the Prosecutor shall move swiftly and without undue delay. The Prosecutor shall not seek unnecessary adjournments and shall ensure that post-arrest bail petitions are argued at the first available opportunity.<sup>74</sup>

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<sup>71</sup>Section 8.2, Standard Operating Procedures of Coordination Between Police Department and Prosecution Service Khyber Pakhtunkhwa, Government of Khyber Pakhtunkhwa

<sup>72</sup>Section 8.6, Standard Operating Procedures of Coordination Between Police Department and Prosecution Service Khyber Pakhtunkhwa, Government of Khyber Pakhtunkhwa

<sup>73</sup>Section 8.5, Standard Operating Procedures of Coordination Between Police Department and Prosecution Service Khyber Pakhtunkhwa, Government of Khyber Pakhtunkhwa

<sup>74</sup>Sections 8.3, 8.4, Standard Operating Procedures of Coordination Between Police Department and Prosecution Service Khyber Pakhtunkhwa, Government of Khyber Pakhtunkhwa

### 3.7 Summary

- ‘Investigation’ is defined in Section 4(1)(I) of the Cr.P.C as including all the proceedings under this Code for the collection of evidence conducted by a Police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.
- Determination of guilt or innocence of the accused is vested with the Courts, and is not a task that can be delegated to the Police.
- During the investigation, whenever any legal guidance/opinion is required by the Head of Investigation, it is sought from the District Public Prosecutor, who then issues such guidance or opinion, which is then required to be followed by the Investigating Officer.
- Advice given by the Prosecutor deals primarily with admissibility of evidence, evidential sufficiency, probable lines of inquiry, possible defenses, and reliability/credibility of witnesses.
- Inculpatory evidence is that which implies guilt or tends to incriminate the accused, while exculpatory evidence is defined as evidence which tends to justify, excuse or clear the defendant from alleged fault or guilt.
- It is the basic duty of the Investigating Officer to place on record all the relevant documents or other evidence collected during investigation, whether it favors the accused or Prosecution.
- Under Section 54 of Cr.P.C, the Police may arrest without warrant “any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned”. Remand is only to be granted in cases of real necessity.
- Where the Prosecutor is of the opinion that the order ‘refusing remand’ is in violation of the law, or serves as an unwarranted restriction of access to justice, the Prosecutor shall challenge the order through a revision petition in the competent Court.
- Recording of confessional and witness statements is an area of investigation that Prosecutors should remain involved in and should guide the Police appropriately where they feel that the Prosecution’s case could be prejudiced due to any neglect or oversight of the Police.
- Section 172 of the Cr.P.C makes it mandatory for an investigating officer to enter day to day proceedings of the investigation in a case diary

(Zimni) which contains details such as the time of receipt of information, places visited, statements of circumstances ascertained and collection of evidence and mode of collection etc. Crucially, the Prosecutor is allowed access to the case diaries.

- Where an IO or the Prosecutor considers a bail granting order against the facts of the case or law, the matter will be referred to the District Public Prosecutor (DPP) for advice. The DPP shall determine whether an application for cancellation of bail is warranted or not.

## 3.8 Activities

### Self-Assessment Questions

- Try to come up with examples of situations where the Police could benefit from the advice of the Prosecutors during the investigation process.
- Give an illustration of a situation where both inculpatory and exculpatory evidence exists against the accused. In your experience, does the Police usually collect both kinds of evidence?
- In your experience, is it common for the Prosecutors to challenge an order of remand if they feel that it is in violation of the law?
- In your opinion, would access of case diaries to Prosecutors aid them in securing more convictions and building a stronger case?
- How are the Prosecutors and the Police required to coordinate in bail proceedings?



### 3.9 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I can identify the role of the Police during the investigation of a criminal case.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the functions of the Prosecutor in guiding the Police during the investigation process.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can distinguish between inculpatory and exculpatory evidence.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can recognize the role of Police and Prosecutor in arrest and remand.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the duty of Police to record confessional and witness statements.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the role of Police in and the access to Prosecutors of case-diaries.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can recognize the Police-Prosecutor coordination in bail proceedings.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

## CHAPTER 4

### FINAL POLICE REPORT

## Introduction

This Chapter provides an overview of the role of the Police in the submission of a S. 173 ‘Challan’, and the subsequent role that the Police play once that report has been provided. It then explores the role of the Prosecutor in scrutinizing said document, namely making sure that such a report would pass uncontested in Court, and if not, returning the report for further review with recommendations. The challenges associated with providing such advice without overstepping into Police powers is also explored at length, with a final discussion of the grounds on which a Prosecutor should decide whether to proceed to Court, or potentially reconsider.

## Learning Outcomes

By the end of this chapter and the relevant readings you should be able to:

- Identify the role of the Prosecutor in scrutinizing the Challan submitted by the Police.
- Recognize the limitations of the powers of the Prosecutor as relates to the power of submission of a Challan.
- Learn to apply the Evidential Test and the Public Interest Test in deciding whether to proceed with a Prosecution or not.

## Essential Reading

- Code of Criminal Procedure, 1898 (Relevant Sections)
- Guidelines for Prosecutors – Khyber Pakhtunkhwa Prosecution Service
- The Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

## 4.1 Role of Police - Ipse Dixit: 173 Report/Challan

Upon the conclusion of the investigation, the Investigating Officer must formulate his own opinion either under Section 169 of the Cr.P.C.<sup>75</sup> for disposal of the case due to insufficient evidence, or under S.170 to recommend that the accused be sent for trial.<sup>7677</sup> He is required under S.173 of the Cr.P.C. to submit the Police report, referred to as the “challan”<sup>78</sup> where conclusion of guilt is drawn by the Police, containing his opinion regarding the guilt or innocence of the accused<sup>79</sup> to the authorized Magistrate who shall then take such action as he may consider proper.<sup>80</sup>

Investigation regarding the commission of offences is the duty and the prerogative of the Police, and is not within the domain of the Court.<sup>81</sup> Moreover, the Court must not sit in judgment over the conclusions of the Investigating Officers and in investigating a crime reported to it the Police performs a statutory duty and its operational and investigative independence in that respect is worthy of as much sanctity and respect as the independence of the judiciary in its adjudicatory domain.<sup>82</sup>

However, equally, the ipse dixit (opinion) of the Police is not binding on the Court<sup>83</sup> since the Police has no authority to give judgement about the merits of a case as that is the Court’s function. The Court should not agree with a report under section 173 Cr.P.C blindly and pass an order in a whimsical and arbitrary manner.<sup>84</sup> The order thus passed either agreeing or disagreeing with the report under section 173 Cr.P.C must show application of mind and the Police’s opinion must be supported by reasons and its conclusions must be laced with evidence.<sup>85</sup>

<sup>75</sup>Release of accused when evidence deficient: If upon an investigation under this Chapter, it appears to the officer in charge of the Police station or to the Police officer making the investigation that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, and if and when so required, before a Magistrate empowered to take cognizance of the offence on a Police-report and to try the accused or send him for trial.

