



The Attorney General of the
Falkland Islands

AGG30

THE ATTORNEY GENERAL'S GUIDANCE ON THE ACCEPTANCE OF PLEAS AND THE PROSECUTOR'S ROLE IN SENTENCING

General principles

Justice in this jurisdiction, save in the most exceptional circumstances, is conducted in public. This includes the acceptance of pleas by the prosecution and sentencing.

The Code for Prosecutors governs the prosecutor’s decision-making prior to the commencement of the trial hearing and sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted.

When a case is listed for trial and the prosecution form the view that the appropriate course is to accept a plea before the proceedings commence or continue, or to offer no evidence on the charge or indictment or any part of it, the prosecution should whenever practicable speak to the victim or the victim’s family, so that the position can be explained. The views of the victim or the family may assist in informing the prosecutor’s decision as to whether it is the public interest, as defined by the Code for Prosecutors, to accept or reject the plea. The victim or victim’s family should then be kept informed and decisions explained once they are made at court.

The appropriate disposal of a criminal case after conviction is as much a part of the criminal justice process as the trial of guilt or innocence. The prosecution advocate represents the public interest, and should be ready to assist the court to reach its decision as to the appropriate sentence. This will include drawing the court’s attention to:

- any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim
- where appropriate, to any evidence of the impact of the offending on a community
- any statutory provisions relevant to the offender and the offences under consideration
- any relevant sentencing guidelines and guideline cases
- the aggravating and mitigating factors of the offence under consideration

The prosecution advocate may also offer assistance to the court by making submissions, in the light of all these factors, as to the appropriate sentencing range. In all cases, it is the prosecution advocate’s duty to apply for appropriate ancillary orders, such as restraining orders and confiscation orders. When considering which ancillary orders to apply for, prosecution advocates must always have regard to the victim’s needs, including the question of his or her future protection.

It is not the role of the Prosecutor to argue for the most severe sentence open to the court. The sentencing decision is a matter for the sentencing court and the Prosecutor assists the court by ensuring that all the relevant information is available and by making submissions as to where the case falls in accordance with sentencing guidelines and case law.

Determining the Factual Basis of Sentence

Where a guilty plea is offered to less than the whole indictment or series of charges and the prosecution is minded to accept pleas tendered to some counts or to lesser alternative counts.

In some cases, defendants wishing to plead guilty will simply plead guilty to all charges on the basis of the facts as alleged and opened by the prosecution, with no dispute as to the factual basis or the extent of offending.

Alternatively a defendant may plead guilty to some of the charges brought; in such a case, the judge will consider whether that plea represents a proper plea on the basis of the facts set out by the papers.

Where the prosecution advocate is considering whether to accept a plea to a lesser charge, the advocate may invite the judge to approve the proposed course of action. In such circumstances, the advocate must abide by the decision of the judge.

If the prosecution advocate does not invite the judge to approve the acceptance by the prosecution of a lesser charge, it is open to the judge to express his or her dissent with the course proposed and invite the advocate to reconsider the matter with those instructing him or her.

In any proceedings where the judge is of the opinion that the course proposed by the advocate may lead to serious injustice, the proceedings may be adjourned to allow the following procedure to be followed:

- as a preliminary step, the prosecution advocate must discuss the judge’s observations with the instructing prosecutor of the prosecuting authority as appropriate, in an attempt to resolve the issue;
- where the issue remains unresolved, the Head of Legal Services of the prosecuting authority should be consulted;

- in extreme circumstances the judge may decline to proceed with the case until the prosecuting authority has consulted with the Attorney General, as may be appropriate.

Prior to entering a plea of guilty, a defendant may seek an indication of sentence under the procedure known as a Goodyear direction.

Where a guilty plea is offered on a limited basis

Where a defendant puts forward a plea of guilty without accepting all of the facts as alleged by the prosecution.

The basis of plea offered may seek to limit the facts or the extent of the offending for which the defendant is to be sentenced. Depending on the view taken by the prosecution, and the content of the offered basis, the case will fall into one of the following categories:

- a plea of guilty upon a basis of plea agreed by the prosecution and defence;
- a plea of guilty on a basis signed by the defendant but in respect of which there is not or only partial agreement by the prosecution;
- a plea of guilty on a basis that contains within it matters that are purely mitigation and which do not amount to a contradiction of the prosecution case;

The basis of plea

The basis of a guilty plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim’s interests. An illogical or insupportable basis of plea will inevitably result in the imposition of an inappropriate sentence and is capable of damaging public confidence in the criminal justice system. In cases involving multiple defendants the bases of plea for each defendant must be factually consistent with each other.

