Private Prosecutions in Mauritius: Clarifying *Locus Standi* and Making the Director of Public Prosecutions more Accountable

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Abstract

Case law shows that private prosecutions have been part of Mauritian law at least since 1873. In Mauritius there are two types of private prosecutions: private prosecutions by individuals; and private prosecutions by statutory bodies. Neither the Mauritian constitution nor legislation provides for the right to institute a private prosecution. Because of the fact that Mauritian legislation is not detailed on the issue of *locus standi* to institute private prosecutions and does not address the issue of whether or not the Director of Public Prosecutions has to give reasons when he takes over and discontinues a private prosecution, the Supreme Court has had to address these issues. The Mauritian Supreme Court has held, inter alia, that a private prosecution may only be instituted by an aggrieved party (even in lower courts where this is not a statutory requirement) and that the Director of Public Prosecutions may take over and discontinue a private prosecution without giving reasons for his decision. However, the Supreme Court does not define “an aggrieved party.” In this article the author takes issue with the Court’s findings in these cases and, relying on legislation from other African countries, recommends how the law could be amended to strengthen the private prosecutor’s position.

Keywords

private prosecutions – Mauritius – Locus Standi – Director of Public Prosecutions – aggrieved party – supreme court

I Introduction

Private prosecutions have been part of Mauritian law for a long period of time.¹ In Mauritius there are two types of private prosecutions: private prosecutions by individuals; and private prosecutions by statutory bodies. Neither the Mauritian constitution nor legislation provides for the right to institute a private prosecution. Unlike legislation in some countries such as South Africa,² Ethiopia,³ Botswana,⁴ Swaziland,⁵ Zimbabwe⁶ and Namibia,⁷ which is detailed when it comes to the manner in which private prosecutions may be conducted, the Mauritian legislation is not that detailed. The result is that Mauritian courts have had to deal with issues such as: who has *locus standi* to institute a private prosecution and the role of the Director of Public Prosecutions in private prosecutions. The Mauritian Supreme Court has held, inter alia, that a private prosecution may only be instituted by an aggrieved party (even in lower courts where this is not a statutory requirement) and that the Director of Public Prosecutions may take over and discontinue a private prosecution without giving reasons for his decision. However, the Supreme Court does not define “an aggrieved party.” In this article I take issue with the Supreme Court’s decisions on these two issues and rely on legislation from other African countries to recommend how Mauritian legislation could be amended. I will start by highlighting the law on private prosecutions in Mauritius.

II Types of Private Prosecutions in Mauritius

In Mauritius there are two types of private prosecutions: private prosecutions by individuals (persons) and private prosecutions by statutory bodies. The Supreme Court observed that in Mauritius legislation allows ‘government departments like the Ministry of Health or the Ministry of Agriculture or the

1 The first reported case that I was able to find dates back to 1873.

2 Sections 7–16 of the Criminal Procedure Act No. 51 of 1977.

3 Articles 46–48, 150–153, 165, 221 of the Criminal Procedure Code of Ethiopia, Proclamation No. 185 of 1961.

4 Sections 14–25 of the Criminal Procedure And Evidence, Chapter 8:2. For a recent detailed discussion of the law on private prosecutions in Botswana, see *Margaret Danster v Neo Daniel Moroka* (MAHGB-000820–14) Botswana High Court, Lobatse (11 May 2016).

5 Sections 10–19 of the Criminal Procedure and Evidence Act, Act 67 of 1938.

6 Sections 12–22 of the Criminal Procedure and Evidence Act, Chapter 9:07.

7 Sections 7–16 of the Criminal Procedure Act 51 of 1977.

Ministry of Labour or even by Municipal bodies' to institute prosecutions.⁸ In *Ameerally N v The Municipal Council of Beau Bassin-Rose Hill*⁹ the Supreme Court held that prosecutions by municipal councils are private prosecutions.¹⁰ Although prosecutions by statutory bodies are also private prosecutions, it is beyond the scope of this article to discuss these prosecutions in detail. This article will focus on prosecutions by individuals. I will start with the issue of the right to institute a private prosecution in Mauritius.

III The "Right" to Institute a Private Prosecution in Mauritius

Whether or not a person, whether or not he is a victim of crime, has a right to institute a private prosecution has been dealt with differently by different countries. In some countries this right is provided for in legislation, in others it is provided for at common law yet there are countries in which, although a private prosecution may be instituted, there is no right to institute private prosecutions.¹¹ In Mauritius there is no statutory provision providing for the right to institute a private prosecution and case law is not clear whether or not there is in fact a right to institute a private prosecution. In this part of the article the author highlights legislative provisions and case law from Mauritius on the issue of the right to institute a private prosecution. In dealing with this issue, two questions, which are closely related, are dealt with: *locus standi* to institute a private prosecution; and whether a person who is not a victim of crime may institute a private prosecution.

Locus standi to Institute a Private Prosecution

Private prosecutions by persons are provided for in two pieces of legislation: the Criminal Procedure Act¹² (for private prosecutions before the Supreme Court) and the District and Intermediate Courts (Criminal Jurisdiction) Act¹³ (for private prosecutions in lower courts). Section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that: 'Any agent, manager or other

8 *Bismillah Garments Ltd. v The State* 1995 SCJ 216, p. 4. See also *Suneechara O. v. The State* 2007 SCJ 131, p. 7.

9 *Ameerally N. v The Municipal Council of Beau Bassin-Rose Hill* 2016 SCJ 373.

10 *Ameerally N. v The Municipal Council of Beau Bassin-Rose Hill* 2016 SCJ 373, p. 3.

11 See generally Jamil Ddamulira Mujuzi, 'The Right to Institute a Private Prosecution: A Comparative Analysis' (2015) 4 *International Human Rights Law Review* 222–255.

12 Of 1853.

13 The District and Intermediate Courts (Criminal Jurisdiction) Act 1888, Act 35/1852.

employee may, without any special power or mandate, prosecute an offence committed to the prejudice of his principal or employer.' This provision was introduced in Mauritian law in 1888.¹⁴ There are several issues to note about section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act.

Firstly, it does not provide that it is the victim of crime to institute a private prosecution. What it states is that an agent, manager or other employee may, without any special power or mandate, prosecute a person who has committed an offence against his manager or employer. The offence in question is not committed against the prejudice of the private prosecutor but rather against the prejudice of his employer or principal. Secondly, the private prosecutor does not need his principal or employer's 'mandate' for him to institute a private prosecution which has been committed to the prejudice of the principal or employer. This issue raises two problems: the first one is that principal or the employer may disown the private prosecutor; and two, there is a danger that should the private prosecutor lose the case, the principal or employer may be ordered to compensate the accused for the costs incurred in his defence although he did not mandate the employer or agent to institute the prosecution. Thirdly, any employer's employee, irrespective of his position, may institute a private prosecution. Fourthly, it could be argued that the section caters for both natural and juristic persons such as private companies. This is because both natural and juristic persons may have agents, managers and employees. Although the author is not aware of any case in which a private company has instituted a private prosecution in Mauritius, the Mauritian Companies Act¹⁵ provides that companies have managers,¹⁶ employees¹⁷ and agents.¹⁸ This means that in Mauritius both natural and juristic persons may institute private prosecutions on the basis of section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act.

Another argument could be that private companies cannot institute private prosecutions under section 121. This is because of the principle in Mauritian law that a company is separate from its employers, shareholders and agents. In *Mauritius Commercial Bank Ltd v Mr Robert Lesage and Ors*¹⁹ the Supreme

14 In *Alfred v Narainsamy Chetty* 1899 MR 40, the Court held that 'the Ordinance of 1888 introduced what was not in the Ordinance of 1852 – the private individual who institutes a criminal prosecution.'

15 Act No. of 2001.

16 Section 144.

17 Section 2 defines a 'manager' of the company.

18 Section 2 defines a 'registered agent' of the company.

19 *Mauritius Commercial Bank Ltd v Mr Robert Lesage and Ors* 2010 SCJ 222.

Court held that '[a]s far back as the decision of *Salomon v Salomon Co. Ltd* [1897] AC 22, companies have been recognised as separate legal entities to their shareholders, their directors and their Employees.'²⁰ In *Barahim M F v Transinvest (Mauritius) Ltd*²¹ the Supreme Court of Mauritius held that '[i]t is trite law that under section 26 of the Companies Act, a company incorporated under the Companies Act is a body corporate, having its own legal entity distinct from that of the shareholders and directors ...'²² This means that for a private prosecution to be instituted by a company, it has to be instituted in the company's name as opposed to its employee, agent or manager's name. Therefore, an argument could be made, that an employee, agent or manager of a company may not invoke section 121 to institute a private prosecution against a person who has committed an offence against the company. In the light of the fact that there has been no case in which Mauritian courts have dealt with the issue of whether or not a private company, which has not been expressly authorised by the establishing statute, may institute a private prosecution under section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act, if this issue were to arise, courts may choose one of two approaches above. In the author's opinion, the preferable approach would be for courts to interpret the law as empowering a private company to institute a private prosecution. This is because of two reasons: one, like natural persons, juristic persons may also be victims of crime; and two, as will be discussed below, there are mechanisms in place under Mauritian law to ensure that private companies do not abuse private prosecutions.