<sup>76</sup>2011 SCMR 1430

<sup>77</sup>Rule 7, Chap 11, Volume III, High Court Rules & Orders

<sup>78</sup>2003 PCRLJ 244 LHR

<sup>79</sup>2010 PCrLJ 261 LHR

<sup>80</sup>2007 PLD 243 KHI

<sup>81</sup>2001 PCr.LJ 1054

<sup>82</sup>PLJ 2000 Lahore 865

<sup>83</sup>2017 YLRN 87 LHR

<sup>84</sup>2014 YLR 92

<sup>85</sup>2011 YLR 1230

The ultimate authority on whether to proceed with trial or to discharge the accused vests with the Court. The Court, if it considers proper, can take cognizance even on a negative report, and can refuse to take cognizance on a positive report, depending upon the circumstances of the case.<sup>86</sup> Although the magistrate can disagree with a discharge/cancellation report by the Police and summon the accused<sup>87</sup>, he does not have the power to direct the Police to submit the challan in a particular manner.<sup>88</sup> The investigation of a case and the resulting conclusion regarding guilt or innocence lays within the sole domain and prerogative of the Police over which no other authority has control and so the Magistrate while disagreeing with a report under section 173 Cr.P.C cannot direct the Police to submit it in a particular manner.<sup>89</sup>

The Magistrate, while declining the opinion of an Investigating Officer recommending discharge and proceeding to try the case has to keep in mind the lengthy trial, mental torment and financial loss of an innocent person.<sup>90</sup>

Prosecutors have an important role to play in scrutinizing a report under section 173 Cr.P.C and it is they who then submit it before the concerned Court. Their role is discussed in greater detail in chapter 5.

## 4.2 Role of Prosecutors

### 4.2.1 Scrutinizing the Challan

Upon conclusion of the investigation, the Investigating Officer formulates his own opinion for disposal of the case due to insufficient evidence<sup>91</sup> or for a recommendation for the accused to be sent for trial<sup>92</sup> and submit a Police report/challan under Section 173 of the Cr.P.C. to the Prosecutor, who then submits it to the authorized Magistrate. The role of Prosecutor upon receipt of this report is of great significance; he is required to scrutinize the challan for lacunae<sup>93</sup> and either forward the same to the competent Court if he finds it fit for submission<sup>94</sup>, or return it to the Investigation Officer with written

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<sup>86</sup>ibid

<sup>87</sup>1967 PLD 425 SC

<sup>88</sup>2010 PCrLJ 261 LHR, 2011 SCMR 1430

<sup>89</sup>2010 PCrLJ 261 LHR

<sup>90</sup>2017 PCrLJ 812 KHI

<sup>91</sup>Section 169 of the Code of Criminal Procedure, 1898

<sup>92</sup>Section 170 of the Code of Criminal Procedure, 1898

<sup>93</sup>2010 PCrLJ 182 Lahore

<sup>94</sup>Section 4(b)(i) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

direction to resubmit the report after removal of the deficiencies and defects so identified by him<sup>95</sup> within seven days.<sup>96</sup> Following this, the Prosecutor is required to submit the amended report to the competent Court.

The role of the Prosecutor in the light of his expertise and understanding of jurisprudence has been comprehensively articulated by Justice Sajjad Ali Shah in case titled *Abdul Hafeez Junejo v The State*<sup>97</sup> as:

*... the conduct of the Prosecution on behalf of government is the responsibility of the Prosecutors and every report under Section 173 of the Code of Criminal Procedure including the report for cancellation of FIR or discharge of a suspect or an accused has to be filed in Court after the same is scrutinized by the public Prosecutor ... Prosecutors have the power to return such report to the officer In charge of a Police station or the Investigating Officer if they find it defective for the removal of identified defect. ... the result of such scrutiny as an expert opinion may be placed before the Court for its convenience and consideration of course without any binding force. Even otherwise, the Prosecutor having expertise in the field is in a better position to opine that on the basis of the investigated fact the accused can be tried under a specific provision.*

The term ‘scrutinize’ in this context means to examine a matter from all pros and cons and attend all its aspects with due care and caution inasmuch as to make deep search or inspect the matter in close, care and thorough manner.<sup>98</sup> Therefore, the Office of District Public Prosecutor is not only a post-office but a bridge between Police and Court to promote procedure of Prosecution for better achievement of justice.<sup>99</sup>

In scrutinizing the aforementioned report, the Prosecutor is required to examine the nature of offences committed by the accused and analyze whether the correct provisions are mentioned in the investigation report.<sup>100</sup> He can then add or delete or add any offences<sup>101</sup> according to the facts and evidence collected by the Investigating Officer before submitting the report to the

<sup>95</sup>2013 PCrLJ 1411 Lahore

<sup>96</sup>Section 4(b)(ii) and 7(d) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

<sup>97</sup>2010 YLR 470

<sup>98</sup>2012 PCrLJ 1823 Lahore

<sup>99</sup>ibid

<sup>100</sup>ibid

<sup>101</sup>2009 PLD 135 Lahore; 2015 PLD 84 Lahore

Court.<sup>102</sup> The object of this exercise is that the applicability of offences is decided by law-knowing agencies and not by the Police who may not be able to provide legal opinion directly to the Court.<sup>103</sup>

#### 4.2.2 Limitations to Power

It is pertinent to mention that although the Prosecutor is required to point out the defects of the report to the Police, he is not authorized to direct for submission of report/challan under S.173, Cr.P.C. against the accused for their trial<sup>104</sup> or to direct the Investigating Officer to place the name of accused in a specific column of the challan.<sup>105</sup> Hence, there is no legal sanctity attached to the Prosecutor's opinion on the guilt of an accused person.<sup>106</sup>

#### 4.2.3 Deciding whether to Prosecute

One of the foremost and essential functions of a Prosecutor is to make the decision whether or not to prosecute a case. While the Police, government, media, pressure groups and other stakeholders may be strongly inclined that a particular case be prosecuted, the final decision rests with the Prosecutor who in making his decision has to fairly, firmly, impartially, consistently, efficiently and with integrity.<sup>107</sup>

The Prosecutor must acquaint himself with the facts, circumstances and evidence of a case and determine on the strength of these whether there is a sufficient evidential basis to support a Prosecution. Where it is not so, the Prosecutor must not decide to prosecute. A Prosecutor must also make the call whether trial is the best solution in a case or whether it would be preferable to withhold a Prosecution either so that more evidence could be obtained.

The **Guidelines for Prosecutors** issued by the Khyber Pakhtunkhwa Prosecution Service contains a 2-stage test to be applied by Prosecutors to determine whether a case is fit for Prosecution. Any case must pass both stages before the Prosecutor can deem it fit for Prosecution. The two-stage test is as follows:

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<sup>102</sup>2017 PCrLJ 440 Lahore

<sup>103</sup>2012 PCrLJ 1823 Lahore

<sup>104</sup>2009 PCrLJ 1043 Lahore

<sup>105</sup>2008 YLR 1462 Lahore

<sup>106</sup>Ibid, 2009 YLR 1364 Karachi

<sup>107</sup>Ibid, 2009 YLR 1364 Karachi



- a. **Evidential Test** – This is a test of sufficiency and quality of evidence where on an objective assessment of evidence and information provided by the investigating agency, the Prosecutor concludes whether or not there exists a realistic prospect of conviction against the accused on each of the charges. It is important to stress that this test is less strict than the one applied by Courts in all criminal cases i.e. proof of guilt beyond a reasonable doubt.

In assessing the evidence with a view to it leading to the conviction of the accused, the Prosecutor has to take care to ensure that the said evidence meets the requirements of admissibility. Any violations committed in collecting the evidence may lead to the evidence being excluded. This further highlights the need for Prosecutors to keep up with the investigation and to provide suggestions to the Police so that legal requirements are adhered to. As regards admissible evidence and witnesses, the Prosecutors need to be sure that the same is not tainted and is reliable in all respects. The honesty and integrity of witnesses may become questionable by reason of them being interested witnesses or their testimony could be unreliable by reason of them being chance witnesses if their presence at the place of occurrence is not natural or explained. Moreover, any duress, temptations, motives for false implication or past history of false testimony can also diminish the credibility of a witness.