When the defendant indicates an acceptable plea, the defence advocate should reduce the basis of the plea to writing. This must be done in all cases save for those in which the defendant has indicated that the guilty plea has been or will be tendered on the basis of the prosecution case.

The written basis of plea must be considered with great care, taking account of the position of any other relevant defendant where appropriate. The prosecution should not lend itself to any agreement whereby a case is presented to the sentencing judge on a misleading or untrue set of facts or on a basis that is detrimental to the victim’s interests.

There will be cases where a defendant seeks to mitigate on the basis of assertions of fact which are outside the scope of the prosecution’s knowledge. A typical example concerns the defendant’s state of mind. If a defendant wishes to be sentenced on this basis, the prosecution advocate should invite the judge not to accept the defendant’s version unless he or she gives evidence on oath to be tested in cross-examination. In such circumstances the defence advocate should be prepared to call the defendant and, if the defendant is not willing to testify, subject to any explanation that may be given, the judge may draw such inferences as appear appropriate.

The prosecution advocate should show the prosecuting authority any written record relating to the plea and agree with them the basis on which the case will be opened to the court. If, as may well be the case, the basis of plea differs in its implications for sentencing or the making of ancillary orders from the case originally outlined by the prosecution, the prosecution advocate must ensure that such differences are accurately reflected in the written record prior to showing it to the prosecuting authority.

It is the responsibility of the prosecution advocate thereafter to ensure that the defence advocate is aware of the basis on which the plea is accepted by the prosecution and the way in which the prosecution case will be opened to the court.

In all cases where it is likely to assist the court where the sentencing issues are complex or unfamiliar the prosecution must add to the written outline of the case which is served upon the court a summary of the key considerations. This should take the form of very brief notes on:

- any relevant statutory limitations
- the names of any relevant sentencing authorities or guidelines
- the scope for any ancillary orders (e.g. concerning restraining orders, deprivation, notification which will need to be considered.
- the age of the defendant and information regarding any outstanding offences

It remains open to the prosecutor to provide further written information (for example to supplement and update the analysis at later stages of the case) where he or she thought that likely to assist the court, or if the judge requests it.

A plea of guilty upon a basis of plea agreed by the prosecution and defence

The prosecution may reach an agreement with the defendant as to the factual basis on which the defendant will plead guilty, often known as an “agreed basis of plea”. It is always subject to the approval of the court, which will consider whether it adequately and appropriately reflects the evidence as disclosed on the papers, whether it is fair and whether it is in the interests of justice.

The principles to be applied where the defendant admits that he or she is guilty, but disputes the basis of offending alleged by the prosecution.

- The prosecution may accept and agree the defendant’s account of the disputed facts or reject it in its entirety, or in part. If the prosecution accepts the defendant’s basis of plea, it must ensure that the basis of plea is factually accurate and enables the sentencing judge to impose a sentence appropriate to reflect the justice of the case;
- In resolving any disputed factual matters, the prosecution must consider its primary duty to the court and must not agree with or acquiesce in an agreement which contains material factual disputes;
- If the prosecution does accept the defendant’s basis of plea, it must be reduced to writing, be signed by advocates for both sides, and made available to the judge prior to the prosecution’s opening;
- An agreed basis of plea that has been reached between the parties should not contain matters which are in dispute and any aspects upon which there is not agreement should be clearly identified;
- On occasion, the prosecution may lack the evidence positively to dispute the defendant’s account, for example, where the defendant asserts a matter outside the knowledge of the prosecution. Simply because the prosecution does not have evidence to contradict the defendant’s assertions does not mean those assertions should be agreed. In such a case, the prosecution should test the defendant’s evidence and submissions by requesting a Newton hearing.

- If it is not possible for the parties to resolve a factual dispute when attempting to reach a plea agreement under this part, it is the responsibility of the prosecution to consider whether the matter should proceed to trial, or to invite the court to hold a Newton hearing as necessary.