The Right to Institute a Private Prosecution?

Related to the above is whether a person has a right to institute a private prosecution. Section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act does not state that a person has a right to institute a private prosecution. Mauritian courts have taken different approaches on the issue of whether a person has a right to institute a private prosecution. There are some decisions from Mauritian courts to the effect that section 121 provides for the right to institute a private prosecution. As early as 1899 in the case of *Alfred v Narainsamy Chetty*²³ the Court observed that '[i]t is true that a private person who avails himself of the right conferred on him by that Ordinance to

20 *Mauritius Commercial Bank Ltd v Mr Robert Lesage and Ors* 2010 SCJ 222, p. 225.

21 *Barahim M F v Transinvest (Mauritius) Ltd* 2013 SCJ 418.

22 *Barahim M F v Transinvest (Mauritius) Ltd* 2013 SCJ 418, p. 6.

23 *Alfred v Narainsamy Chetty* 1899 MR 40.

prosecute before a District Magistrate ... prosecutes on behalf of the public.²⁴ In this case the Court holds expressly that a person has a right to institute a private prosecution. A few years later, in the 1903 case of *Anicet v Camal Boudou*²⁵ the Court also held that '[t]he right of a person aggrieved to prosecute implies a right of prosecution by persons either acting under his or her authority, or having power to prosecute on his or her behalf; we hold that a husband is entitled to prosecute on behalf of his wife.'²⁶ The same right was reiterated in the 1932 case of *André Tronche v R*²⁷ in which the court held that the respondent 'exercised his rights to prosecute' the appellant.²⁸ The above three cases were decided during colonialism.

At independence Mauritius adopted a constitution and as mentioned above this constitution does not provide for the right to institute a private prosecution. In the 1994 of *Edath-Tally Nizam v Michael James Kevin Glover*²⁹ the Supreme Court had to directly answer the question of whether a person who is not a victim of crime has a constitutional right to institute a private prosecution. The applicant, a Mauritian businessman, instituted a private prosecution against the respondent, a Cabinet Minister in the Mauritian government, for unlawful possession of drugs (under the Dangerous Drugs Act) and for conspiracy to import drugs under the Criminal Code. The applicant argued that he had a right under sections 3 and 72 of the Constitution to institute a private prosecution even if he had not been a victim of the respondent's alleged crimes. Section 3 of the Constitution provides that:

It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms – (a) the right of the individual to life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation, and

24 *Alfred v Narainsamy Chetty* 1899 MR 40, p. 3.

25 *Anicet v Camal Boudou* 1903 MR 72.

26 *Anicet v Camal Boudou* 1903 MR 72, p. 2.

27 *André Tronche v. R* 1932 MR 3.

28 *André Tronche v R* 1932 MR 3, p. 2.

29 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409.

the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Section 72 provides for the establishment of the office of the DPP, the qualifications someone must have to qualify to be appointed the DPP, the powers of the DPP, and the independence of the DPP.³⁰ The applicant argued that

[U]nder section 3 and, impliedly, under section 72(3)(b) of ... [the] Constitution, an individual had ... a fundamental right to enter prosecutions, irrespective of his being an aggrieved party or not, though the DPP

30 Section 72 provides that '(1) There shall be a Director of Public Prosecutions whose office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission. (2) No person shall be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court. (3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do – (a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law); (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and (c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority. (4) The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or through other persons acting in accordance with his general or specific instructions. (5) The powers conferred upon the Director of Public Prosecutions by subsection (3)(b) and (c) shall be vested in him to the exclusion of any other person or authority: Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court. (6) In the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority. (7) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purposes of any such proceedings to any other court, shall be deemed to be part of those proceedings: Provided that the power conferred on the Director of Public Prosecutions by subsection (3)(c) shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved except at the instance of such a person.'

could very well, under section 72(3)(c) and (5) of the Constitution, discontinue the proceedings.³¹

The respondent argued that ‘an individual has never been entitled under the Constitution and our law to enter a prosecution unless he was an aggrieved person and that, in any event, an offence under section 41 of the [Dangerous Drugs] Act could be prosecuted only by the DPP.’³² The applicant relied on English case law on private prosecutions to argue that ‘any private citizen in England has a right to enter a prosecution whether he is an aggrieved party or not’³³ and that Mauritian ‘procedural laws in *pari materia* should avail since the administration of criminal justice largely follows what obtains in England.’³⁴ The Court, after analysing the differences between the British and the Mauritian criminal justice systems and the relevant provisions of the Mauritian constitution,³⁵ held that:

It is clear from its terms that section 3 does not confer on an individual a right to prosecute other persons or even a right to have another person prosecuted by the DPP. It is also clear that the enforcement of the protective provisions with regard to the rights recognised in sections 3 to 16 is open only to a person who is aggrieved within the meaning of section 17(1), in that the action will lie only at the instance of the person in relation to whom any of those rights is alleged to have been contravened.³⁶

The Court added that

In so far as the expression “protection of the law” used in section 3(a) is concerned, that expression would clearly cover a wider field than is envisaged by the use of the same expression in section 10 which deals, generally speaking, with the rights of due process guaranteeing a fair trial in criminal and civil cases though there are certain differences in the section with regard to the specific modalities of protection in criminal as distinct from civil cases. The expression would generally cover the protection of all laws that give effect to the various rights included in sections 3 to 16.

31 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 4.

32 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 4.

33 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 9.

34 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 9. Emphasis in original.

35 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, pp. 5–7.

36 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 8.

As is obvious from the proviso to section 17(2), the protection would be by way of civil redress and the Supreme Court will withhold the exercise of its jurisdiction where adequate means of redress are or have been available. But as already noted, section 3 confers no fundamental right on any citizen to prosecute any person but only provides civil redress when he is an aggrieved party, that is to say, when a particular right “has been, is being or is likely to be contravened in relation to him”, thus excluding any *actio popularis*.³⁷

On the issue of whether Mauritian courts should follow the procedure in England in terms of which every person, whether aggrieved or not, has a common law right to institute a private prosecution, the Court held that:

It would not be correct to import the law of England into our own law except where our law makes specific provision to that effect ... In England, basic rights are deemed to have been conferred by the common law to the extent that those rights have not been modified by statute, whereas in Mauritius all rights are based on written law, whether it is the Constitution or any other law. In the absence of specific provisions in our own statutes in that regard, it is not possible, therefore, to import English law.³⁸

Several points should be noted about the Court’s judgement. Firstly, the Constitution does not provide for the right to institute a private prosecution. Secondly, the Constitution does not provide for the right of any person to approach the DPP to request or compel him to prosecute; thirdly the Court makes it very clear that in Mauritius all rights have to be based on written law. In other words, according to the Court, common law rights have no place in Mauritian law. Although some common law rights have been included in statutes in Mauritius,³⁹ it is argued that the Court’s holding that all rights in Mauritius have to be conferred by statute is questionable because there have been cases where the Supreme Court has held that there are common law rights – that is, rights not created or recognised by statute. These have included legal professional privilege (the right to have the communication between the lawyer and

37 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 8. Emphasis in original.

38 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 9.

39 For example the right to trade mark, see *Sprints Ltd. v Comptroller of Customs and Chipie Design and Signoles S.A.* Privy Council Appeal No. 45 of 1998, p. 2; and the right of an accused to confront state witnesses, see Article 10(1)(e) of the Constitution, *State v Charles Jean Desire Huberto* 2012 SCJ 407, p. 6.

his client to be kept confidential),⁴⁰ the 'common law right of the landlord to recover the possession of his premises';⁴¹ the common law right of 'company finding out that another company has been or is about to be registered under the same name as itself ... to restrain the newcomer from the use of that name';⁴² 'the common law right protection against the passing off of goods of another person'⁴³ and the 'former common law right of the employer to terminate unilaterally and without cause the employment of his worker' which was abolished by the 1963 Termination of Contracts of Service Ordinance.⁴⁴ In other words, before its abolition it was part of Mauritian law. Finally, in *Sonah H v The State*⁴⁵ the Supreme Court referred to

[R]ules of evidence which would generally apply with regard to the exercise of the common law right to examine a witness about a former out of court statement made by him which is alleged to be inconsistent with his present testimony in Court when this is done in the course of cross examination with a view to impeaching his credibility.⁴⁶

The above examples illustrate that the Court's justification for disregarding the common law right of any private person, whether aggrieved or not, to institute a private prosecution is easily disputable. One would have expected the court to come up with a more convincing reason as did the South African high court when it had to deal with a similar issue.⁴⁷ Still on the question of whether a

40 *Ahmine A R v Chady M S & Anor* 2013 SCJ 264, p. 10.

41 *Allied Cinemas Company Limited v Allabux* 1974 MR 202, p. 2. This right is now restricted by the Landlord and Tenant Ordinance, 1960. See also *Merville and anor v Limalia and ors* 1992 MR 201; 1992 SCJ 25.

42 *Budget Tours (Mauritius) Ltd. v Budget Holidays International Ltd.* 1978 MR 188, p. 188. This issue is now governed by the Companies Act of 2001.