Prosecutors should endeavor to discuss the witnesses with Investigating Officers who have interacted with them during the course of investigation and who are more informed of the context and circumstances in which their evidence is given. Due weight should be given to the opinion of the Investigating Officer in deciding whether the witnesses are reliable and whether their evidence should be considered in determining whether there is a sufficient evidential basis to go forward with Prosecution.

Finally, any lines of defense open to the defendant and any plea made by the accused in his defense during investigation should also be taken into account and both inculpatory and exculpatory evidence should be appreciated in juxtaposition before determining a case fit for Prosecution or otherwise.

- b. **Public Interest Test** – This is a public policy test which requires that the Prosecutor ought not to proceed with a Prosecution, even though it is in accordance with the law, where the public interest in favor of proceeding with Prosecution is outweighed by the public interest against proceeding. It is applied once a case passes the evidential test

and irrespective of the public interest in favor of a Prosecution, if a case fails the evidence test, it will not progress to the public interest test stage.

There are several public interest considerations which may bear upon the Prosecutor when assessing a case under this test. At times some of these considerations will conflict with others and in making the decision the Prosecutor has to give appropriate weight to each and in some cases one exceedingly significant factor may outweigh all other considerations and compel a Prosecutor to make a conclusion other than that which he would have but for that factor. As a general rule of thumb, the more serious an offence, the greater the public interest in prosecuting it.

Some of the most important factors and considerations to this end are the extent of harm or grievousness of injuries caused to a victim, the number of victims, age of the victim, extent of premeditation, the ulterior purpose behind the act for e.g. terrorism – causing fear & panic among the people, whether the accused is a previous offender, whether there is likelihood of repetition and so on. The Prosecutor must also have regard for factors such as the circumstances of the victim, the offender and whether Prosecution would have a positive impact in the community in terms of maintenance of law & order, deterrence of crime and boosting the community's confidence in the law.

A Public Prosecutor in KPK who receives a report u/s 173 Cr.P.C is competent under Section 4(b) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005, to either lodge the same before the competent trial Court or to withhold the same for want of proper evidence and return it to the investigation officer with written direction to resubmit the report after removal of the deficiencies identified by him.

Furthermore, it is for the Prosecutor to determine whether to charge an accused and if so, what charges should be applied before a trial can commence. Under Section 5(b) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005, no Prosecution may take effect against persons other than those charged as accused by the Public Prosecutor on the basis of available evidence.

#### 4.2.4 Application for Discharge of Accused or Withholding Prosecution

If the Prosecutor is of the opinion that there is insufficiency of evidence, he can submit an application under Section 265-D of the Cr.P.C and under Section 4(c) and 5(b) of the KPPS Act 2005<sup>108</sup> for the discharge of the accused along with the challan to the competent Court. On the other hand, the Prosecutor can withhold Prosecution if reasonable ground exists for him to believe that the offence is compoundable.<sup>109</sup> However, the powers under the KPPS Act 2005<sup>110</sup> cannot be exercised in respect of offences punishable with death or life imprisonment.<sup>111</sup>

The following chart elaborates upon the process for the discharge of accused in case of insufficiency of evidence:

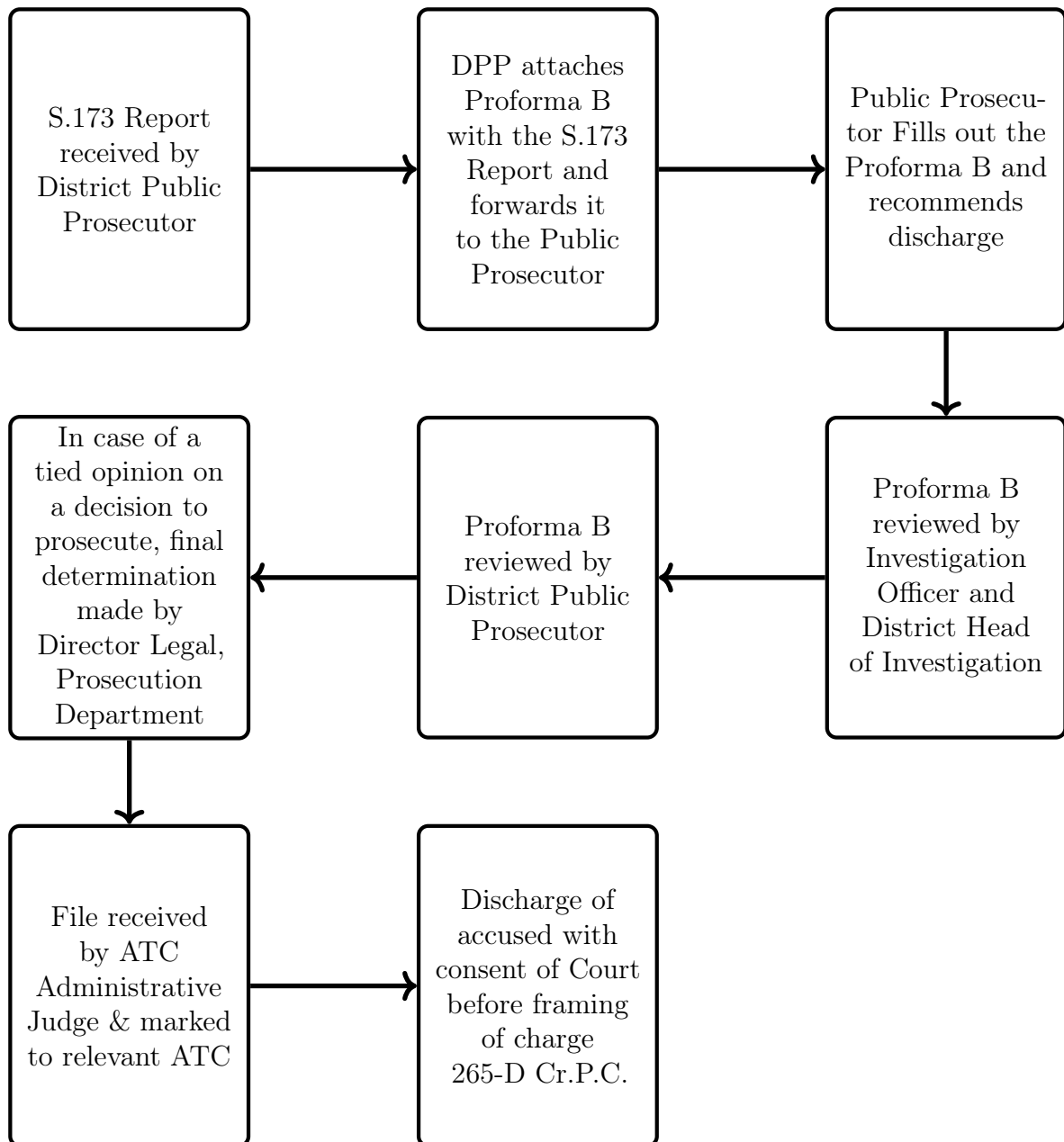
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<sup>108</sup>Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

<sup>109</sup>Section 4(c) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005

<sup>110</sup>ibid

<sup>111</sup>Ibid, 2018 YLR 2025 Peshawar



### 4.3 Summary

- The Police are required under S.173 of the Cr.P.C. to submit the Police report, referred to as the “challan”.
- The Prosecutor is to scrutinize the ‘Challan’ in line with the role as

articulated in *Abdul Hafeez Junejo v. The State*.

