



## OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE DIRECTOR OF PUBLIC PROSECUTIONS AND **NOT TO ANY OFFICER BY NAME** AND THE FOLLOWING REFERENCE QUOTED:-

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**3<sup>rd</sup> April 2013**

### **MEDIA RELEASE**

**Re: Reasons for the Director of Public Prosecutions (ODPP) Declining to Seek Leave to Appeal the Judgment of the Court of Appeal Decision of *Harry Daley v R* delivered on March 8, 2013.**

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Subsequent to the delivery of the judgment of the Court of Appeal on March 8, 2013 in the matter of ***Harry Daley v R***, after having reviewed the judgment and other relevant documentations as well as considering the relevant law on the issues arising I made the decision to decline leave to appeal to the Privy Council of the said judgment. This decision was made well before the expiration of the time allowed for filing the appeal. I hereby outline the reasons for declining to seek leave to appeal the judgment. This course is being taken in order to provide clarity in the public domain for what has been a very high public interest matter.

#### **Outline of Facts and Background**

1. The brief facts concerning the case are that following a sting operation conducted over a period of months in 2008, Mr. Harry Daley, hereinafter referred to as the Appellant, was charged with an offence contrary to section 14 of ***The Corruption Prevention Act***. The Appellant was at the time a Superintendent of Police with over thirty-one (31) years of service and had attracted various commendations during his tenure. His accuser on the other hand, Mr. Tafari Clarke (Clarke) was a convicted drug runner who had served four (4) years in her Majesty's Prison in the United Kingdom (UK) and was subsequently deported to Jamaica. Before deportation he attempted to receive asylum in the UK but the basis of his application was unsubstantiated and he was returned.

2. The substratum of Clarke's accusations towards the Appellant was that the Appellant extorted 'protection money' from him on a monthly basis in the sum of fifteen thousand dollars (\$15,000.00). Clarke made these payments to the Appellant to safeguard the protection of himself and his premises that were under threat by one Terry or Kerry. The premises which were to be protected consisted of a small shopping plaza located in an area known as Charlemont on the main road between Linstead and Ewarton, St. Catherine.

### **Nature of the Charge**

3. **The particulars of the charge that formed the basis of the conviction read:**

**"Harry Daley being a public servant on the 31<sup>st</sup> of July 2008 corruptly accepted the sum of \$15,000.00 from Tafari Clarke for doing an act in the performance of his public function to wit; to offer protection to Tafari Clarke and his premises which were under threat by one Terry."**

4. On his part, the Appellant asserted that he did collect frequent sums of money from Clarke, however these monies were for repayment of a loan of two hundred and twenty thousand dollars (\$220,000.00) that he loaned to the owner of the plaza (Clarke's uncle) before his demise. The Appellant not only gave evidence but called several witnesses in support; two (2) Justices of the Peace who had spoken to the loan agreement, and a retired Senior Superintendent of Police spoke to his honesty. Additionally, a male tenant from the Plaza also gave evidence in support of the Appellant. The thrust of the evidence of all these persons cumulatively is that the agreement did exist, that payments though inconsistent were made to the Appellant in satisfaction of the loan, and that the Appellant unlike Mr. Clarke was a man of good character.
5. The main issue therefore, for the Learned Senior Resident Magistrate's consideration was credibility.

### **Appeals to Her Majesty in Council in Criminal Cases**

6. Section 35 of the *Judicature (Appellate Jurisdiction) Act* provides that the Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court, appeal to Her Majesty in Council from any decision of the Court of Appeal in criminal cases where in the opinion of the Court, the decision involves **a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought**. The relevant section lays down a two (2) stage test:

- (1) A point of law of exceptional public importance; AND
- (2) It is desirable in the public's interest that a further appeal be brought.

Both limbs of the test must be satisfied before leave can be granted.

### **EXAMINATION OF THE THRESHOLD TEST TO BE MET**

7. **Lai Leung and Noray v R (1972), 20 WIR 433**, is a case from the Court of Appeal of Trinidad and Tobago where the Court, following the pronouncements from cases out of the United Kingdom (UK) having a provision similar to theirs and ours, pronounced on the threshold test. [See in particular the case of **Thompson and the King [1918] A.C. 221 at 236.**] At page 435 the Court stated, "**It is not necessary, and perhaps it would not be wise, to attempt to point out or prescribe all the grounds which may be available for the purpose of testing the exceptional public importance of a point of law; but it may safely be said that the point raised should involve a new principle of law or require the elucidation of some new aspect of established and familiar principles of law; or possibly also, where the point raised discloses that the due and orderly administration of justice has been diverted into a new course which might create a precedent for the future.** In short, the point of law has to be not only one of public importance but it needs also to be **exceptionally so.**"

8. **THE APPROACH OF THE BOARD OF THE PRIVY COUNCIL REGARDING APPEALS.**

In ***Ibrahim v. The King* [1914] AC 599** the Privy Council expressed an aspect of their function in the following way:

"...The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. ***Misdirection, as such, even irregularity as such, will not suffice...There must be something which, in the particular case, deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future...***

9. **Their Lordships think that the jurisdiction which they exercise in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter...** This case is binding precedent and has been repeatedly endorsed by the Court of Appeal in Jamaican cases.

10. Therefore, it is clear that their Lordships will have to examine **all** of the judgment and transcript in their considerations and contemplations of any appeal by the Crown in this matter.

