



The Attorney General Falkland Islands

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The Attorney General's Guidance on the Acceptance of Pleas and Sentencing

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1. Introduction

1. Unlike in other jurisdictions there is no concept of “plea bargaining” in the Falkland Islands. “Plea bargaining” is where a defendant pleads guilty to some offences in return for a specific sentence. Prosecutors in the Falkland Islands have no power to promise a defendant that they will receive a specific type of sentence. Sentencing is entirely a matter for the court to decide.
2. It remains the case, however, that in criminal proceedings defendants will indicate or “offer” pleas to a lesser offence, or a limited number of offences where multiple offences are charged and Prosecutors must decide whether to “accept” those pleas as being determinative of the entire case. This Guidance sets out the principles that are applied when this situation arises.
3. If a person is convicted, having pleaded guilty or having been found guilty, then the court will determine how to sentence that person. This Guidance sets out the role of the Prosecutor in the sentencing process.

2. Basis of Plea

Determining the Factual Basis of Sentence

4. In some cases, defendants wishing to plead guilty will simply plead guilty to all charges on the basis of the facts as alleged by the prosecution, with no dispute as to the factual basis or the extent of offending.
5. In other cases a defendant may indicate that they will plead guilty but that they do not accept certain factual elements of the prosecution case. In this scenario the defendant is advancing a version of events that still amounts to a criminal offence but they do not accept certain facts. It is often the case that the defendant does not accept the more serious factual elements of the allegation. This is known as a basis of plea.
6. Depending on the view taken by the prosecution, and the content of the offered basis, the case will fall into one of the following categories:
 - (a) a plea of guilty on a factual basis that can be agreed by the prosecution
 - (b) a plea of guilty on a factual basis that can be partially agreed by the prosecution
 - (c) a plea of guilty on a factual basis that cannot be agreed by the prosecution

Agreeing (or partially agreeing) a basis of plea

7. If the prosecution accepts the defendant's basis of plea, it must ensure that the basis of plea is factually accurate and enables the sentencing judge to impose a sentence appropriate to reflect the justice of the case
8. When agreeing a basis of plea Prosecutors must not agree a basis that is based on a misleading or untrue set of facts and the basis must take proper account of the victim's interests. An illogical or insupportable basis of plea will inevitably result in the imposition of an inappropriate sentence and is capable of damaging public confidence in the criminal justice system. In cases involving multiple defendants the bases of plea for each defendant must be factually consistent with each other.
9. The Prosecutor has a duty to protect the public interest by only accepting a basis of plea if it is properly justified in the circumstances of the case. A basis of plea should never be accepted as a matter of convenience.

10. When the defendant indicates an acceptable plea, the defence advocate should reduce the basis of the plea to writing. This must be done in all cases save for those in which the defendant has indicated that the guilty plea has been or will be tendered on the basis of the prosecution case.
11. Where the prosecution partially agrees a basis of plea the matters agreed and the matters in dispute should be clearly set out.
12. An agreed basis of plea is always subject to the approval of the court will consider whether it adequately and appropriately reflects the evidence as disclosed on the papers, whether it is fair and whether it is in the interests of justice. If the court indicates that the basis of plea does not adequately reflect the evidence then the Prosecutor should review the decision to agree the basis of plea in light of the indication given by the court.
13. If the Prosecutor determines that it is still correct to accept the basis of plea then the court, of its own volition, can hold a hearing to determine the factual basis of sentence. This is because sentencing is a matter for the court to determine and the court can therefore hold a hearing regardless of the submissions made by the prosecution and the defence.
14. A hearing to determine the factual basis for sentence is known as a "Newton" hearing and is named after the case that gave rise to the procedure to be followed.

Basis of plea not agreed

15. Where a basis of plea is not agreed the defendant must decide whether to proceed to trial or whether to nonetheless enter the guilty plea and advance the basis of plea as being the basis upon which sentence should take place.
16. Where a defendant enters a guilty plea on a basis that is not agreed by the prosecution then the Prosecutor must determine whether the prosecution position is that a Newton Hearing should be held.
17. A Newton Hearing is a hearing held by the court after a guilty plea has been entered to determine the factual basis for sentence where there is a dispute as to the factual elements of the offence. It is only necessary to hold a Newton Hearing where the difference in the factual basis of the plea will have a significant effect on the type of sentence that the court will pass.
18. On occasion, the prosecution may lack the evidence positively to dispute the defendant's account, for example, where the defendant asserts a matter outside the knowledge of the prosecution. Simply because the prosecution does not have evidence to contradict the defendant's assertions does not mean those assertions should be agreed. In such a case, the prosecution should test the defendant's evidence and submissions by requesting a Newton hearing.

19. A typical example concerns the defendant's state of mind. If a defendant wishes to be sentenced on this basis, the Prosecutor should invite the court not to accept the defendant's version unless he or she gives evidence on oath to be tested in cross-examination. In such circumstances the defence advocate should be prepared to call the defendant and, if the defendant is not willing to testify, subject to any explanation that may be given, the court may draw such inferences as appear appropriate.
20. There remains an overriding duty on the prosecution advocate to ensure that the sentencing judge is made aware of the discrepancy and of the consideration which must be given to holding a Newton hearing to resolve the issue. The court should be told where a derogatory reference to a victim, witness or third party is not accepted, even though there may be no effect on sentence.