- In scrutinizing the aforementioned report, the Prosecutor is required to examine the nature of offences committed by the accused and analyze whether the correct provisions are mentioned in the investigation report. He can then add or delete or add any offences according to the facts and evidence collected by the Investigating Officer before submitting the report to the Court.
- In deciding to proceed with a Prosecution, the Prosecutor must apply the two-stage test:
  - **Evidential Test** – This is a test of sufficiency and quality of evidence where on an objective assessment of evidence and information provided by the investigating agency, the Prosecutor concludes whether or not there is a prospect of conviction against the accused on each of the charges.
  - **Public Interest Test** – This is a public policy test which requires that the Prosecutor ought not to proceed with a Prosecution, even though it is in accordance with the law, where the public interest in favor of proceeding with Prosecution is outweighed by the public interest against proceeding.
- If the Prosecutor is of the opinion that there is insufficiency of evidence, he can submit an application under Section 265-D of the Cr.P.C and under Section 4(c) and 5(b) of the KPPS Act 2005 for the discharge of the accused along with the challan to the competent Court.

## 4.4 Activities

### Self-Assessment Questions

- In your experience, do Prosecutors generally scrutinize the challan in great detail once they receive it from the Investigating Officer?
- Do you feel that the role of Prosecutors in scrutinizing the Final Police Report is significant in trying to secure more convictions and build a stronger case for the Prosecution?
- Identify and explain the two tests that need to be applied by Prosecutors in deciding whether to prosecute a case.

- Specify a scenario where both tests would have to be applied in deciding whether to prosecute.
- Specify a scenario where a Prosecutor would submit an application for discharge of the accused and outline the reasons for such discharge.

## 4.5 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I can identify the role of the Prosecutor in scrutinizing the Challan submitted by the Police.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I understand the limitations of the powers of the Prosecutor as relates to the power of submission of a Challan.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I know how to apply the Evidential Test and the Public Interest Test in deciding whether to proceed with a Prosecution or not.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the legislations involved in an application that discharges the Accused.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

## CHAPTER 5

### POWER OF PROSECUTOR AFTER COMMENCEMENT OF TRIAL



## Introduction

This Chapter provides an overview of the duty of a Prosecutor to act impartially in all circumstances. They are not bound to pursue a case where they believe that there is no prospect of success, and where the evidence does not support a conviction. The primary responsibility of the Prosecutor is as an officer of the Court, and therefore he must act fairly in all circumstances. It also explores the role of the Prosecutor in the filing of appeals, and what decision-making procedures go into deciding to proceed down that path.

## Learning Outcomes

By the end of this chapter and the relevant readings you should be able to:

- Recognize that the role of the Prosecutor is one of impartiality, and that they must only come to conclusions based on reasoned evidence.
- Identify the role of the Prosecutor in the Appeals process.

## Essential Reading

- Guidelines for Prosecutors – Khyber Pakhtunkhwa Prosecution Service
- PLD 2002 SC 1060
- AIR 1957 SC 389

## 5.1 Responsibility to Act Impartially

The commencement of trial does not mean that a Prosecutor is bound to continue pursuing a case which he has become convinced has no prospects of success and in which the evidence is not sufficient to bring home the guilt of the accused. The primary responsibility of the Prosecutor is as an officer of the Court and he has to act impartially. He must act fairly and responsibly taking care that innocent persons should not suffer the hardships of investigations and trials particularly where their innocence becomes apparent. Section 265-L Cr.P.C allows the Advocate General to inform the Court on behalf of the government at any stage of any trial prior to passing of sentencing that he will not prosecute the accused upon the charge. All proceedings shall then be stayed and the accused is discharged from the proceedings. Such discharge however does not amount to an acquittal unless the judge so states.

Similarly, Section 494 Cr.P.C allows that any Public Prosecutor may with the consent of the Court, prior to pronouncement of judgment, withdraw from the Prosecution of the person either generally or in respect of any of the offences for which he is tried. Upon such withdrawal, where charge has not yet been framed against the accused, he shall be entitled to a discharge and where charge has been framed, he shall be entitled to an acquittal.<sup>112</sup> Section 494 Cr.P.C confers no unilateral or arbitrary powers of discharge or acquittal upon the Prosecutor and the ultimate decision has to be made by the Court which is subject to revision or appeal as appropriate.<sup>113</sup>

## 5.2 Role of Prosecutors in Appeals

The Government in appropriate cases files appeals against the decisions of Courts before a superior forum. This is usually done on the basis of recommendations made by Prosecutors. Any recommendation for filing an appeal should be made by the Prosecutor after carefully considering the merits of the case and never as a matter of routine. An appeal should be filed where the Prosecutor comes to the conclusion that the Court's decision is against the law or that the Court has engaged in arbitrary exercise of its discretion.<sup>114</sup> Appeals in cases under the Anti-Terrorism Act, 1997 lie under Section 25 of the Act. The government has a period of 30 days from the date of passing of order to file an appeal against acquittal. Every effort must be made by the Prosecutor to make recommendation for appeal, if any, to the

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<sup>112</sup>PLD 2002 SC 1060

<sup>113</sup>AIR 1957 SC 389

<sup>114</sup>Guidelines for Prosecutors – Khyber Pakhtunkhwa Prosecution Service

government well in advance of time so that a timely decision can be made and if necessary, appeal may be filed within time.

### 5.3 Summary

- The Prosecutor is not bound to continue Prosecution of a case if he is of the belief that there is no prospect of success.
- The Prosecutor must act fairly and take care that an innocent person does not have to go through the hardships associated with investigations and trials once their innocence has become apparent.
- Section 265-L Cr.P.C allows the Advocate General to inform the Court on behalf of the government at any stage of any trial prior to passing of sentencing that they will not pursue a Prosecution.
- The Government in appropriate cases files appeals against the decisions of Courts before a superior forum. This is usually done on the basis of recommendations made by Prosecutors.
- An appeal should be filed where the Prosecutor comes to the conclusion that the Court's decision is against the law or that the Court has engaged in arbitrary exercise of its discretion.

### 5.4 Activities

#### Self-Assessment Questions

- Do you feel that Prosecutors generally recognize their responsibility to act impartially after commencement of trial?
- Give an example of a situation where a Prosecutor would recommend the filing of an appeal.

## 5.5 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I fully recognize that the role of the Prosecutor is one of impartiality, and that they must only come to conclusions based on reasoned evidence.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the role of the Prosecutor in the Appeals process.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

## CHAPTER 6

# CO-DEPENDENCE OF POLICE AND PROSECUTION

## Introduction

This Chapter gives a final overview of the role of the Prosecutor in scrutinizing the Final Police Reports, and subsequently conducting the trial. It also covers witness preparation, evidence preparation, and the processes by which the Prosecutor can become more involved in any investigations. The Chapter illustrates the necessity of a change in attitudes in the Police-Prosecution paradigm, with cooperation and consultation being a necessary for the functioning of an effective criminal justice system.

## Learning Outcomes

By the end of this chapter and the relevant readings you should be able to:

- Identify the role of the Prosecutor in the formulation of the Final Police Report.
- Identify the role of the Investigating Officer in the course of a trial, and what use they can be to a Prosecutor.
- Identify how Prosecutors can get more involved in the investigation process.
- Recognize the importance of Police-Prosecution Partnership.
- Recognize what can happen when there is a break-down in Police-Prosecution relationships.

## Essential Readings

- Code of Criminal Procedure, 1898 (Relevant Provisions)
- DPP v Woolmington [1935] AC 462
- Safdar Ali v The Crown 1953 PLD 93 Federal Court of Pakistan

## 6.1 Final Reports

S.173 Cr.P.C as amended by Code of Criminal Procedure (Amendment) Act 1992 requires that final or interim reports under Section 173 Cr.P.C be forwarded to a Magistrate through the Public Prosecutor. The Prosecutor's role upon receipt is discussed above in detail and at the expense of repetition it is stated that upon receipt of a report under Section 173 Cr.P.C, the Public Prosecutor does not merely act as a post office and forward the same to the concerned Magistrate. As has been discussed in Chapter 4 extensively, the Prosecutor has an important role to play as regards scrutiny of the same for lacunae, point out defects and deficiencies and analyze whether correct provisions are mentioned. The Police's expertise in investigation is thus supplemented by the Prosecutor's expertise in the law and appraisal of evidence and this usually results in a stronger Prosecution case and fewer lapses in investigation which offenders can take advantage of at trial.

