The 'Shawcross Doctrine'

From Hansard ~ the Attorney General Sir Hartley Shawcross responding to a Parliamentary Question from the Member for Leicester, North-East Mr. Ungoed-Thomas:

A guide to the role of the Attorney General in criminal prosecutions and the legitimate bounds of political pressure is to be found in an answer given in Parliament by Sir (later Baron) Hartley Shawcross as Attorney General in 1951.[1] He observed, in response to criticism of decisions he had made as Attorney:

I am glad to have the opportunity of talking about the position of the Attorney-General in connection with prosecutions because, as my hon. and learned Friend the Member for Leicester, North-East (Mr. Ungoed-Thomas), said, there has been some criticism that my enforcement of the criminal law was a matter of expediency. Indeed, it was seriously suggested that the operation of the law should be virtually automatic where any breach of it was known or suspected to have occurred. The truth is, of course, that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions, who works under the direction of the Attorney-General.

It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases: "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration. I should perhaps say that, although he is called the Director of Public Prosecutions, constitutionally I am responsible for all his decisions, and as a Minister of the Crown I am answerable to the House for any decision he may make in particular cases.

So, under the tradition of our criminal law the position is that the Attorney-General and the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest so to do. Lord Simon, who was once himself a most distinguished Attorney-General, put the position very clearly when he said in debate in this House: "there is no greater nonsense talked about the Attorney- General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case.' It is not true, and no one who has held that office supposes it is."[2] My hon. and learned Friend then asked me how I direct myself in deciding whether or not to prosecute in a particular case. That is a very wide subject indeed, but there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never

enters into account. Apart from that, the Attorney-General may have to have regard to a variety of considerations, all of them leading to the final question— would a prosecution be in the public interest, including in that phrase of course, in the interests of justice?

Usually it is merely a question of examining the evidence. Is the evidence sufficient to justify a man being placed on his trial? The other day, in a case of murder to which the hon. and learned Gentleman referred—a case which became the subject of a good deal of publicity—I personally decided not to prosecute. I examined the papers myself, and I came to the conclusion that it was not an appropriate case in which I should instruct the Director of Public Prosecutions on behalf of the Crown.

It is not in the public interest to put a man upon trial, whatever the suspicions may be about the matter, when the evidence is insufficient to justify his conviction, or even to call upon him for an explanation. So the ordinary case is one where one has to review the evidence, to consider whether the evidence goes beyond mere suspicion and is sufficient to justify a man being put on trial for a specific criminal offence.

In other cases wider considerations than that are involved. It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed. And almost every day in particular cases, and where guilt has been admitted, I decide that the interests of public justice will be sufficiently served not by prosecuting, but perhaps by causing a warning to be administered instead.

Sometimes, of course, the considerations may be wider still. Prosecution may involve a question of public policy or national, or sometimes international, concern; but in cases like that, the Attorney-General has to make up his mind not as a party politician; he must in a quasi-judicial way consider the effect of prosecution upon the administration of law and of government in the abstract rather than in any party sense. Usually, making up my mind on these matters, I have the advice of the Director of Public Prosecutions and very often of Treasury Counsel as well. I have hardly ever, if ever, refused to prosecute when they have advised prosecution. I have sometimes ordered prosecution when the advice was against it.

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might

affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.

That was the view that Lord Birkenhead once expressed on a famous occasion, and Lord Simon stated that the Attorney-General: "… should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute." I would add to that that he should also decline to receive orders that he should not prosecute. That is the traditional and undoubted position of the Attorney-General in such matters.