43 *Polo/Lauren Co Ltd Partnership v Regent Ltd & 2 Ors* 2004 SCJ 45, p. 14.

44 *Cayeux Ltd v De Maroussem* 1974 MR 166, p. 3; *Danse v Manager Ferney Sugar Estate* 1976 MR 289, p. 2; *Harel Freres Ltd. v Veerasamy and Anor*, 1968 MR 218, p. 2; *Saint Aubin Limitee v Alain Jean Francois Doger De Speville* 2011 PRV 3; [2011] UKPC 42, p. 13; *L.S.C. Saintas v J.O.B. Textiles Ltd.* 2000 SCJ 023, p. 6; *Vacoas Transport Co. Ltd. v Pointu* 1970 MR 35, p. 1.

45 *Sonah H v The State* 2014 SCJ 435.

46 *Sonah H v The State* 2014 SCJ 435, p. 3.

47 In *Attorney-General v Van der Merwe and Bornman* 1946 OPD 197, p. 201, the South African High Court gave the following as the reason why a person who is not a victim of crime may not institute a private prosecution: 'to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to

person has a right to institute a private prosecution, in *Edath-Tally Nizam v Michael James Kevin Glover*⁴⁸ the Supreme Court held that section 72 of the Constitution ‘implies that an individual may in accordance with our law enter a prosecution.’⁴⁹ This holding makes it very clear that an aggrieved party does not have a constitutional right to institute a private prosecution under section 72 of the Constitution. It is now clear that the position taken by the Supreme Court is that the Constitution cannot be interpreted as creating the right to institute a private prosecution.

A related question is whether an aggrieved person has a right under section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act to institute a private prosecution. This is an issue that the court in *Edath-Tally Nizam v Michael James Kevin Glover*⁵⁰ does not address. This is because it was not one of the issues that the Court was dealing with. Close to decade later, in the case of *Hurnam D v AH Foon Chui Yew Cheong & Ors*,⁵¹ the Court held that an aggrieved party has the ‘power’ to initiate a private prosecution.⁵² In other words, such a person does not have a right. He or she has the power to institute a private prosecution. A few years later, the Court in *Suneechara O v The State*⁵³ held that in Mauritian law there is a ‘possibility of a private individual lodging a private prosecution provided he is an aggrieved party.’⁵⁴ In this case it is not a right but a ‘possibility.’ In one case the magistrate seemed to have had the impression that in some of the cases above the Supreme Court held that an aggrieved person has a right to institute a private prosecution although that right is not absolute.⁵⁵ What emerges from the above discussion is that Mauritian courts have at different times reached different conclusions on the question of whether an aggrieved person has a right to institute a private prosecution. In the earlier cases, courts held that such a person has a right. However, in later cases the position has changed. In one case the court held that he has a ‘power’ and in another case that he has a ‘possibility.’ What is beyond doubt is that such a right is neither expressly provided for in the constitution nor any legislation in Mauritius. Parliament would have to amend the law to specifically

curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.’

48 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409.

49 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 10.

50 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409.

51 *Hurnam D v AH Foon Chui Yew Cheong & Ors* 2003 SCJ 26; 2003 MR 187.

52 *Hurnam D v AH Foon Chui Yew Cheong & Ors*, p. 5.

53 *Suneechara O v The State* 2007 SCJ 131.

54 *Suneechara O v The State* 2007 SCJ 131.

55 *Deerpalsing Nunkeshwarsingh v Bhuckory Sanjay & Ors* 2009 PL3 22.

provide for that right. This brings us to another question: who is an aggrieved party for the purpose of instituting a private prosecution?

Aggrieved Party?

As mentioned earlier, in Mauritius private prosecutions are governed by two different pieces of legislation: the Criminal Procedure Act and the District and Intermediate Courts (Criminal Jurisdiction) Act. The question of whether only an aggrieved party may institute a private prosecution is answered in the Criminal Procedure Act but not in the District and Intermediate Courts (Criminal Jurisdiction) Act. Section 4 of the Criminal Procedure Act provides that:

(1) In any case of crime or of misdemeanour triable before the Supreme Court, the Director of Public Prosecutions may, on the complaint of an aggrieved party, institute a prosecution on behalf and at the expense of the State. (2) Where the Director of Public Prosecutions has declined to institute a prosecution under subsection (1), the aggrieved party or his representative may, subject to section 5, institute a prosecution.

The Criminal Procedure Act does not define an ‘aggrieved party.’ It is not clear if this refers to a victim of crime. The argument that it could mean another person other than a victim of crime cannot easily be dismissed in the light of the facts that: one, in cases where the legislator intended a specific section to be applicable to only victims of crime, this was clearly stated in the Criminal Procedure Act;⁵⁶ two, in other pieces of legislation in which the phrase has been used, the legislature has defined it;⁵⁷ and three, the Interpretation and General

56 For example, section 20 which deals with the ‘description of victim’ by providing that ‘(1) The names of persons against whom the offence is committed, or whose description is involved in the statement of the offence, shall be specified. (2) Such persons shall in general be described by their first names and surnames, where they are known by such names, or by the names by which they are commonly known.’ See also section 109 which provides for ‘child victim as witness’ by stating that ‘In every trial of an offence charged as having been committed, or attempted to be committed, upon a child of tender years, the child, if under the age of 9, shall be admissible as a witness, where the Judge or Magistrate by or before whom the case is tried, is satisfied that he has sufficient intelligence to make a correct statement on the subject of the trial, although he may not understand the nature of an oath or of a solemn affirmation.’

57 See for example, section 24A(2) of the Education Act, Act 39 of 1957; Section 6 of the Equal Opportunities Act, Act No. 42 of 2008; and section 2 of the Protection from Domestic Violence Act, Act No. 6 of 1997.

Clauses Act⁵⁸ does not define 'aggrieved party.' However, the Supreme Court, as the discussion below illustrates, has interpreted an 'aggrieved party' to mean a victim of crime. Unlike the Criminal Procedure Act, section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that: 'Any agent, manager or other employee may, without any special power or mandate, prosecute an offence committed to the prejudice of his principal or employer.' Section 121 of the District and Intermediate Courts (Criminal Jurisdiction) Act does not provide that for a person to institute a private prosecution, he or she should be 'aggrieved' by the commission of the offence. What matters is that the offence in question should have been committed against that person's employer or principal. In other words, it is the principal or the employer, as opposed to the private prosecutor, who should be a victim of crime. However, courts have held that in all private prosecutions, whether before the Supreme Court or the District Court, the private prosecutor must be an aggrieved party.

The issue first arose in the 1888 case of *Monty v Queen*⁵⁹ in which the appellant, a guard at the Inland Revenue, was convicted by the magistrate of accepting a bribe from a member of the public and sentenced to six months' imprisonment. He had been prosecuted at the instance of the Superintendent of Inland Revenue. The appellant argued that the Superintendent of Inland Revenue was neither an Inspector of Police nor a public prosecutor and therefore had no right to prosecute the appellant. The Court outlined, inter alia, the appointment process and the powers and functions of Superintendent of Inland Revenue⁶⁰ and held that:

In the first place, in this matter, our custom and the custom of all modern civilised nations has departed from the Roman system of law, which invited any citizen to prosecute for any offence which was injurious to the public interest. With a wiser and what I will call a more salutary policy, and one which is more suitable to our state of society, our law has confided the important privilege of prosecution to different descriptions of persons. In the first place there is the party injured by any offence, who under certain conditions is entitled to prosecute. In the second place, there is the Procureur General who under the Ordinance 29 of 1853 by himself and his deputes, can prosecute in any court, and third, there is the Police, who, under Ordinance 11 of 1860 ... are entitled to do so ... Now

58 Interpretation and General Clauses Act, Act 33 of 1974.

59 *Monty v Queen* 1888 MR 15.

60 *Monty v Queen* 1888 MR 15, pp. 2–3.

these are the classes of persons who have the right to appear as prosecutors in our Courts ...⁶¹

The Court makes it clear that for a person to institute a private prosecution, he or she has to be 'injured by any offence.' However, unlike in the case of the other two parties who may institute prosecutions where the court refers to the applicable legislation, in the case of private prosecutions the court does not refer to which law empowers a victim of crime to institute a private prosecution. This issue arose again in 1903 in the case *Anicet v Camal Boudou*.⁶² The question in this case was whether the magistrate was right in holding that a husband had no *locus standi* to institute a private prosecution on behalf of his wife who had been assaulted. The Court first observed that in Mauritian law a husband could prosecute on behalf of his wife if she had been abused or slandered.⁶³ It is against that background that the Court held that a husband:

[M]ay prosecute for any offence committed to the prejudice of his wife. His right to do so results from his legal position towards his wife. By law he is bound to protect his wife – this per se implies that he has the power to take such measures as may be necessary for her protection. It stands to reason, therefore, that if his wife has been assaulted or she has been slandered, he is entitled to bring the offender to condign punishment. This right we consider also results from the general position of the husband towards his wife.⁶⁴

For the first time the court held that a husband is an aggrieved party when an offence is committed against his wife. A few years later, in 1911, the Court allowed a widow to institute a private prosecution against those who had defamed her late husband.⁶⁵ The issue arose again in 1925 in the combined cases of *Raymond & Ors v Captain Collin; Abass Meea & Ors v Others*⁶⁶ in which the accused argued that the prosecutor, a Captain of a ship, did not have the title to institute a private prosecution for the offences they had committed against the

61 *Monty v Queen* 1888 MR 15, p. 3.