## 6.2 Course of Trial

It is the public Prosecutor who conducts trials on behalf of the State and in so doing he performs all the functions expected of a lawyer. In conducting a Prosecution, the public Prosecutor relies heavily on the investigative work done by the Police which is why Prosecutors remain interested in it from the time the FIR is registered. However, the Police's collaboration with the Prosecution does not end there. It endures throughout the trial wherein the Police appear as witnesses themselves. In fact, the Investigating Officer is often the star witness in a case as he is familiar with the entire investigation including recoveries, spot inspection, identification parade, circumstantial evidence etc. He would also have recorded the statements of witnesses during whom he would have had a chance to observe and form an opinion on their credibility, reliability and the veracity of their evidence. This makes the Investigating Officer a valuable resource for a Prosecutor preparing a trial and gives a Prosecutor an early indication if any witness is shaky and who if possible, should be given up as unnecessary.

Apart from the Investigating Officer, other members of the Police who have remained part of the investigation either through affecting recoveries or preparing or witnessing documentary evidence are also important witnesses and are sometimes collectively referred to as formal witnesses. Their evidence is crucial in proving material facts of the case. In this backdrop, the SOP for Police and Prosecution obliges the Investigating Officer to ensure that Prosecutors are afforded a reasonable opportunity to meet with Police witnesses

ahead of their testimony in Court to prepare them for their testimony.

## **6.3 Witness Preparation**

The Police can also be instrumental in arranging for private witnesses, including but not limited to ocular witnesses, witnesses of circumstantial evidence etc, to meet with Prosecutors prior to their evidence so that they could be prepared for their examination in chief and cross examination. In this way mistakes which create reasonable doubt in the veracity of Prosecution evidence, from which the accused would be entitled to benefit, can be avoided. In this backdrop, the Standard Operation Procedures for Police and Prosecution oblige the Investigating Officer to ensure that Prosecutors are afforded a reasonable opportunity to meet with Police witnesses ahead of their testimony in Court to prepare them for the same.

## **6.4 Evidence Preparation**

To allow the Prosecutors timely and easy access to case property and Prosecution witnesses ahead of proceedings, among other important reasons, the SOP provides for posting of an appropriate number of Detective Foot Constables (DFC) to each Court. This is designed to help the Prosecutor be prepared for evidence in a timely manner and also to better familiarize him with the evidence to be presented. Prosecutors should take advantage of this provision and call upon the DFC's should they need to examine case property or interview witnesses to help prepare their brief.

## **6.5 How to Improve Prosecutors' Involvement in Investigation**

### **6.5.1 Change of Attitudes**

Since investigation is the domain of the Police, it is often difficult for Prosecutors to assist in it because the Police often see it as an encroachment upon their powers and usurpation of their function for Prosecutors to be playing any significant part in the collection of evidence. This attitude needs to change for any meaningful progress to be made in ensuring a liaison and cooperation between the Police and the Prosecutors.

The onus does indeed remain on the Police to invite Prosecutors to provide



their inputs and the Prosecutors should then eager to assist as expeditiously as possible. That, however, is not to say that there is no opportunity for the Prosecutors to take the initiative and to encourage the Police to seek their assistance. Prosecutors can promote a culture of openness and accessibility in their department towards any personnel of the Police who may wish to seek their legal opinion regarding a case.

### **6.5.2 Consultations**

As the Prosecution department is provided a copy of every FIR that is lodged, the Prosecutors should keep tabs on the new FIRs received by them and familiarize themselves with the cases. It is suggested in draft SOPs specific for terrorism that the Police and Prosecution should start their interactions soon after the FIR is lodged with an object to build a case with cogent evidence in preparation for the trial.

These early interactions and consultations may also lead to a timely determination of whether an investigation should go forward and if so, against whom. Hopelessly weak cases can be filtered out which has the obvious advantage of preserving the time and resources of both departments and also have the positive external effect of not subjecting accused persons to a prolonged investigation which would ultimately prove fruitless.

Through active early consultations Prosecutors can have the opportunity to make recommendations where they see fit in order to direct the investigation. Accordingly it has been suggested that the District Public Prosecutor and the Prosecutor attached with the Anti-Terrorism Court should issue necessary advice to the investigation officer wherever appropriate throughout the course of investigation.

### **6.5.3 Establishing a Culture of Cooperation**

Cooperation cannot be forced upon the unwilling and true cooperation can only be embraced through free will of all parties involved. For there to be meaningful cooperation between the Police and Prosecution, each department has to understand its limitations and foster a culture of respect for the other's skill, expertise and experience. There needs to be an understanding that both departments pursue a common goal and each has its significant role to perform in the achievement of it.

Mutual interaction and seeking of advice should be the norm rather than something to resort to in exceptional circumstances. This can be done

through informal communication which can be encouraged by the heads of each respective department i.e. the Police and Prosecution.

#### **6.5.4 Change from the Top**

Having seen that true cooperation is more about a change of attitudes than a practice to be adopted upon instruction, it still falls upon the heads of each department to take the lead and to introduce and encourage a work ethic which involves mutual consultation, review and feedback.

The suggested SOPs for terrorism offences suggest that heads of both institutions at provincial and district level shall meet at regular intervals to improve coordination mechanisms between them. Regular high-level meetings should have the effect of conveying to the department as a whole that they are not to function in isolation of the other departments but rather work together towards the achievement of their common goal.

#### **6.5.5 Enhancing the Role of DSP Legal**

The DSP Legal within the Police Department is a person who is resourceful in matters of legal guidance to investigators. DSP Legal can also act as a point of contact for the Prosecutors whom the Prosecutors can involve any time they wish to convey advice or give opinion about the investigation of a case. Since he is a sufficiently senior member of the Police force, he enjoys a position of authority sufficient to compel obedience and so the advice of the Prosecutor would be better received by the Investigating Officer if the DSP Legal acts as a medium.

The DSP Legal can further utilize his influential position to encourage mutual assistance between the Police and the Prosecution. This may not be restricted to encouraging communication, consultation and seeking advice but also aspects like ensuring case diaries and Roznamcha or the registers maintained by the Police are made accessible to the Prosecutor should he require them. He can act as an intermediary to facilitate various requests of the Prosecutors including but not limited to access to evidence or being able to meet witnesses in advance of their testimony in Court in order to prepare them.

#### **6.5.6 Informal communication**

Seeing that communication voluntarily established in the belief that it would be helpful is more productive and endures for a longer duration than if it be done with a mere intention to pay lip service to a direction issued by one's

superior officer. Only in the former case can the communication be candid and frank. This does, however, require a mutual trust and openness which takes time to develop.

Fortunately, in the contemporary world there is no shortage of platforms that would facilitate informal contact and information sharing. Telephonic and electronic media interaction and dissemination of information should be encouraged since there is a need to build bridges and promote interaction and a manifestly demonstrating that the same is being done is not of any real importance.

## 6.6 Result of failure of Police or Prosecution to discharge their functions

Having established clearly that pursuance of a criminal case on behalf of the state requires teamwork and mutual co-operation by both the Police and the Prosecution, each of whom are an essential pillar on which the framework of criminal justice rests, it is quite clear who stands to benefit from a failure of these two institutions to pull in the same direction: the accused.

