



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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MEDIA RELEASE

Re: The Director of Public Prosecution's Explanation of the Legal Issues surrounding the Buckfield Matter

I refer to the captioned matter. Having received a comprehensive written report from the Crown Counsel who prosecuted this matter I now in the public interest outline a chronology of events along with a discussion of what occurred in Court and the relevant case law in an effort to bring clarity to the issues which have found its way into the public domain.

Background

A cell phone recorded video aired on the local television stations sometime at the end of July 2010 it depicted images of a Jamaican police officer firing his gun at a man on the ground throwing a small missile at the same police officer. This man

was later identified to be Ian Lloyd and the police officer later identified as Det. Sgt. Lloyd Kelly. This incident occurred on the 29th day of July 2010 in Buckfield St. Ann. Mr. Ian “Chen Sing” Lloyd succumbed to gunshot injuries and there was a massive hue and cry from the members of the public in respect of the images depicted on this video. Statements were compiled from other individuals at the scene during an investigation conducted by the Bureau of Special Investigations (BSI). The maker of the video did not provide a statement and did not make himself known to the prosecutorial authorities. The statements along with a post mortem report were sent to the Office of Director of Public Prosecutions for a ruling. *It must be stated categorically that the ODPP is not an investigative entity. We depend on the police investigators and INDECOM investigators (which was established after this incident) to find witnesses.*

Ruling of the Director of Public Prosecutions (DPP)

Having reviewed the material on file, including viewing the video recording, I ruled on August 05, 2010 *inter alia*, that Det. Sgt. Kelly be charged with murder. This four (4) page ruling made it very clear to the police authorities that given the very nature of the particular case, it was critical that the maker of the video be found and a statement taken from him. This was very important in light of the fact that the statements of the eyewitnesses were favourable to Det. Sgt. Kelly, a popular police officer in Buckfield, and in marked contrast to the video.

Evidence in Court

The matter had spent some two and a half (2 ½) years on the trial list. The accused is entitled to his day in Court and was pressing for the trial of the matter. The prosecution cannot hold back a matter indefinitely in order to find a witness. It must be remembered that the prosecutor cannot take its case any higher than the witnesses who are giving evidence. Ethically the prosecutor's duty is to present all the available relevant evidence. The test for the admissibility of evidence is relevance. Anything that is said outside of the witness box or a video image is not evidence for the purposes of the Court unless it passes the legal test of admissibility in Court. The Court therefore can only take account of evidence in Court which has passed the legal test of admissibility.

Gap in the chain of evidence

Two (2) bullets were removed from the body of the deceased Mr. Lloyd, one of which matched the firearm carried by Detective Sergeant Lloyd Kelly and the other which is said to have been lodged in the body of deceased arising from an earlier and unrelated incident. The bullets in question were retrieved by the pathologist and given to the colleague officer of the then accused Detective Sergeant Kelly to be taken to the Ballistics Laboratory for testing. This Officer did not mark the bullets as is the practice and while he said that he marked and labelled the envelope in which these bullets were submitted to the Laboratory, this was not reflected in his statement on the file. An attempt was made by Crown Counsel to address this lacuna by instructing that the bullets which were submitted to the lab

should be located and handed over to the Crown. The Investigating Officer after making checks reported that these bullets contained in an envelope said to have been labelled and sealed could not be located.

Post Mortem Report

As a matter of prosecutorial practice and well established legal principle, there are three (3) options which would facilitate the introduction of the post mortem evidence which basically establishes the cause of death of the deceased:

- Death can be inferred from the circumstances (no post mortem report or pathologist evidence would be required);
- The consultant pathologist would give evidence on oath in Court reflecting the content of his previous post mortem report and
- The use of the Evidence Act section 31D (c) which allows the post mortem report to be admitted into evidence if certain legal criteria have been established evidentially.

In the case at bar where the cause of death was simply death by gunshot injury the Crown found it appropriate to use section 31D (c).

Section 31D (c) of the Evidence Act provides inter alia as follows:

“Subject to section 31(G) a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the Court that such person –

a) _

b) _

c) Is outside of Jamaica and it is not reasonably practicable to secure his attendance

d) _

e) _

The Crown called the custodian of the Immigration Department and a High Official at the Ministry of National Security to establish that Dr Rao an Indian national was outside of the jurisdiction. The learned trial judge found that she was not satisfied that in all the circumstances ‘reasonably practicable’ steps were taken by the Crown to secure Dr. Rao’s attendance. The budgetary constraints of the government have been a great factor preventing the facilitating of doctors returning to give evidence. In our view even if the post mortem report had been admitted or Dr Rao had given evidence that the cause of death was due to gunshot injury, that could not in any way have made a difference in the outcome of this matter since it was not in issue that Det. Sgt Kelly shot Mr. Lloyd. **The issue was whether Det. Sgt Kelly had any lawful justification, that is, he was not acting in self defence to use deadly force on Mr. Lloyd in the way depicted on the video image.** It was the Crown’s duty to prove the case against the accused beyond a reasonable doubt.