62 *Anicet v Camal Boudou* 1903 MR 72.

63 *Anicet v Camal Boudou* 1903 MR 72, p. 72.

64 *Anicet v Camal Boudou* 1903 MR 72, p. 72.

65 *Newton v Bench of Magistrates of Port Louis & Morel* 1911 MR 99.

66 *Raymond & Ors v Captain Collin 2. Abass Meea & Ors v Others* 1925 MR 156.

ship on voyage.⁶⁷ The court held that the Captain was an aggrieved party and could therefore institute a private prosecution against the accused because the offences had been committed against his authority. This is because, the court reasoned,

It is clear that if he allowed such a defiance and affront to his authority to pass without securing an enquiry by the only competent body in Mauritius (the Marine Court), there might be serious consequences to his professional reputation, and therefore to his means of livelihood. It is also clear that any menace to the safety of the ship would at the same time involve the personal responsibility of the captain.⁶⁸

The Supreme Court later drew a distinction between a private prosecutor and a public prosecutor by holding that a private prosecutor is a person 'who brings a criminal charge for some offence committed to his prejudice' and a public prosecutor means a person 'who informs the Court of an offence where the public interest is involved.'⁶⁹ In other words, private prosecutions serve private interests and public prosecutions serve public interests. The issue of whether a citizen may institute a private prosecution when he is not an aggrieved party arose again in the 1994 case of *Edath-Tally Nizam v Michael James Kevin Glover*⁷⁰ in which the Court, as discussed above, held that a member of the public cannot institute a private prosecution against another person for offences under the Dangerous Drugs Act. In this case the court declined to decide the issue of whether the applicant was an 'aggrieved party' because the applicant's affidavits on this issue were irrelevant and the Supreme Court was not 'sitting as Judges of fact' as the matter had been referred to the Supreme Court by the trial court.⁷¹ However, the Court agreed with the respondent's submission that 'only aggrieved parties may enter prosecutions before the District Court.'⁷² Since then the Supreme Court has been consistent with the view that for a person to institute a private prosecution, he or she has to be 'an aggrieved party'

67 The facts of the case show that the 'Appellants were convicted under article 225 (e) of the Merchant Shipping Act for the offence of combining together to disobey lawful commands in order to impede the progress of the voyage of the S.S. Corsican from Vohémar to Mauritius, by quitting the said ship without leave and refusing to proceed on board to perform their ordinary duties, on 30th May 1925, in the Bay of Vohémar at Madagascar.'

68 *Raymond & Ors v Captain Collin 2. Abass Meea & Ors v Others* 1925 MR 156, p. 2.

69 *Director of Public Prosecutions v Anmole* 1976 MR 152; SCR 128.

70 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409.

71 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 5.

72 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 14.

this is the case in both lower courts and in the Supreme Court.⁷³ It is now clear that under Mauritian law, only an aggrieved party may institute a private prosecution. This is the case although it is not a requirement in the District and Intermediate Courts (Criminal Jurisdiction) Act. The reason why a private prosecution should only be instituted by an aggrieved party is, according to the District Court, to avoid 'open[ing] the floodgates.'⁷⁴ Allowing a person who is not a victim of crime to institute a private prosecution would amount to 'usurping the functions of a public prosecutor.'⁷⁵ Examples from some countries such as Uganda where any person, whether a victim of crime or not, may institute a private prosecution shows that it is possible for people who are not victims of crime to use private prosecutions to harass others.⁷⁶ However, what matters is the existence of safeguards to ensure that whoever has instituted a private prosecution does not abuse it. As the discussion below shows, there have been cases where victims of crime have abused their right to institute private prosecutions.

The challenge though is that courts do not define who an 'aggrieved party' is. Case law shows that the following have been found to be 'aggrieved' and therefore have locus standi to institute private prosecutions: direct victims of crime, such as victims of assault,⁷⁷ theft,⁷⁸ insult in writing,⁷⁹ criminal defamation,⁸⁰ dismissing the prosecutor without paying him contrary to the

73 *Hurnam D v AH Foon Chui Yew Cheong & Ors* 2003 SCJ 26; 2003 MR 187, p. 5; *Suneechara O. v. The State* 2007 SCJ 131, p. 7.

74 *Deerpalsing Nunkeshwarsingh v Bhuckory Sanjay & Ors* 2009 PL3 22, p. 3.

75 *Anicet v Camal Boudou* 1903 MR 72, p. 2.

76 See for example, Ephraim Kasozi, 'Balunywa case dismissed' 8 July 2014, *The Monitor*. Available at <http://www.monitor.co.ug/News/National/Balunywa-case-dismissed/688334-2375502-v58y74/index.html> (accessed 09 November 2016), in which a private citizen who did not have sufficient evidence instituted a private prosecution against a senior academic for forgery and presenting false academic papers. The case was dismissed for lack of evidence. See also Ephraim Kasozi, 'The private prosecution against city businessman' 19 January 2013, *The Monitor*. Available at <http://www.monitor.co.ug/News/National/The-private-prosecution-against-city-businessman/688334-1669058-11npt70/index.html> (accessed 9 November 2016). In which a private prosecution was instituted against a businessman for conspiracy to defeat tax laws, forgery of a court document and uttering a false document. The prosecution was based on media reports.

77 *Naggea D. v Rosseawon T* 2003 SCJ 246; 2003 MR 222.

78 *Piaree Sirdarsing vs R. and Anor* 1938 MR 77.

79 *Atchia v The Queen and Atchia* 1955 MR 21.

80 *Coralie v The Queen and Beejadhur* 1957 MR 290; *Amod Cassam M. D v Hurnam Devendranath* 2006 PL1 1; *Coindreau L. v Lazer A. & Others* 2004 SCJ 166.

Labour Act,⁸¹ giving false testimony against the prosecutor,⁸² perjury,⁸³ a captain if the offence was committed against his ship,⁸⁴ a husband if the offence is committed against his wife,⁸⁵ and a widow if his late husband's reputation is defamed⁸⁶ or where the husband was murdered⁸⁷ and a person whose brother was murdered.⁸⁸ Because of the fact that the Constitution of Mauritius recognises equality between men and women,⁸⁹ it cannot be disputed that a wife may also bring a private prosecution on behalf of her husband. It is not clear if an 'aggrieved party' includes a parent or guardian bringing a private prosecution on behalf of his minor child or a legal representative on behalf of a mental patient. In other words, there is a need for a clear definition of 'an aggrieved party.' The Cambridge Dictionary defines 'aggrieved' to mean 'unhappy and angry because of unfair treatment.'⁹⁰ It is precisely because of the lack of a definition of an 'aggrieved party' that there have been cases where people have erroneously considered themselves to have locus standi to institute private prosecutions. In some countries such as South Africa,⁹¹ Ethiopia,⁹²

81 *Nowbuth Muslim v ABC Coach Works Ltd & Ors* 2006 IND 58.

82 *Bail Court Ranagapen v The Queen* 1873 MR 74.

83 *Alfred v Narainsamy Chetty* 1899 MR 40.

84 *Raymond & Ors v Captain Collin 2. Abass Meea & Ors v Others* 1925 MR 156.

85 *Anicet v Camal Boudou* 1903 MR 72.

86 *Newton v Bench of Magistrates of Port Louis & Morel* 1911 MR 99.

87 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194.

88 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194.

89 Section 3.

90 See <http://dictionary.cambridge.org/dictionary/english/aggrieved>.

91 Section 7 of the Criminal Procedure Act provides that '(1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence – (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; (b) a husband, if the said offence was committed in respect of his wife; (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59 (2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.'

92 Article 47 of the Criminal Procedure Code provides that 'No person other than: (a) the injured party or his legal representative: or (b) the husband or wife on behalf of the spouse; or (c) the legal representative of an incapable person; or (d) the attorney oia body corporate: may conduct a private prosecution.'

Zimbabwe,⁹³ Namibia,⁹⁴ and Botswana⁹⁵ the law is very clear on who may institute a private prosecution.

IV The Role of the Director of Public Prosecutions (DPP) in Private Prosecutions

A private prosecution is the exception to the general rule that an offence has to be prosecuted by a public prosecutor. Different countries, as discussed below, have adopted different approaches to the question of whether the DPP has to decline to prosecute for a private prosecutor to be able to institute a private prosecution. What follows is a discussion of how this issue has been dealt with in Mauritius.