Criminal cases of which terrorism is a branch require an extremely strict burden of proof to be discharged before a finding of guilt can be arrived at. This burden of proof is required to be beyond a reasonable doubt. It is not for an accused to prove his innocence but rather for the Prosecution to prove beyond a reasonable doubt that the accused is guilty of the offence charged and if the Prosecution fails to do so, the accused would be entitled to an acquittal.<sup>115</sup> This rule of general application formulated by the House of Lords in England in the pre-independence case of *DPP v Woolmington*<sup>116</sup> and was affirmed by then Federal Court in Pakistan in the famous case of *Safdar Ali v The Crown*<sup>117</sup> with the emphasis that even where the accused fails to prove the special plea taken by him but manages to raise reasonable doubt, he is entitled to an acquittal.

Benefit of the slightest doubt arising during trial goes to the accused as he is the favorite child of the law<sup>118</sup> and warrants an honorable acquittal for the accused.<sup>119</sup> This creates a serious problem for the state especially in

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<sup>115</sup>2018 PCrLJ 954 Quetta

<sup>116</sup>*DPP v Woolmington* [1935] AC 462

<sup>117</sup>*Safdar Ali v The Crown* 1953 PLD 93 Federal Court of Pakistan

<sup>118</sup>2014 PCrLJ 272 Lahore

<sup>119</sup>2018 PCrLJ 922 Peshawar

offences against terrorism where the state's predominant interest in convicting the accused against whom credible evidence has surfaced indicating his involvement in the crime is to protect its citizens from repetition of offence and to retain the public's confidence in governance as well as the maintenance of law and order. Effective control of terrorist activities demands that offenders are put to justice.

It is not important merely that justice is done but it must manifestly be seen to be done and the opposite holds equally true as well. Seeing offenders walk away with acquittals due to the fact that the investigation and Prosecution was inadequate is severely demoralizing not merely for the investigative agencies and the Prosecution but also for the public in general.

## 6.7 Summary

- Upon receipt of a report under Section 173 Cr.P.C, the Public Prosecutor does not merely act as a post office and forward the same to the concerned Magistrate.
- The Prosecutor has an important role to play as regards scrutiny of the same for lacunae, point out defects and deficiencies and analyze whether correct provisions are mentioned.
- In conducting a Prosecution, the Public Prosecutor relies heavily on the investigative work done by the Police which is why Prosecutors remain interested in it from the time the FIR is registered.
- The Investigating Officer is often the star witness in a case as he is familiar with the entire investigation including recoveries, spot inspection, identification parade, and circumstantial evidence.
- The Standard Operation Procedures for Police and Prosecution obliges the investigating officer to ensure that Prosecutors are afforded a reasonable opportunity to meet with Police witnesses ahead of their testimony in Court to prepare them for the same.
- Since investigation is the domain of the Police, it is often difficult for Prosecutors to assist in it because the Police often see it as an encroachment upon their powers and usurpation of their function for Prosecutors to be playing any significant part in the collection of evidence. This attitude needs to change for any meaningful progress to be made in ensuring a liaison and cooperation between the Police and the Prosecutors.

- The DSP Legal within the Police Department is a person who is resourceful in matters of legal guidance to investigators.
  - He can act as an intermediary to facilitate various requests of the Prosecutors including but not limited to access to evidence or being able to meet witnesses in advance of their testimony in Court in order to prepare them.
- Benefit of the slightest doubt arising during trial goes to the accused as he is the favorite child of the law and warrants an honorable acquittal for the accused.
  - This creates a serious problem for the state especially in offences against terrorism where the state's predominant interest in convicting the accused against whom credible evidence has surfaced indicating his involvement in the crime is to protect its citizens from repetition of offence.

## 6.8 Activities

### Self-Assessment Questions

- Identify the Prosecutors role prior during the investigation phase.
- Identify the role of the Police once a trial has commenced.
- In your experience, have the Police and Prosecution cooperate effectively in the past?
- Do you see a need for enhanced Police-Prosecution Partnership, if so, what specific changes would you make to the current regime?
- What are the possible consequences of a failure of the Police and Prosecution to effectively discharge their functions?

## 6.9 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I can identify the role of the Prosecutor in the formulation of the final Police report.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the role of the Investigating Officer in the course of a trial, and what use they can be to a Prosecutor.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify how Prosecutors can get more involved in the investigation process.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can recognize the importance of Police-Prosecution Partnership.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can recognize what can happen when there is a break-down in Police-Prosecution relationships.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

## CHAPTER 7

# INTERNATIONAL BEST PRACTICES

## Introduction

In most common law countries, there is usually a stark dividing line between the Police and the Prosecution service, with the Police and the Prosecution both largely enjoying independent roles in the execution of their duties. In the Inquisitorial system—as in most of Continental Europe—the Prosecution and Police play a more connected role, with the Prosecution being in charge of the whole pre-trial stage, often deciding on whether an investigation ought to be instigated, and what the scope of said investigation will be.<sup>120</sup>

However, with the increasing complexity of criminal matters in the modern era, and the resultant increase in complexity of laws, there has been a general change of thinking regarding the involvement of Prosecutors in common law jurisdictions, with greater emphasis placed on the giving of Prosecutorial advice to Police bodies to aid in their investigations. In many common law jurisdictions such cooperation can often lead to Prosecutors playing a more active role in the investigation process, albeit, usually on an informal basis, without infringing on the statutory divisions between the two organizations.<sup>121</sup>

This Chapter explores the Police-Prosecution partnership paradigm in several counties, attempting to draw out best practices in those particular jurisdictions in relation to the pre-investigative phase, the investigation phase, and even in a subsequent trial. To that end, general recommendations are also included in how best to foster a conducive relationship with the Police, with a view both to increase the effectiveness of both the Police and the Prosecution, as well as to maintain morale and encourage collegiality between the two bodies.

## Learning Outcomes

By the end of this chapter and the relevant readings you should be able to:

- Understand the general Prosecution-Police relationship within the United Kingdom.
- Understand the general Prosecution-Police relationship within Canada.
- Understand the general Prosecution-Police relationship within India.
- Identify the general recommendations made by the UNAFEI in relation

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<sup>120</sup>Dr. Despina Kyprianou, *Comparative Analysis of Prosecution Systems: The Role of Prosecution Services in Investigation and Prosecution Principles and Policies*

<sup>121</sup>Dr. Despina Kyprianou, *Comparative Analysis of Prosecution Systems: The Role of Prosecution Services in Investigation and Prosecution Principles and Policies*



to maintaining an effective relationship between the Police and the Prosecution.

## Essential Readings

- Cooperation Between Police and Prosecutors – 120th UNAFEI International Senior Seminar
- Sarala v. Velu, AIR 2000 SC 1732
- Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117
- State of Gujarat v. Kishan Bhai, (2014) 5 SCC 108

## 7.1 The United Kingdom

In England and Wales, the Crown Prosecution Service (CPS) and the Police play an interconnected role in the Prosecution process. The Police are responsible for the investigation of criminal offences, and also perform tasks such as ensuring the appearance of witnesses to Court, obtaining further witness statements and informing victims as to the progress of the case. It is essential that a working relationship be maintained between the CPS and the Police, especially due to the central role that they both play in the process of charging.<sup>122</sup>

This cooperation, however, should not affect or compromise the independence of the CPS, they have distinct responsibilities from the Police, and direct intervention into investigations or Police operational procedures are outside the purview of CPS duties. However, providing advice to the Police in matters relating to criminal offences is a statutory function of the CPS, and so Prosecutors must provide advice to the Police in order to positively contribute to the effectiveness of the investigation process and the subsequent Prosecution.<sup>123</sup>

The duty of the CPS to advise the Police is derived primarily from Section 3(2)e of the Prosecution of Offences Act, 1985<sup>124</sup>, which states:

3. *Functions of the Director.*

(2) *It shall be the duty of the Director, subject to any provisions contained in the Criminal Justice Act 1987-*

(e) *to give to such extent as he considers appropriate, advice to Police forces on all matters relating to criminal offences;*

This duty, alongside the provisions of the Code for Crown Prosecutors and the Director's Guidance on Charging specifies the modes of communication, and what constitutes appropriate advice between the Police and the CPS. Advice from the CPS is particularly relevant in complex cases, where the Police may not have the requisite expertise, and therefore early involvement

<sup>122</sup>'Police And CPS Relations | The Crown Prosecution Service' (Cps.gov.uk) <https://www.cps.gov.uk/legal-guidance/Police-and-cps-relations> accessed 20 November 2018.