Whenever an agreement as to the basis of plea is made between the prosecution and defence, any such agreement will be subject to the approval of the trial judge, who may of his or her own motion disregard the agreement and direct that a Newton hearing should be held to determine the proper basis on which sentence should be passed.

Where the basis of plea cannot be agreed and the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, it is the duty of the defence advocate so to inform the court before the sentencing process begins.

There remains an overriding duty on the prosecution advocate to ensure that the sentencing judge is made aware of the discrepancy and of the consideration which must be given to holding a Newton hearing to resolve the issue. The court should be told where a derogatory reference to a victim, witness or third party is not accepted, even though there may be no effect on sentence.

Whether or not pleas have been “agreed”, the judge is not bound by any such agreement and is entitled of his or her own motion to insist that any evidence relevant to the facts in dispute (or upon which the judge requires further evidence for whatever reason) should be called. Any view formed by the prosecution on a proposed basis of plea is deemed to be conditional on the judge’s acceptance of the basis of plea.

A judge is not entitled to reject a defendant’s basis of plea absent a Newton hearing unless it is determined by the court that the basis is manifestly false and as such does not merit examination by way of the calling of evidence or alternatively the defendant declines the opportunity to engage in the process of the Newton hearing whether by giving evidence on his own behalf or otherwise.

Where a defendant declines to admit an offence that he or she previously indicated should be taken into consideration, the prosecution advocate should indicate to the defence advocate and the court that, subject to further review, the offence may now form the basis of a new prosecution.

A plea of guilty on a basis signed by the defendant but in respect of which there is no or only partial agreement by the prosecution

Where the defendant pleads guilty, but disputes the basis of offending alleged by the prosecution and agreement as to that has not been reached following procedure should be followed:

- The defendant’s basis of plea must be set out in writing, identifying what is in dispute and must be signed by the defendant;
- The signed original document setting out the disputed factual matters should be made available to the trial judge and thereafter lodged with the court papers, as it will form part of the record of the hearing.
- The prosecution must respond in writing setting out their alternative contentions and indicating whether or not they submit that a Newton hearing is necessary;
- The court may invite the parties to make representations about whether the dispute is material to sentence; and
- If the court decides that it is a material dispute, the court will invite such further representations or evidence as it may require to resolve the dispute.

Where the disputed issue arises from facts which are within the exclusive knowledge of the defendant and the defendant is willing to give evidence in support of his case, the defence advocate should be prepared to call the defendant. If the defendant is not willing to testify, and subject to any explanation which may be given, the judge may draw such inferences as appear appropriate.

The decision whether or not a Newton hearing is required is one for the judge. Once the decision has been taken that there will be a Newton hearing, evidence is called by the parties in the usual way and the criminal burden and standard of proof applies. Whatever view has been taken by the prosecution, the prosecutor should not leave the questioning to the judge, but should assist the court by exploring the issues which the court wishes to have explored. The rules of evidence should be followed as during a trial, and the judge should direct himself appropriately as the tribunal of fact.

A plea of guilty on a basis that contains within it matters that are purely mitigation and which do not amount to a contradiction of the prosecution case

A basis of plea should not normally set out matters of mitigation but there may be circumstances where it is convenient and sensible for the document outlining a basis to deal with facts closely aligned to the circumstances of the offending which amount to mitigation and which may need to be resolved prior to sentence.

The resolution of these matters does not amount to a Newton hearing properly so defined and in so far as facts fall to be established the defence will have to discharge the civil burden in order to do so. The scope of the evidence required to resolve issues that are purely matters of mitigation is for the court to determine.

Sentence indications: R v Goodyear

Prior to pleading guilty, it is open to a defendant to request from the judge an indication of the maximum sentence that would be imposed if a guilty plea were to be tendered at that stage in the proceedings. The defence should notify the court and the prosecution of the intention to seek an indication in advance of any hearing.

Advocates are reminded that indications as to sentence should not be sought from the trial judge unless issues between the prosecution and defence have been addressed and resolved. Therefore, in difficult or complicated cases, no less than seven days’ notice in writing of an intention to seek an indication should normally be given to the prosecution and the court. When deciding whether the circumstances of a case require such notice to be given, defence advocates are reminded that prosecutors should not agree a basis of plea unless and until the necessary consultation has taken place first with the victim and/or the victim’s family and second, in the case of an independent prosecution advocate, with the prosecuting authority.