DPP's Decline to Prosecute

Another issue that is related to the institution of private prosecutions is whether a private prosecution may only be instituted after the public prosecutor has declined to prosecute. In some countries such as South Africa,⁹⁶ Ethiopia,⁹⁷

93 Section 14 of the Criminal Procedure and Evidence Act provides that 'The following shall possess the right of prosecution – (a) a husband, in respect of offences committed against his wife; (b) the legal guardians or curators of minors or mentally disordered or defective persons, in respect of offences committed against their wards; (c) the wife or children or, where there is no wife or child, any of the next-of-kin of any deceased person, in respect of any offence by which the death of such person is alleged to have been caused; (d) public bodies and persons on whom the right is specially conferred by statute, in respect of particular offences.

94 Section 7 of the Criminal Procedure Act. It is worded exactly as section 7 of the South African Criminal Procedure Act outlined above.

95 Section 15 of the Criminal Procedure and Evidence Act provides that '(1) The following persons also possess the right of prosecution under section 14 as private parties- (a) a husband in respect of offences committed against his wife; (b) the legal guardians or curators of minors or lunatics in respect of offences committed against their wards; (c) the wife or children or, where there is no wife or child, any of the next of kin of any deceased person in respect of any offence by which the death of such person is alleged to have been caused.'

96 Section 7 of the Criminal Procedure Act.

97 Article 44(1) of the Criminal Procedure Code provides that 'Where the public prosecutor refuses to institute proceedings ... in relation to an offence punishable on complaint only, he shall authorise in writing the appropriate person mentioned in Art. 47 to conduct a private prosecution.'

Namibia,⁹⁸ Botswana,⁹⁹ Swaziland¹⁰⁰ and Zimbabwe,¹⁰¹ a private prosecution may only be instituted after a DPP or public prosecutor has declined to prosecute. In Uganda there is no such requirement.¹⁰² In Mauritius, whether or not a private prosecution will only be instituted after the DPP has declined to prosecute will depend on Court in which the private prosecutor has decided to institute a private prosecution. As mentioned above, section 4(2) of the Criminal Procedure Act provides that '[w]here the Director of Public Prosecutions has declined to institute a prosecution under subsection (1), the aggrieved party or his representative may ... institute a prosecution.' The fact that the DPP has declined to prosecute does not oblige the aggrieved party to institute a private prosecution.¹⁰³ However, in terms of the District and Intermediate Courts (Criminal Jurisdiction) Act, the DPP does not have to decline to prosecute before a private prosecution may be instituted in lower courts. However, in some cases courts seem to have held the view that for a private prosecution to be instituted in any court, it is a prerequisite for the DPP to decline to prosecute. In the 1892 case of *Ex parte Pakeree*,¹⁰⁴ the Mauritian High Court held that a private prosecution may only be instituted after the DPP has declined to prosecute. The Court held that:

[I]t is important ... to note that the systems of administering Criminal Justice in England and Mauritius are in many respects different. In England, there was, until very recently, no Officer who was specially

98 Section 7 of the Criminal Procedure Act.

99 Section 14 of the Criminal Procedure and Evidence Act provides that 'In all cases where the Director of Public Prosecutions declines to prosecute for an alleged offence, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he individually has suffered by the commission of the offence, may prosecute in any court competent to try the offence, the person alleged to have committed it.'

100 Section 10 of the Criminal Procedure and Evidence Act provides that 'If the Attorney-General declines to prosecute for an alleged offence, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he individually has suffered by the commission of such offence, may prosecute the person alleged to have committed it in any court.'

101 Section 13 of the Criminal Procedure and Evidence Act. It is worded exactly as section 10 of the Swazi Criminal Procedure and Evidence Act above.

102 Section 43 of the Magistrates Court Act, Chapter 16.

103 *Collet and anor v Albert* 1955 MR 300, p. 5, the DPP declined to prosecute but the aggrieved party did not institute a private prosecution.

104 *Ex parte Pakeree* 1892 MR 22.

entrusted with the care and management of prosecuting the crimes of the kingdom, but private parties were compelled to do so in almost all cases. In Mauritius, we have always had a public official, whose chief duty is to prosecute all crimes and attend to the vindication of Justice in all cases and of whom the Police officers who generally prosecute lesser crimes in the lower Courts of the Colony are, so to speak, the implied delegates. At any rate, the Attorney and Procureur General has by long use and wont supported the case of the Crown in all criminal appeals, and Cases under the Labour Law. The law places the entire direction of the criminal work of the Colony under the control of that officer, and he may prosecute in all cases, while the private prosecutor is only allowed to prosecute, if the public prosecutor has refused to do so.¹⁰⁵

There are two challenges with this judgement. Firstly, the Court does not refer to the law which empowers the private prosecutor to prosecute only when the public prosecutor has declined to prosecute. Secondly, in that case itself and in earlier cases,¹⁰⁶ the facts are silent on whether private prosecutions were only instituted after the public prosecutors had declined to prosecute. This holding should be understood in the light of the fact that at the time the case was decided, there was no specific provision empowering a person to institute a private prosecution. The provision which empowers a person to institute a private prosecution was introduced in 1888. In *Alfred v Narainsamy Chetty*¹⁰⁷ the Court held that ‘the Ordinance of 1888 introduced what was not in the Ordinance of 1852 – the private individual who institutes a criminal prosecution.’¹⁰⁸ Some litigants believe that a private prosecution is a remedy if the police have declined to prosecute.¹⁰⁹ The Supreme Court has held that ‘the decision of the DPP not to initiate a prosecution is not a relevant consideration in determining the success or failure of a private prosecution.’¹¹⁰ It is evident that for a private prosecution to be instituted before the Supreme Court, it is a prerequisite that the DPP should have declined to prosecute. This is however, not a requirement for a private prosecution to be instituted before a lower court. The Mauritian approach is different from that adopted in other African countries

105 *Ex parte Pakeree* 1892 MR 22, p. 23.

106 *Bail Court Ranagapen v The Queen* 1873 MR 74; *Crecy de Lanux v Junior District Magistrate of Port Louis* 1888 MR 87.

107 In *Alfred v Narainsamy Chetty* 1899 MR 40.

108 *Alfred v Narainsamy Chetty* 1899 MR 40.

109 *Hansa v Manjoo* 1958 MR 91, p. 2.

110 *Budlawan v R* 1987 MR 50; 1987 SCJ 153, p. 153.

such as South Africa, Namibia, Ethiopia, Zimbabwe, Swaziland, and Botswana. In these countries, as illustrated above, the DPP has to decline to prosecute before a private prosecution may be instituted irrespective of the court before which the private prosecution is instituted.

Another issue relates to the certificate that the private prosecutor has to present before the Supreme Court to be able to institute a private prosecution. Section 5 of the Criminal Procedure Act provides that:

(1) Where an aggrieved party or his representative intends to institute a prosecution, he shall produce before a Judge an information duly prepared, together with a certificate endorsed on it, under the hand of the Director of Public Prosecutions, specifying that he has seen such information and declines to prosecute at the expense of the State the party charged for the offence named in the information.

....

(4) The certificate under subsection (1) shall be given by the Director of Public Prosecutions within one week from the exhibition to him of the proposed information.

There are at least three points to note about the above provisions. One, the certificate is a precondition for a private prosecution to be instituted before the Supreme Court. The Supreme Court emphasised that this certificate is not a requirement for private prosecutions before District or Intermediate courts. The Court held that

[U]nlike the provisions governing prosecutions before the Supreme Court, there is no specific provision requiring a certificate of non-prosecution from the DPP or the leave of the Court or a Judge before a party can enter a prosecution before a District Court. It may very well be that these two requirements owe their origins to the desirability of strictly controlling process before the Supreme Court where the costs of trial, including the attendance of jurors, would be high.¹¹¹

Two, the accused can only be prosecuted for an offence that the DPP has declined to prosecute. If, for example, the accused could be prosecuted for either murder or manslaughter but the DPP declines to prosecute murder, the private prosecutor must prosecute murder and not manslaughter. And finally, the DPP has no discretion whether or not to issue the certificate once the

111 *Edath-Tally Nizam v Michael James Kevin Glover* 1994 SCJ 409, p. 13.

private prosecutor has exhibited the proposed information to him or her. She/he must issue the certificate within one week. This timeframe within which the certificate must be issued is absent in legislation in other African countries such as South Africa,¹¹² Ethiopia,¹¹³ Namibia,¹¹⁴ Botswana,¹¹⁵ Swaziland,¹¹⁶ and Zimbabwe.¹¹⁷ In the author's opinion it is a good requirement as it ensures that the certificate is issued as soon as possible and prevents a situation where the DPP takes longer than necessary to issue such certificate. It also removes the ambiguity that has been faced in some countries such as South Africa¹¹⁸ and Zimbabwe¹¹⁹ on the issue of whether the DPP is obliged to issue a certificate should he decline to prosecute. The Mauritian legislation is silent on the time within which the private prosecutor has to institute a private prosecution after obtaining the certificate from the DPP.¹²⁰ In other Southern African countries such as South Africa¹²¹ and Namibia¹²² the private prosecutor has to institute a private prosecution within three months of the issue of the certificate otherwise the certificate will expire. This ensures that the accused's trial takes place

112 Section 7(2) of the Criminal Procedure Act.

113 Article 44(1) of the Criminal Procedure Code.

114 Section 7(2) of the Criminal Procedure Act.

115 Section 18 of the Criminal Procedure and Evidence Act.

116 Section 13 of the Criminal Procedure and Evidence Act.

117 Section 16 of the Criminal Procedure and Evidence Act.

118 *Singh v Minister of Justice and Constitutional Development & Another* (5072/05) [2006] ZAKZHC 20.