<sup>123</sup>'Police And CPS Relations | The Crown Prosecution Service' (Cps.gov.uk) <https://www.cps.gov.uk/legal-guidance/Police-and-cps-relations> accessed 20 November 2018.

<sup>124</sup>'Prosecution Of Offences Act 1985' (Legislation.gov.uk) <https://www.legislation.gov.uk/ukpga/1985/23> accessed 20 November 2018.

by the CPS may bring substantial benefits to the conducting of an effective Prosecution. Advice may be solicited by the Police itself, or if the CPS feels it necessary, it may provide unprompted advice where, for example, there has been a substantial change in law that may alter the course of the Police investigation.<sup>125</sup>

The Police may ask for advice from the CPS both formally and informally. Informal queries can be triggered without the need to submit an application, and generally center around early investigation and pre-charge phase. If the Prosecutor believes that the scope of advice asked is more expansive, the CPS may insist on written documentation attesting to such a query, both to give a comprehensive answer as well as to maintain an accurate audit trail. Advice given in haste or without due consideration, may result in the Police making a wrong decision and therefore potentially jeopardizing the possible Prosecution.<sup>126</sup>

Charging (The Director's Guidance) 2013 (5th Edition)<sup>127</sup> states,

*Prosecutors may provide guidance and advice in serious, sensitive or complex cases and any case where a Police supervisor considers it would be of assistance in helping to determine the evidence that will be required to support a Prosecution or to decide if a case can proceed to Court.*

The document also sets out the general processes that will be followed in all joint-working scenarios between the Police and the CPS during the investigation and Prosecution of criminal cases.<sup>128</sup>

The advice given by the CPS primarily deals with the legal or evidential effect of a particular Police operational procedure. Such as, indicating the nature of the evidence required, commenting on the likely effect of actual or proposed

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<sup>125</sup>'Police And CPS Relations | The Crown Prosecution Service' (Cps.gov.uk) <https://www.cps.gov.uk/legal-guidance/Police-and-cps-relations> accessed 20 November 2018.

<sup>126</sup>'Police And CPS Relations | The Crown Prosecution Service' (Cps.gov.uk) <https://www.cps.gov.uk/legal-guidance/Police-and-cps-relations> accessed 20 November 2018.

<sup>127</sup>'Charging (The Director's Guidance) 2013 - Fifth Edition, May 2013 (Revised Arrangements) | The Crown Prosecution Service' (Cps.gov.uk, 2013) <https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-2013-fifth-edition-may-2013-revised-arrangements> accessed 20 November 2018.

<sup>128</sup>'Charging (The Director's Guidance) 2013 - Fifth Edition, May 2013 (Revised Arrangements) | The Crown Prosecution Service' (Cps.gov.uk, 2013) <https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-2013-fifth-edition-may-2013-revised-arrangements> accessed 20 November 2018.

activity on a Prosecution, identifying legal or evidential elements which need to be addressed, advising on the admissibility of evidence obtained, and highlighting any public interest considerations which may affect any eventual Prosecution. However, the CPS must take heed that it does not overstep into Police operational matters and should not therefore comment on the efficacy of a particular Police action, limiting themselves to objective advice. Decisions on whether such advice is implemented is entirely up to the Police themselves.<sup>129</sup>

With an impressive overall conviction rate of 80% in the Crown Court, and 84% at the Magistrates' Court<sup>130</sup>, Prosecution-Police Partnership in the United Kingdom can serve as a model for other countries to follow.

## 7.2 Canada

In Canada, assigning Prosecutors to provide pre-charge advice in large complex investigations is common practice in most jurisdictions. In British Columbia and Ontario, in order to provide time-sensitive advice to the Police, Prosecutors are being placed within Police divisions, and Quebec Prosecutors provide round-the-clock consultation services to all Police divisions within their jurisdiction.<sup>131</sup>

The Supreme Court of Canada has noted in *R v. McNeil* that it is the duty of the Police to provide full disclosure of all material collected in the course of investigation—including information that may prove favorable to the accused—to the Crown counsel, failure to do so could result in possible disciplinary action.<sup>132</sup>

Traditionally, the Police have alone determined the size and scope of the case that would be brought into the Court system, with the role of Crown at the pre-charge stage being purely advisory in nature. However, in certain cases the Supreme Court has accepted that the Prosecution must play a

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<sup>129</sup>'Police And CPS Relations | The Crown Prosecution Service' (Cps.gov.uk) <https://www.cps.gov.uk/legal-guidance/Police-and-cps-relations> accessed 20 November 2018.

<sup>130</sup><https://www.cps.gov.uk/sites/default/files/documents/publications/Key-Measures-Q3-2017-18.xlsx>

<sup>131</sup>'Police And Crown Collaboration - Recommendations - Steering Committee On Justice Efficiencies And Access To The Justice System – Report On Disclosure In Criminal Cases June 2011' (Justice.gc.ca, 2011) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rod-crc/p31.html#fn39> accessed 20 November 2018.

<sup>132</sup>*R. V. Mcneil - SCC Cases (Lexum)* (Scc-csc.lexum.com) <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/6614/index.do> accessed 20 November 2018.

role in pre-charge investigation, such as in the case of wiretaps. The Court ruled that not all pre-charge involvement necessarily precluded the Police and the Prosecution from objectively conducting their specific duties. They did, however, draw a distinction between pre-charge advice, and advising the Police specifically of the grounds on which they should lay a charge.<sup>133</sup>

In all cases where the Police and Prosecution cooperate, they must keep in mind that they are independent bodies, and may only advise each other on how to proceed. Just as it is important that the Police be able to conduct an independent investigation unhindered by interference from the Prosecution services, so is it important that the Prosecution services work at an arm's length from the Police, so that they might be able to perform their duties objectively, without being tied to the particular, perhaps incorrect, theories of the investigative agencies on any particular case up for Prosecution.<sup>134</sup>

### 7.3 India

In India, the separation between the Prosecution services and the Police was entrenched in the case of *Sarala v. Velu*, wherein the Supreme Court held that consultations between the two services under Section 173(2) of the Code of Criminal Procedure represented an encroachment on the independence of the Police to investigate.<sup>135</sup> This was based on similar reasoning used in *Abhinandan Jha v. Dinesh Mishra*, wherein a similar restriction was placed on the powers of a magistrate to similarly direct the Police.<sup>136</sup> Therefore, cases today are largely investigated solely by the Police, with the Prosecution only playing a role upon the proceedings reaching the Court room.<sup>137</sup>

However, in the recent case of *State of Gujarat v. Kishan Bhai*<sup>138</sup>, the Court stated,

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<sup>133</sup>'Police And Crown Collaboration - Recommendations - Steering Committee On Justice Efficiencies And Access To The Justice System – Report On Disclosure In Criminal Cases June 2011' (Justice.gc.ca, 2011) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rod-crc/p31.html#fn39> accessed 20 November 2018.