Procedure

21. The defendant's basis of plea must be set out in writing, identifying what is in dispute and must be signed by the defendant.
22. The signed original document setting out the disputed factual matters should be made available to the court and thereafter lodged with the court papers, as it will form part of the record of the hearing.
23. Where the basis of plea is provided to the prosecution in advance of the court hearing the prosecution must respond in writing setting out their position, alternative contentions and indicating whether or not they submit that a Newton hearing is necessary.
24. The court may invite the parties to make representations about whether the dispute is material to sentence.
25. If the court decides that it is a material dispute, the court will invite such further representations or evidence as it may require to resolve the dispute.
26. The decision whether or not a Newton hearing is required is one for the court. Once the decision has been taken that there will be a Newton hearing, evidence is called by the parties in the usual way and the criminal burden and standard of proof applies.
27. Whatever view has been taken by the prosecution, the prosecutor should not leave the questioning to the judge, but should assist the court by exploring the issues which the court wishes to have explored. The rules of evidence should be followed as during a trial, and the judge should direct himself appropriately as the tribunal of fact.
28. A plea of guilty on a basis that contains within it matters that are purely mitigation and which do not amount to a contradiction of the prosecution case does not require a Newton Hearing.

3. Accepting Pleas

29. Whether to accept a plea to a lesser charge or to a lesser number of charges is a decision for the prosecution to make. This is because the prosecution decides independently which charges the defendant should face. The court is entitled to express a view as to the course of action proposed by the prosecution but the court cannot force the prosecution to proceed in a specific way.
30. When deciding whether to accept a plea to a lesser charge or to a lesser number of charges the prosecutor will apply the principles set out in the Code for Prosecutors including any views expressed by a complainant. It is ultimately for the prosecution to decide what course of action is in the public interest. A lesser plea will never be accepted as a matter of convenience. A lesser plea will only be accepted where the circumstances as they relate to the evidence and to the public interest justify that course of action.
31. Prosecutors should be prepared to explain their decisions to the court and it always remains open to the court to express dissent with the course proposed by the prosecution.
32. In any proceedings where the judge is of the opinion that the course proposed by the advocate may lead to serious injustice, the proceedings may be adjourned to allow time for reflection on the view expressed by the judge or for the prosecutor to consult with the Attorney General who has the ultimate responsibility for conducting prosecutions.

4. Indications of Sentence

33. Prior to entering a plea of guilty, a defendant may seek an indication of sentence from the court. This procedure is known as a Goodyear direction.
34. Prior to pleading guilty, it is open to a defendant to request from the judge an indication of the maximum sentence that would be imposed if a guilty plea were to be tendered at that stage in the proceedings. The defence should notify the court and the prosecution of the intention to seek an indication in advance of any hearing.
35. Indications as to sentence should not be sought from the court unless issues between the prosecution and defence have been addressed and resolved.
36. If an indication is sought, the prosecution advocate should normally enquire whether the judge is in possession of or has access to all the evidence relied on by the prosecution, including any victim personal statement, as well as any information about relevant previous convictions recorded against the defendant.
37. Whether to give a Goodyear indication, and whether to give reasons for a refusal, is a matter for the discretion of the judge, to be exercised in accordance with the principles outlined in case law.
38. There should be no prosecution opening nor should the judge hear mitigation. However, during the sentence indication process the prosecution advocate is expected to assist the court by ensuring that the court has received all of the prosecution evidence, any statement from the victim about the impact of the offence, and any relevant previous convictions.
39. Further, where appropriate, the prosecution should provide references to the relevant statutory powers of the court, relevant sentencing guidelines and authorities, and such other assistance as the court requires.
40. The prosecution should not say anything which may create the impression that the sentence indication has the support or approval of the Crown. This prohibition against the Crown indicating its approval of a particular sentence applies in all circumstances when a defendant is being sentenced, including when joint sentencing submissions are made.
41. An indication, once given, is, save in exceptional circumstances, binding on the judge who gave it, and any other judge, subject to overriding statutory obligations. In circumstances where a judge proposes to depart from a Goodyear indication this must only be done in a way that does not give rise to unfairness. However, if the defendant does not plead guilty, the indication will not thereafter bind the court.

5. The Prosecutions Role in Sentencing

Opening the case

42. The Prosecution has an important, but limited role to play in the sentencing process. Prosecutors must assist the court to reach its decision as to the appropriate sentence by ensuring that the court has all the relevant factual information before it and is aware of the applicable law and sentencing guidelines. Prosecutors must also protect victims by challenging derogatory assertions and applying for protective orders, such as a restraining order. It is not, however, for prosecutors to argue in favour or against any particular sentence or to indicate approval for any particular course of action.
43. Prosecutors should set out fully the facts of the offences which fall to be sentenced and are expected to draw the court's attention to:
- (a) any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim;
 - (b) where appropriate, to any evidence of the impact of the offending on a community;
 - (c) any statutory provisions relevant to the offender and the offences under consideration;
 - (d) any relevant sentencing guidelines and guideline cases; and
 - (e) the aggravating and mitigating factors of the offence under consideration.
44. The prosecution advocate may also offer assistance to the court by making submissions, in the light of all these factors, as to the appropriate sentencing range.
45. It is not for the prosecution to argue for any particular type of sentence or outcome. Neither is it for the prosecution to enter into any negotiation as to how credit for a guilty plea may be reflected in the sentence.

Pleas in mitigation

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

47. An assertion which is derogatory to a person's character will rarely amount to mitigation unless it has a causal connection to the circumstances of the offence or is otherwise relevant to proper sentencing considerations.
48. Where, in the opinion of the prosecution advocate, there are substantial grounds for believing that such an assertion is false or irrelevant to sentence, he or she should inform the court of their opinion and invite the court to consider making an order under section 486A Criminal Procedure and Evidence Ordinance 2014, preventing publication of the assertion.
49. Where the prosecution advocate considers that the assertion is, if true, relevant to sentence, or the court has so indicated, he or she should seek time, and if necessary an adjournment, to establish whether the assertion is true. If the matter cannot be resolved to the satisfaction of the parties, the prosecution advocate should invite the court to consider holding a Newton hearing to determine the issue.

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