119 *Telecel Zimbabwe (Pvt) Ltd v AG of Zimbabwe N.O.* Civil Appeal No. SC 254/11 [2014] ZWSC 1 (28 January 2014). Available at <http://www.zimlil.org/zw/judgment/supreme-court/2014/1>.

120 There is one exception to this principle. It is found in section 4(1) of the Public Officers' Protection Act 45 of 1957 which provides that '(1) Every civil or criminal action, suit, or proceeding, by a person, other than the State, for any fact, act or omission, against a – (a) public officer in the execution of his duty;

(b) person engaged or employed in the performance of any public duty; or (c) person acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b), shall, under pain of nullity, be instituted within 2 years from the date of the fact, act, or omission which has given rise to the action, suit, or other proceeding.' In *Erriah v Hurnam* 1980 MR 288; 1980 SCJ 334 a private prosecution was dismissed because it had been instituted against a public official (a police constable) after the expiry of the period under section 4(1) the Public Officers' Protection Act.

121 Section 7(2)(c) of the Criminal Procedure Act provides that 'A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process ... within three months of the date of the certificate.'

122 Section 7(2)(c) of the Criminal Procedure Act is worded exactly as the South African section 7(2)(c) above.

within a reasonable time which is one of the elements of the right to a fair trial.¹²³ The fact that the Mauritian legislation does not provide for the expiration of the certificate to institute a private prosecution does not mean that the accused's right to be tried within a reasonable time will be violated. The Supreme Court held that an accused's right to a fair trial includes the right to be tried within a reasonable time and that a court will dismiss a case against the accused or prevent the prosecution from getting underway if it has not been instituted within a reasonable time.¹²⁴ The same principle is applicable in private and public prosecutions.

DPP's Intervention in a Private Prosecution

Private prosecutions may be abused. In *Crawford Adjusters & Ors v Sagicor General Insurance (Cayman) Ltd & Anor (Cayman Islands)*¹²⁵ the United Kingdom Court of Appeal (Lord Sumption) observed that '[t]he tort of malicious prosecution was created in the seventeenth and eighteenth centuries to deal with the problem of abusive private prosecutions, which was then a serious social evil ...'¹²⁶ There is evidence from other countries to the effect that private prosecutions have been abused.¹²⁷ In Mauritius there have also been cases where private prosecutions have been abused. For example in one case the Court held that the private prosecutor had based the prosecution on lies.¹²⁸ It is therefore important that measures are put in place to prevent or stop such abuses. The DPP's intervention in private prosecutions could be used to prevent or stop the abuse of private prosecutions. In *Sewnarain v R*¹²⁹ the Mauritian Supreme Court held that 'the Director of Public Prosecutions has

123 Article 14(3)(c) of the International Covenant on Civil and Political Rights. In *Peerbocus v R* 1991 MR 90; 1991 SCJ 212, the Court referred to the ICCPR when interpreting the Mauritian Bill of Rights.

124 *Hurnam D v AH Foon Chui Yew Cheong & Ors* 2003 SCJ 26; 2003 MR 187, p. 6.

125 *Crawford Adjusters & Ors v Sagicor General Insurance (Cayman) Ltd & Anor (Cayman Islands)* [2013] UKPC 17 (13 June 2013) [2013] UKPC 17, [2013] 6 Costs LO 826, [2013] 3 WLR 927, [2014] 1 AC 366, [2014] AC 366, [2013] WLR(D) 229, [2013] 4 All ER 8.

126 *Crawford Adjusters & Ors v Sagicor General Insurance (Cayman) Ltd & Anor (Cayman Islands)* [2013] UKPC 17 (13 June 2013) [2013] UKPC 17, [2013] 6 Costs LO 826, [2013] 3 WLR 927, [2014] 1 AC 366, [2014] AC 366, [2013] WLR(D) 229, [2013] 4 All ER 8 para 121.

127 See generally Jamil Ddamulira Mujuzi, 'The Right to Institute a Private Prosecution: A Comparative Analysis' (2015) 4 *International Human Rights Law Review* 222–255.

128 *Bhatoo v Nellayah and anor* 1982 MR 97; SCR 114.

129 *Sewnarain vs R* 1986 MR 149; 1986 SCJ 231.

the power and the duty to ensure, and this even applies to a private prosecution, that no abuse of the process of the criminal Courts is made.¹³⁰

Section 72(3) of the Constitution provides for two ways through which the DPP may intervene in private prosecutions: firstly, he has the power 'to take over and continue any such criminal proceedings that may have been instituted by any other person or authority';¹³¹ and secondly, he has the power 'to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority'.¹³² While interpreting a similarly formulated constitutional provision,¹³³ the Ugandan High Court held that these are two distinct powers.¹³⁴ The Mauritian Supreme Court held that section 72 gives the DPP 'the widest powers ... to control prosecutions at every stage'.¹³⁵ In *Mingard v The Commissioner of Police*¹³⁶ the Supreme Court held that in deciding whether or not to take over and continue with or discontinue a private prosecution under section 72(3) of the Constitution, the DPP 'is no doubt guided by the public interest'.¹³⁷ The Supreme Court emphasised the fact that under section 72 of the Constitution, '[a]ll prosecutions initiated by a party other than the DPP are ... subject to the DPP's decision to take over and continue or to discontinue'.¹³⁸ In *Hurnam D v AH Foon Chui Yew Cheong & Ors*¹³⁹ the Supreme Court held that the DPP is 'not ... amenable to prosecution [whether by a public or private prosecutor] in respect of a decision taken in the lawful discharge of his duties' under section 72 of the Constitution.¹⁴⁰ This is the case 'either whilst being in office or at a later stage, after leaving such office'.¹⁴¹ There are two ways through which

130 *Sewnarain vs R* 1986 MR 149; 1986 SCJ 231, p. 11.

131 Section 72(3)(a).

132 Section 72(3)(b).

133 Article 120(3) of the Ugandan Constitution provides that the functions of the Director of Public Prosecutions include: '(c) to take over and continue any criminal proceedings instituted by any other person or authority; (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority.'

134 *Uganda v Kayihura & Ors* (Revision Cause No. 34 of 2016) [2016] UGHCCRD 75 (17 August 2016).

135 *Bismillah Garments Ltd v The State* 1995 SCJ 216, p. 3.

136 *Mingard v The Commissioner of Police* 1988 MR 57; 1988 SCJ 73.

137 *Mingard v The Commissioner of Police* 1988 MR 57; 1988 SCJ 73, p. 2.

138 *Suneechara O. v The State* 2007 SCJ 131.

139 *Hurnam D v AH Foon Chui Yew Cheong & Ors* 2003 SCJ 26; 2003 MR 187.

140 *Hurnam D v AH Foon Chui Yew Cheong & Ors* 2003 SCJ 26; 2003 MR 187, p. 7.

141 *Hurnam D v AH Foon Chui Yew Cheong & Ors* 2003 SCJ 26; 2003 MR 187, p. 7.

the DPP may take over a private prosecution: either of his own volition¹⁴² or on the basis of an application made by the accused.¹⁴³ An important question is whether the DPP's power to take over and continue with or discontinue a private prosecution is subject to judicial review? It should be noted that this question is not answered in the Constitution or in any piece of legislation.

Courts have given different answers at different times. The issue first arose in the 1988 case of *Mingard v The Commissioner of Police*¹⁴⁴ in which the Court held that the DPP's decision whether or not to take over and continue with or discontinue a private prosecution is 'not subject to review'.¹⁴⁵ Fourteen years later in *Bissoonauth P v District Magistrate of Rose-Hill & Ors*¹⁴⁶ the Court saw 'no necessity ... to decide whether the D.P.P's decision under section 72 of the Constitution is reviewable or not' but pointed out that section 72(6) of the Constitution guaranteed that DPP's independence.¹⁴⁷ The issue of whether the DPP's power to discontinue a private prosecution is reviewable arose directly in the case of *Mohit J v DPP*.¹⁴⁸ In this case, the applicant instituted private prosecutions against those who had murdered her husband. The DPP took over and discontinued these private prosecutions without giving reasons for his decisions in most of the cases.¹⁴⁹ The applicant approached the Supreme Court to review the DPP's decision on the ground that he (the DPP) 'had not exercised his discretion in a judicious or proper manner'.¹⁵⁰ The Court referred to section 72 of the Constitution and to case law from common law jurisdictions to hold that the DPP's power to discontinue a private prosecution was not subject to judicial review. The Court reasoned that:

It is trite law that judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. Since it is beyond dispute that the DPP, before taking a decision to prosecute or not, does

142 This was done for example in the following cases: *Hurnam D v Fokeerbux N & Ors* 2013 SCJ 488, p. 7; and *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194.

143 *Bissoonauth P v District Magistrate of Rose-Hill & Ors* 2002 SCJ 14, p. 5.