<sup>134</sup>'Police And Crown Collaboration - Recommendations - Steering Committee On Justice Efficiencies And Access To The Justice System – Report On Disclosure In Criminal Cases June 2011' (Justice.gc.ca, 2011) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rod-crc/p31.html#fn39> accessed 20 November 2018.

<sup>135</sup>*Sarala v. Velu*, AIR 2000 SC 1732

<sup>136</sup>*Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117

<sup>137</sup>'Prosecution And Police In India: Time For The Twain To Meet' (Live Law) <https://www.livelaw.in/prosecution-and-Police-in-india-time-for-the-twain-to-meet/> accessed 20 November 2018.

<sup>138</sup>*State of Gujarat v. Kishan Bhai*, (2014) 5 SCC 108

*... on the completion of the investigation in a criminal case, the prosecuting agency should... require that all shortcomings be rectified, if necessary, by requiring further investigation.*

This appears to be a reversal of prior precedent and may spell a change in the previous policy of complete disconnect between the Police and Prosecution.

Such a system of cooperation already appears to be in place in the Central Bureau of Investigation (CBI), wherein Prosecution and investigation work together, in the manner practiced by countries with Inquisitorial Justice Systems, jointly investigating and prosecuting cases. Chapter 22 of the CBI Manual<sup>139</sup> states,

*Investigating Officers should realize that their duty does not end when the investigation has been completed. They should render all possible assistance and facilities to the Prosecutors during the conduct of the cases in Courts.*

Due in part to this close cooperation, the CBI had a conviction rate of 69% in 2014, while the general conviction rate in India hovers at around 40%.<sup>140</sup>

## 7.4 UNAFEI Recommendations

The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), in its 120th International Senior Seminar tackled the topic of ‘Cooperation between the Police and Prosecutors’, the purpose of which was to suggest possible changes that could be implemented to improve the effectiveness of investigations and Prosecutions, while maintaining accountability in the criminal justice system.<sup>141</sup>

An effective criminal justice system requires that the Police and Prosecution both share the ultimate goal of upholding the rule of law. For that to occur, there needs to be a general meeting of the minds in the upper echelons of both organizations, as is the case in England and Wales, where a ‘Joint Business Plan for the Criminal Justice System’ has been developed, and in Germany

<sup>139</sup>Chapter 22, CBI Manual

<sup>140</sup>‘Prosecution And Police In India: Time For The Twain To Meet’ (Live Law) <https://www.livelaw.in/prosecution-and-Police-in-india-time-for-the-twain-to-meet/> accessed 20 November 2018.

<sup>141</sup>‘Cooperation between the Police and Prosecutors | 120th International Senior Seminar Reports of the Course’ (Unafei.or.jp) [https://www.unafei.or.jp/publications/pdf/RS\\_No60/No60\\_21RC\\_Group2.pdf](https://www.unafei.or.jp/publications/pdf/RS_No60/No60_21RC_Group2.pdf) accessed 20 November 2018.

where ‘Joint Guideline of the Ministers of Justice and Ministers of the Interior to Cooperation between the Public Prosecution Office and the Police in the Prosecution of Organized Crime’ have been issued, with a view to encouraging similar endgame outlooks between the Police and Prosecutors.<sup>142</sup>

A greater level of communication between the Police and Prosecutors is also required, with a good working relation being key to promotion of a constructive dialogue. Intensive consultation has been advised in the early phases of an investigation, wherein key deficiencies in the Police investigative setup can be caught early on by Prosecutors in order to avoid frustrations and potential embarrassment once a flawed investigation makes it to the Court room. To that end, regular workshops should be held between the Police and the Prosecution services so that they may hash out particularly contentious problems and discuss their experiences in order to better work together.<sup>143</sup>

Liaisons should be posted from their respective offices into the others, both to provide guidance and advice when it is needed, and also to promote an atmosphere of collegiality between the two offices, once again furthering the aim of cementing similar outlooks between Prosecutors and the Police.<sup>144</sup>

Finally, if informal consultations are not able to achieve the desired outcomes, legislation may be implemented that regulates the roles of both the Police and the Prosecution in relation with each other. However, care must be taken that the role of the Police or the Prosecution are not eroded or made subservient to one or the other, as a lack of independence or ownership in the investigative and Prosecutorial process may result in a downturn in efficiency and morale.<sup>145</sup>

In all jurisdictions, whether of the common law tradition or otherwise, there seems to be a momentum towards increased Police-Prosecution cooperation. This is done, not in the name of expediency, with the independence of the institutions being eroded or called into question, but as a necessary evolution of the dynamics criminal justice system. Criminal elements have grown more complex and insidious, and so all tools necessary to bring them to justice must be brought forth.

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<sup>142</sup>Ibid

<sup>143</sup>Ibid

<sup>144</sup>Ibid

<sup>145</sup>Ibid

## 7.5 Summary

- The duty of the CPS to advise the Police is derived primarily from Section 3(2)e of the Prosecution of Offences Act, 1985.
- The provisions of the Code for Crown Prosecutors and the Director's Guidance on Charging specifies the modes of communication, and what constitutes appropriate advice between the Police and the CPS.
- Advice from the CPS is particularly relevant in complex cases, where the Police may not have the requisite expertise, and therefore early involvement by the CPS may bring substantial benefits to the conducting of an effective Prosecution.
- In Canada, assigning Prosecutors to provide pre-charge advice in large complex investigations is common practice in most jurisdictions.
- The Supreme Court of Canada has noted in *R v. McNeil* that it is the duty of the Police to provide full disclosure of all material collected in the course of investigation.
- In India, the separation between the Prosecution services and the Police was entrenched in the case of *Sarala v. Velu*, wherein the Supreme Court held that consultations between the two services under Section 173(2) of the Code of Criminal Procedure represented an encroachment on the independence of the Police to investigate.
  - Therefore, cases today are largely investigated solely by the Police, with the Prosecution only playing a role upon the proceedings reaching the Court room.
- An effective criminal justice system requires that the Police and Prosecution both share the ultimate goal of upholding the rule of law.
- A greater level of communication between the Police and Prosecutors is also required, with a good working relation being key to promotion of a constructive dialogue.
- Liaisons should be posted from their respective offices into the others, both to provide guidance and advice when it is needed, and also to promote an atmosphere of collegiality between the two offices
- Legislation may be implemented that regulates the roles of both the Police and the Prosecution in relation with each other.



## 7.6 Activities

### Self-Assessment Questions

- Identify the procedures used by the Police and Prosecution in England and Wales to effectively cooperate.
- Identify the Canadian jurisdictions within which a permanent Prosecution Office is set-up within Police Divisions.
- Why do the Indian Prosecution and Police Services play such separate roles, and do you feel that such an approach is an effective one?
- Do you agree with the Recommendations of the UNAFEI, and if not, what specific recommendations would you advise for better coordination and cooperation between the Police and the Prosecution?

## 7.7 Reflect and Review

**Look through the points listed below:** Are you ready to move on to the next chapter?

**Ready to move on:** I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first:** There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again:** I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

(Tick a box for each topic)

**I understand the general Prosecution-Police relationship within the United Kingdom.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I understand the general Prosecution-Police relationship within Canada.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I understand the general Prosecution-Police relationship within India.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again

**I can identify the general recommendations made by the UNAFEI in relation to maintaining an effective relationship between the Police and the Prosecution.**

☐ Ready to move on      ☐ Need to revise first      ☐ Need to study again