If there is no final agreement about the plea to the charge or indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication of sentence, which the judge appears minded to give, the prosecution advocate should remind him or her that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed or the judge has concluded that he or she can properly deal with the case without the need for a trial of the issue.

If an indication is sought, the prosecution advocate should normally enquire whether the judge is in possession of or has access to all the evidence relied on by the prosecution, including any victim personal statement, as well as any information about relevant previous convictions recorded against the defendant.

It is important to safeguard against the creation or appearance of judicial pressure on a defendant. Any advance indication given should be the maximum sentence if a guilty plea were to be tendered at that stage of the proceedings only; the judge should not indicate the maximum possible sentence following conviction by a jury after trial. The judge should only give a Goodyear indication if one is requested by the defendant, although the judge can, in an appropriate case, remind the defence advocate of the defendant’s entitlement to seek an advance indication of sentence.

Whether to give a Goodyear indication, and whether to give reasons for a refusal, is a matter for the discretion of the judge, to be exercised in accordance with the principles outlined in case law. Such indications should normally not be given if there is a dispute as to the basis of plea unless the judge concludes that he or she can properly deal with the case without the need for a Newton hearing.

If there is a basis of plea agreed by the prosecution and defence, it must be reduced into writing and a copy provided to the judge. As always, any basis of plea will be subject to the approval of the court. The judge should not become involved in negotiations about the acceptance of pleas or any agreed basis of plea, nor should a request be made or an indication of the different sentences that might be imposed if various different pleas were to be offered.

There should be no prosecution opening nor should the judge hear mitigation. However, during the sentence indication process the prosecution advocate is expected to assist the court by ensuring that the court has received all of the prosecution evidence, any statement from the victim about the impact of the offence, and any relevant previous convictions.

Further, where appropriate, the prosecution should provide references to the relevant statutory powers of the court, relevant sentencing guidelines and authorities, and such other assistance as the court requires.

The prosecution “should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.”

This prohibition against the Crown indicating its approval of a particular sentence applies in all circumstances when a defendant is being sentenced, including when joint sentencing submissions are made.

An indication, once given, is, save in exceptional circumstances, binding on the judge who gave it, and any other judge, subject to overriding statutory obligations. In circumstances where a judge proposes to depart from a Goodyear indication this must only be done in a way that does not give rise to unfairness. However, if the defendant does not plead guilty, the indication will not thereafter bind the court.

Pleas in mitigation

The prosecution advocate must challenge any assertion by the defence in mitigation which is derogatory to a person’s character, (for instance, because it suggests that his or her conduct is or has been criminal, immoral or improper) and which is either false or irrelevant to proper sentencing considerations. If the defence advocate persists in that assertion, the prosecution advocate should invite the court to consider holding a Newton hearing to determine the issue.

The defence advocate must not submit in mitigation anything that is derogatory to a person’s character without giving advance notice in writing so as to afford the prosecution advocate the opportunity to consider their position under paragraph 50. When the prosecution advocate is so notified they must take all reasonable steps to establish whether the assertions are true. Reasonable steps will include seeking the views of the victim. This will involve seeking the views of the victim’s family if the victim is deceased, and the victim’s parents or legal guardian where the victim is a child. Reasonable steps may also include seeking the views of the police or other law enforcement authority, as appropriate. An assertion which is derogatory to a person’s character will rarely amount to mitigation unless it has a causal connection to the circumstances of the offence or is otherwise relevant to proper sentencing considerations.

Where notice has not been given the prosecution advocate must not acquiesce in permitting mitigation which is derogatory to a person’s character. In such circumstances, the prosecution advocate should draw the attention of the court to the failure to give advance notice and seek time, and if necessary, an adjournment to investigate the assertion in the same way as if proper notice had been given.

Where, in the opinion of the prosecution advocate, there are substantial grounds for believing that such an assertion is false or irrelevant to sentence, he or she should inform the court of their opinion and invite the court to consider making an order under section 486A Criminal Procedure and Evidence Ordinance 2014, preventing publication of the assertion.

Where the prosecution advocate considers that the assertion is, if true, relevant to sentence, or the court has so indicated, he or she should seek time, and if necessary an adjournment, to establish whether the assertion is true. If the matter cannot be resolved to the satisfaction of the parties, the prosecution advocate should invite the court to consider holding a Newton hearing to determine the issue.

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