144 *Mingard v The Commissioner of Police* 1988 MR 57; 1988 SCJ 73.

145 *Mingard v The Commissioner of Police* 1988 MR 57; 1988 SCJ 73, p. 2.

146 *Bissoonauth P v District Magistrate Of Rose-Hill & Ors* 2002 SCJ 14, p. 5.

147 *Bissoonauth P v District Magistrate Of Rose-Hill & Ors* 2002 SCJ 14, p. 6.

148 *Mohit J v DPP* 2003 SCJ 239; 2003 MR 134.

149 He gave reasons why he had stopped the first private prosecution but not the subsequent ones. See *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194, paras 4–7.

150 *Mohit J v DPP* 2003 SCJ 239; 2003 MR 134, p. 1.

not hear the parties and furthermore gives no reason for his decision, it follows that a judicial review of that decision is not meaningful and cannot be an appropriate remedy.¹⁵¹

The Court stressed the fact that

[I]t is not the role of the Court to see that each and every suspect should be brought to trial. There are many considerations which are within the knowledge of the DPP and it is for him, in his wisdom, having regard to public interest, to decide whether a case must be prosecuted or a private prosecution stopped. A person who considers that his constitutional rights “has been, is being or is likely to be contravened in relation to him” has a remedy under section 17 of the Constitution. Furthermore, nothing prevents the victim to bring a civil claim for compensation against the wrongdoer.¹⁵²

With the Supreme Court's permission, the appellant appealed against this holding to the Judicial Committee of the Privy Council. The issue before the Privy Council was ‘whether a decision by the Director of Public Prosecutions of Mauritius to discontinue a private prosecution, in exercise of his powers under section 72(3)(c) of the 1968 Constitution, is in principle susceptible to review by the courts.’¹⁵³ Before I deal with the Privy Council's judgement, it is imperative to analyse the above Supreme Court holding as some of the issues raised therein were not discussed by the Privy Council. Firstly, the Court held that the DPP may stop a private prosecution if he thinks that it is in the public interests to do so. However, the DPP does not have to give reasons for his decision. Secondly, the Court reasons that a person who has been aggrieved by the DPP's decision to discontinue a private prosecution may invoke section 17 of the Constitution and seek a remedy from courts. As mentioned above, section 17 is only applicable when a right in the Constitution has been violated or is threatened. The challenge is that the Constitution does not provide for the right to institute a private prosecution and therefore section 17 is not an option in case the DPP has stopped a private prosecution. As the Supreme Court itself observed in *Hurnam D v Fokeerbux N & Ors*,¹⁵⁴ that the ‘[p]laintiff rightly stated that he could not object to the constitutional powers of the DPP to strike out

151 *Mohit J v DPP* 2003 SCJ 239; 2003 MR 134, p. 21.

152 *Mohit J v DPP* 2003 SCJ 239; 2003 MR 134, p. 24.

153 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194, para 1.

154 *Hurnam D v Fokeerbux N & Ors* 2013 SCJ 488.

his private prosecution.¹⁵⁵ Thirdly, the Court reasoned that an aggrieved person may institute a civil action against the wrongdoer. This reasoning ignores at least two issues – not all victims of crime are interested in being compensated financially by the offender; and not all offenders are in a position to compensate their victims. Our attention now shifts to the Privy Council judgement.

Before the Privy Council, the DPP argued that the Supreme Court's judgement was correct that his powers cannot be subjected to judicial review. The appellant argued otherwise. The Privy Council referred to the Supreme Court's judgement and held that it was

[N]ot persuaded by the court's reasons for holding that the DPP's decisions to file a *nolle prosequi* or not to prosecute are not amenable to judicial review. The complainant may, as in this case, have no remedy against any suspected tortfeasor. The alternative course of resort to private prosecution is not an available option where it is a private prosecution which the DPP has intervened to stop. Recognition of a right to challenge the DPP's decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP's decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner.¹⁵⁶

The Privy Council adopted with approval the Fijian Supreme Court decision that the DPP's exercise of power would be reviewed by court if it were made:

1. In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)). 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review. 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe. 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved. 5. Where the DPP has fettered his or her discretion by a rigid policy – eg one that precludes prosecution of a specific class

155 *Hurnam D v Fokeerbux N & Ors* 2013 SCJ 488, p. 7.

156 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194, para 13.

of offences. There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.¹⁵⁷

The Privy Council concluded by setting aside the judgement of the Supreme Court of Mauritius and inviting the Court

to reconsider the appellant's applications in the light of this judgment and any evidence there may then be. That evidence will include any reasons the DPP may choose to give. But it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be. The English authorities cited above show that there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content. This is a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given. The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief.¹⁵⁸

The Supreme Court accepted that invitation and reconsidered the application. The applicant asked the Court to review the DPP's decision to discontinue one of her private prosecutions without giving her reasons.¹⁵⁹ The Court held that

157 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194, para 17. See also para 21.

158 *Mohit Jeewan v Director of Public Prosecutions* 2005 PRV 31; 2006 MR 194, para 22.

159 *Mohit J v The Director of Public Prosecutions* 2007 SCJ 97, p. 2, the Court observed that 'The applicant had during the period 2001 to 2003 lodged four private prosecutions against [the same accused] ... the first two for an offence under section 172(1) and the other two for an offence under section 39 of the Criminal Code. Whilst the first one was struck out by the court for want of jurisdiction, the respondent had discontinued proceedings in respect of the other three prosecutions. The present application relates to the last one.'

With regard to the complaint that the respondent's decision was "*arrived at without good and legitimate reasons*", we note that in fact no reason was given by the respondent either when taking the decision that he took or in the course of the present proceedings by way of affidavit or otherwise. Indeed the Judicial Committee of the Privy Council has held that, ... there is no obligation on the respondent to give reasons for his decisions. The respondent has chosen not to give any, and this per se cannot be a ground for review of his decision.¹⁶⁰

The Court added that:

We now turn to the complaints of lack of good faith and unreasonableness. We take the view that in an application for a review of the Director of Public Prosecutions' decision to discontinue a prosecution, the threshold of a successful challenge on ground of unreasonableness is a high one. Bare statements of unreasonableness and bad faith, unsupported by sufficient material to show that the applicant has an arguable case, fall far below that threshold. There is no averment in the applicant's affidavit which would justify an inference of irrationality, bad faith or dishonesty on the part of the respondent so as to warrant a review of his decision.¹⁶¹

The Court concluded that it was 'not satisfied that the affidavit of the applicant discloses an arguable case for leave to be granted for a judicial review of the respondent's decision to discontinue the private prosecution lodged by the applicant.'¹⁶² The Court has since then held that the threshold to review the DPP's decision not to prosecute is very high. For example, in *Malhotra K. K. v Director of Public Prosecutions*¹⁶³ the Supreme Court referred to the relevant case law and held that: 'all the decisions of the D.P.P are, in principle, reviewable although the threshold of reviewability will be higher than in the case of administrative decisions by persons and bodies not enjoying the constitutional status of the D.P.P.'¹⁶⁴ The Court held further that 'the purpose of judicial review is to look at the legality of a decision and at the decision making process and not to act as a Court of appeal.'¹⁶⁵ The applicant has to show that the DPP's

160 *Mohit J v The Director of Public Prosecutions* 2007 SCJ 97, pp. 3–4.

161 *Mohit J v The Director of Public Prosecutions* 2007 SCJ 97, p. 4.

162 *Mohit J v The Director of Public Prosecutions* 2007 SCJ 97, p. 4.

163 *Malhotra K. K. v Director of Public Prosecutions* 2015 SCJ 261.

164 *Malhotra K. K. v Director of Public Prosecutions* 2015 SCJ 261, p. 6.

165 *Malhotra K. K. v Director of Public Prosecutions* 2015 SCJ 261, p. 11.

decision was 'irrational, unreasonable or against the public interest.'¹⁶⁶ This decision confirms, inter alia, the Court's earlier view that the DPP is not obliged to give reasons for a decision not to prosecute.¹⁶⁷

The above decisions demonstrate the fact that a DPP's decision to take over and discontinue a private prosecution is not beyond judicial scrutiny. Flowing from that is the fact that the DPP does not have to give reasons why he decided to discontinue a private prosecution. This is because the DPP does not have to explain why he exercised his constitutional function. He does not even need the private prosecutor's consent or the court's approval. In the author's opinion, there may be a need for the law in Mauritius to be amended when it comes to the issue of the DPP taking over and stopping a private prosecution. In order to appreciate the argument made below, it is important to recall the purpose of private prosecutions as stated by the United Kingdom's Court of Appeal. In *Gujra, R (on the application of) v Crown Prosecution Service*¹⁶⁸ the Court held that

Private prosecution is, and I think always has been, a safeguard against the feelings of injustice that can arise when, in the eyes of the public, public authorities do not pursue criminal investigations and proceedings in a manner which leads to culprits being brought before a criminal court. The impunity which offenders appear to enjoy can be socially detrimental. This is ... particularly so in those cases where a victim actually knows that the offence has been committed but finds that a [public] prosecutor does not think on a balance of likelihood that his evidence, if given orally in court, will be accepted. The feeling of injustice will be particularly acute, if ... the [public] prosecutor's decision was a fine one, and the alleged victims or another prosecutor might equally reasonably have concluded that the case was one in which the evidential test was satisfied.¹⁶⁹

It is argued that for the DPP to be more accountable, measures should be put in place to ensure that his power to take over and discontinue a private prosecution is subjected to judicial scrutiny. In order to achieve this, Mauritius could

¹⁶⁶ *Malhotra K. K. v Director of Public Prosecutions* 2015 SCJ 261, p. 11.