11. Statistically, the great majority of appeals to the Privy Council are mounted by the Defendant in a criminal case. This is done against the background of the right of an accused to a fair trial. In ***Randall v Regina* [2002] UKPC 19 ; (2002) 60 WIR 103** the Privy Council held that:

***"...The right of an accused to a fair trial is absolute. There may come a point when the departure from good practice is so gross or so persistent or so prejudicial or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the accused to be guilty."***

12. The appeals by the Crown are rare and must be viewed within the context of the role of the Prosecution. The Court of Appeal in the Harry Daley matter at para. 49. noted that

**"the prosecution means not just the prosecutors who appear in court but includes persons such as the police officers and other state officials connected with the investigation and conduct of the case against the accused person."** This accords with the general commentary of the Privy Council in the case of ***Mark Sangster and Randall Dixon, Privy Council Appeal No. 8 of 2002; delivered the 6th November 2002.***

13. Therefore, if there is non-disclosure of relevant material to the Defence by any agent of the State this could undermine the fairness of the trial of the accused and could be seen as a strike against the integrity of the prosecution. This is so even if the Prosecutor was totally unaware of the non-disclosure by the Police or any other agent of the state.

## **The Role of The Prosecutor**

14. In arriving at my decision on the appropriateness of seeking leave to appeal to the Privy Council in this matter I took into account the transcript, that is the notes of evidence recorded by the Learned Senior Resident Magistrate, the concerns raised by the Court of Appeal in their judgment and the relevant law including cases that have been previously outlined as well as my experience as a Prosecutor at different levels of the Court system. I am also cognizant that the ethical standards of a Prosecutor to which one will be held by the Courts will always be much higher than that which is accorded to Defence Counsel. The Prosecutor also has an overriding duty to make sure that the accused's right to a fair trial is maintained. It was stated in ***Boucher v R*** (1954) 110 CC 263, 270:

***"...The role of the Prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."***

15. There were inherent deficiencies in the case as examined by the Court of Appeal and it is my view that notwithstanding some concern on what may appear on a cursory reading to be the substitution by the Court of Appeal of their view of the facts for that of the Learned Senior Resident Magistrate, the inherent deficiencies, which I will list, cumulatively provided no basis to ground any point of **exceptional public importance**. Also, these inherent deficiencies taken together breached the principle outlined in ***Randall v Regina*** (see para. 10) in such a way that the Crown would risk embarrassment before the Privy Council in appealing this matter.

## **Inherent Deficiencies**

16. The inherent deficiencies highlighted by the Court of Appeal in the judgment and those that were also present in detail on a reading of the transcript of the evidence reveal the following :

- that prejudicial material which was erroneously admitted was elicited from witnesses on the Crown's case and also on the Defence's case. Prejudicial in this context means that the material places the Defendant and his case at a

significant disadvantage. **Ethically and professionally it is my view that since the conviction of the Defendant was quashed by the Court of Appeal and given the fact that we will not be appealing this judgment, no useful purpose would be served by listing any of this prejudicial material which I consider to be quite significant.**

- Search of the Appellant's premises- while he was in custody. There was no representative of the Appellant or Justice of the Peace present.
- There was no admissible evidence before the Court that any list was made by the Police of the documents that were removed from the premises.
- The Appellant asserts that the loan agreement as well as proof of payment pursuant to the loan was at his premises and by extension among the documents taken during the search that was never produced thus hampering his defence.
- This non-production by the Appellant of certain documents must be significant especially when it was noted in the findings of fact by the Learned Senior Resident Magistrate that the loan agreement was never produced by him despite asserting in his defence its existence.
- Failure to disclose asylum application information of the complainant by the police.

### **Conclusion**

17. My deliberations on the legal issues raised in this matter have benefitted from extensive discussions in the chambers of the Office of the Director of Public Prosecutions with members of my legal staff. My original view as posited in the preamble to paragraph one remains the same.

18. It is quite clear to me that when the ~~Crown~~ mounts an appeal to the Privy Council, that Judicial body as do all other Courts places a much higher legal threshold and burden on the Prosecution/Crown than on the defendant.

19. I find that when the judgment of the Court of Appeal is viewed in total, the cumulative effect of the inherent deficiencies are of such a character that the unfairness to the Appellant that was occasioned, overshadowed any real or perceived deviation by the Court of Appeal in their usual approach in the treatment of the Learned Senior Resident Magistrate's assessment of the credibility and

reliability of witnesses whom she would have seen firsthand. The Court of Appeal after all, would have had only the transcript of the notes of evidence available in their deliberation of the matter and the submissions by Counsel and the relevant law. The Court of Appeal having examined the transcript, it would appear, may have been of the view given all the inherent deficiencies of the matter, that the findings of the Learned Senior Resident Magistrate were ~~palpably wrong and~~ unreasonable and unsafe.

20. The investigative and trial breaches when taken together are so indefensible that any departure of the Court of Appeal from the accepted norm could not in any real way deflect the outcome arrived at which saw the quashing of the Appellant's conviction in this matter.

21. In light of the fact that the case involved a Senior Superintendent of Police on a corruption charge, it was a public interest matter. However, the second limb of the case law in respect of discerning "the point of law involving exceptional public importance" could not be grounded in the circumstances of this case. The rules of evidence and law apply equally to every type of case, whether it's a corruption matter involving a police officer or a murder case involving a housewife as the accused. The absolute principle of fairness to the accused is the hallmark in the trial of all criminal cases.

22. It is therefore, my view that given the circumstances of this case it would have been inappropriate to seek leave to appeal to the Privy Council. To have done so would have placed the Crown in a position to be perceived as perpetuating the unfairness to the Defendant.

23. It must always be remembered that the professional and ethical responsibility of a Prosecutor to the administration of justice transcends emotive factors in making a judgment. The discharge of this responsibility requires objectivity and militates against any factor which is extraneous to the law.

**Paula V. Llewellyn, Q.C.**

**Director of Public Prosecutions**