¹⁶⁷ *Bissoonauth P. v District Magistrate of Rose-Hill & Ors* 2002 SCJ 14, p. 5.

¹⁶⁸ *Gujra, R (on the application of) v Crown Prosecution Service* [2013] 1 All ER 612.

¹⁶⁹ *Gujra, R (on the application of) v Crown Prosecution Service* [2013] 1 All ER 612 para 116. See also *Financial Times Ltd. & amp; Ors v Interbrew SA* [2002] EWCA Civ 274 para 22.

adopt one of the three approaches that have been adopted in the three African countries of the Gambia, Uganda and Kenya.

Section 85 of the Constitution of the Gambia allows the DPP to take over private prosecutions but adds that 'the Director of Public Prosecutions shall not – (i) take over and continue any private prosecution without the consent of the private prosecutor and the court; or (ii) discontinue any private prosecution without the consent of the private prosecutor.'¹⁷⁰ These provisions put in place some safeguards to ensure that the DPP does not abuse his powers to take over private prosecutions. In case the DPP wants to take over a private prosecution for the purpose of continuing with it, he needs the consent of both the private prosecutor and the court. However, in the case of taking over a private prosecution for the purpose of discontinuing it, he only needs the consent of the private prosecutor. Either way, the private prosecutor is involved in the process and it is unlikely that he will give his consent unless the DPP has given him convincing reasons why he, the DPP, should take over the private prosecution. The challenge though is that a private prosecutor may decline to give his consent even if the DPP and the court are of the view that it is not in the interests of justice for the private prosecution to be continued.

Article 120(3) of the Constitution of Uganda¹⁷¹ provides for the following as some of the functions of the DPP:

(c) to take over and continue any criminal proceedings instituted by any other person or authority; (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.

Unlike in the Gambia, in Uganda the DPP is empowered to take over and continue with a private prosecution without the private prosecutor or court's consent. However, the court's consent is necessary if the DPP intends to discontinue a private prosecution. The challenge with the Ugandan position is that the private prosecutor does not have to be consulted or to give his consent before the court allows the DPP to take over a private prosecution. In practice this has dissatisfied some people whose private prosecutions have been taken

¹⁷⁰ Section 85.

¹⁷¹ 1995.

over by the DPP¹⁷² to the extent that some private prosecutors recently, though unsuccessfully, approached the High Court to challenge the DPP's power to take over private prosecutions without giving them an opportunity to make submissions. In *Uganda v Kayihura & Ors*¹⁷³ in which the DPP took over a private prosecution instituted against senior police officers for torture, the private prosecutors argued that before taking over a private prosecution the DPP should make a formal application to court in which he gives the reasons as to why he wanted to take over the private prosecution. They added that a formal application would give them an opportunity to challenge the reasoning behind the DPP's decision to take over the private prosecution.¹⁷⁴ The Court held that Article 120(3)(c) of the Constitution 'does not give a procedural format on how the Director of Public Prosecutions can take over any' private prosecution and that the application may be made orally or in writing.¹⁷⁵ The Court held that:

The Director of Public Prosecutions in exercise of his Constitutional mandate under Article 120 (3) (c) of the Constitution is not obliged under the law to file an application, when he is desirous of taking over any criminal matter instituted by any other person or authority in the Magistrate Courts or other Court higher than the Magistrate Courts.¹⁷⁶

However, nothing prevents a court from giving a private prosecutor the opportunity to make submissions before the DPP is allowed to discontinue a private prosecution. Most importantly, the court is unlikely to allow the DPP to discontinue a private prosecution unless he has given convincing reasons for his intention to do so. This ensures that the DPP does not use his powers arbitrarily.

Article 157(6) of the Constitution of Kenya provides for the powers and functions of the DPP which include the following:

¹⁷² See Monitor Reporter, 'Ex- MTN worker petitions Constitutional court over dismissed case' 26 April 2013, The Monitor. Available at <http://www.monitor.co.ug/News/National/Ex--MTN-worker-petitions-Constitutional-court-/688334-1758012-ovf4e2z/index.html> (accessed 9 November 2016), in which the applicants challenge the DPP's power to discontinue a private prosecution they had instituted against businessmen for tax evasion.

¹⁷³ *Uganda v Kayihura & Ors* (Revision Cause No. 34 of 2016) [2016] UGHCCRD 75 (17 August 2016).

¹⁷⁴ *Uganda v Kayihura & Ors* (Revision Cause No. 34 of 2016) [2016] UGHCCRD 75 (17 August 2016) para 4.

¹⁷⁵ *Uganda v Kayihura & Ors* (Revision Cause No. 34 of 2016) [2016] UGHCCRD 75 (17 August 2016) para 5.

¹⁷⁶ *Uganda v Kayihura & Ors* (Revision Cause No. 34 of 2016) [2016] UGHCCRD 75 (17 August 2016) para 5.4.

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

Article 157(8) provides that '[t]he Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.' Under Article 157(6)(b), the DPP may not take over and continue with a private prosecution without the permission of the private prosecutor. The court's permission is not necessary in case the DPP takes over a private prosecution for the purpose of continuing with it. However, the court's permission 'may' have to be given before the DPP discontinues any prosecution – including a private prosecution. Article 157(8) has two notable features: a private prosecutor's permission is not required for the DPP to discontinue a private prosecution; and, the court's permission is not a prerequisite before the DPP discontinues a private prosecution. The word used is 'may' as opposed to 'shall.'

V Conclusion

This article deals with the questions of who may institute a private prosecution and the DPP's power to intervene in private prosecutions. The author recommends that there is a need for Mauritian law to be amended to define an 'aggrieved party' for the purpose of instituting a private prosecution; and to make the DPP more accountable when it comes to the issue of taking over private prosecutions for the purpose of either continuing or discontinuing such prosecutions. The court and the private prosecutor should have a say on whether or not the DPP should take over and continue with or discontinue a private prosecution. The danger that private prosecutions may be abused is real but Mauritian law has some measures in place to prevent or stop such abuses. Two measures will be mentioned here. The first one is found in section 122 of the District and Intermediate Courts (Criminal Jurisdiction) Act

Where a private prosecutor abandons the prosecution or wilfully neglects (in the opinion of the Magistrate) to carry on the prosecution in a proper manner, the Magistrate may stay proceedings and refer the matter to the Director of Public Prosecutions who may direct any officer to continue

the prosecution and thereupon such prosecution may be continued by such officer without any change in the record being necessary.

Section 122 above ensures that even if a private prosecutor abandons or wilfully neglects a private prosecution, the DPP steps in to continue with the accused's prosecution. Another measure is to ensure that the private prosecutor pays the cost of an unsuccessful private prosecution.¹⁷⁷ Section 6 of the Criminal Procedure Act provides that

Where a person is tried before the Supreme Court at the instance of a private prosecutor and is acquitted, the Court may, if the prosecution appears to it to be frivolous or malicious, adjudge the prosecutor to pay the whole costs and expenses of the person prosecuted, without prejudice to the right of the person prosecuted to bring a civil action for damages sustained in consequence of the prosecution.

This provision empowers the court to order the private prosecutor to reimburse the acquitted person all the costs and expenses incurred in defending himself provided that the court was of the view that the prosecution was frivolous or malicious. However, the court is not obliged to make an order in question even if it finds that the prosecution was frivolous or malicious. This is different from other African countries such as South Africa,¹⁷⁸ Namibia,¹⁷⁹ Botswana,¹⁸⁰ Swaziland,¹⁸¹ and Zimbabwe,¹⁸² where the court, should it find that the private prosecution was unfounded or vexatious, is obliged to order the private prosecutor to pay the accused, upon the accused's request, the costs incurred in defending himself.

¹⁷⁷ In the event of a successful private prosecution, the private prosecutor may be reimbursed the expenses incurred in the prosecution. Section 148 of the CPA provides that 'The Supreme Court trying a criminal case, with or without a jury, may, if it thinks fit, upon the conviction of an accused for a crime or misdemeanour, in addition to such sentence as may otherwise by law be passed, condemn the accused to the payment of the whole or part of the costs or expenses incurred, whether by the State or by a private prosecutor, in relation to the prosecution and conviction for the offence of which he is convicted.'

¹⁷⁸ Section 16(2) of the Criminal Procedure Act.

¹⁷⁹ Section 16(2) of the Criminal Procedure Act.

¹⁸⁰ Section 24(2) of the Criminal Procedure and Evidence Act.

¹⁸¹ Section 19(2) of the Criminal Procedure and Evidence Act.

¹⁸² Section 22(2) of the Criminal Procedure and Evidence Act.