Video Evidence

The police investigators up to the time of trial had indicated that they have not been able to obtain the name and address of the person who videoed the shooting of deceased Mr. Lloyd. In the case preparation by Crown Counsel, questions were

asked of the prosecution witnesses whether they knew the name of the person the resounding response has been, **“mi nuh know a who video it, if dem did wan yuh know dem wouldha come tell yuh.”**

Realizing that we could not identify and locate the maker of the video we looked carefully at the case law to see if there were any alternate means to have such critical evidence adduced in Court.

In the R v Nikolovski [1996] 3 S.C.R 1197, where the issue of admissibility of video evidence was central to the case, the Supreme Court of Canada held that:

“ a video camera records accurately all that it perceives and it is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime. Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, it becomes admissible and relevant evidence.”

The crown therefore has to prove the provenance and authenticity of the video recording, that is, that it was not altered or changed in any way and that it depicted the scene of the crime. *Though it was shown on television and YouTube it is not evidence for the purposes of the Court unless it is admitted into evidence in Court according to law.*

This case was adopted in the local case of the *R v Lynden Levy et al SCCA Nos 152, 155, 156, 157 and 158 of 1999*. Judgment delivered **May 16, 2002**. In this

case six (6) men were convicted on the strength of video tape evidence which was authenticated by two (2) kidnapped teenagers who were assaulted and raped by the men. The video was authenticated by the two teenage girls who were able to outline exactly what had occurred and their evidence depicted accurately what was on the video before the video was admitted into evidence through them. The videotaping was done by Mr. Levy for the most part except for when he was sexual assaulting these girls. Thereafter the girls were able to point to the images on the video and identify the accused, their body parts and themselves on the video that was now in evidence. I know this case well since I prosecuted it at first instance and appeared for the Crown on appeal and the convictions were upheld. Please see the copies of the two (2) cases mentioned attached.

Recent commentators in publication in the printed media as recently as Sunday March 17, 2013 relied on the English case of *Toulson, urging the DPP "to use the law to get the video evidence admitted"*. I was quite surprised at the use of this authority since it was an English case decided in the year 1896 which dealt with still photographs when a video recording by cellular phones was not even a concept, let alone in existence.

Having established the threshold that is to be met and cognizant of the absence of the maker of the video, Crown Counsel in pre-trial interviews of the police officer and witnesses who were on the scene, asked questions of the witness to ascertain whether they could accurately corroborate the narrative as depicted on the video.

The police witness was quite clear that at the time his colleague discharged his weapon his back was turned and he therefore did not witness the actual shooting. The civilian eyewitnesses, who stated that they saw when the accused Detective

Sergeant Kelly discharge his weapon, outlined a narrative that directly contradicted the events on the video tape. They maintained that the now deceased Mr. Lloyd was throwing stones and bottles at the accused which caught him on the chest, groin and face just before he discharged his weapon. Therefore, we were unable to authenticate the video based on the eye witness evidence which was available to the Crown. At trial the eyewitnesses on oath reiterated this particular stance and my information is that they even enlarged the stones that were in the hands of the deceased, additionally, they went further to say they did not even see when Det. Sgt. Kelly discharged his weapon.

The ethics of a prosecutor which have to be very high, do not allow us to do anything other than to place the available evidence before the Court. We are not telepathic or in control of what a witness is going to say in Court. We are dealing with human beings who have minds of their own and it was quite clear that Det. Sgt. Kelly was popular within the community of Buckfield and that Mr Lloyd who the police were trying to capture was alleged to have just murdered an elderly female member of the community.

The prosecution's case will only be as good as the quality of the narrative outlined by eye witnesses and the other evidentiary material available. In the instant case, there was no need for Det. Sgt. Kelly to have tested his assertion of self defence, as all three (3) witnesses called by the Crown were consistent in their evidence that at the time that he discharged his weapon he was under sustained attack by Mr. Lloyd, who threw stones and bottles at him, hitting him in the groin, chest and face. Only the admission of the video evidence would have put us in a position to negative self defence on our case. Regrettably the maker of the video did not make

himself known and neither did the efforts made result in this person being unmasked. **Let me re-state that the DPP's office is not an investigative authority. We have no other choice but to depend on the police investigators to find witnesses.**

The trial judge as a matter of law was therefore obliged to uphold the no case submission.

This case is not without lessons to all of us who are interested in the administration of justice. It underscores the need for the independent investigation of police shootings from the very onset so as to safeguard and protect the collection of evidence and the chain of custody. However, the recent case of the ***R v Rushon Hamilton***, which saw the conviction of a police officer for the murder of a fourteen (14) year old girl whose body was never found and where post mortem evidence was not therefore relevant gives credence to the fact that the police can investigate their own and with courageous witnesses giving evidence the Crown can obtain a conviction.

There is also the need for the Parliament to promulgate and pass laws that allow for the admission of a post mortem report similar to ***section 50 of the Evidence Act***, which allows for the admission of medical evidence without more, that is, within the Resident Magistrate's Court. This amendment ought to include matters dealt with at the Supreme Court. In the alternative, allowance could be made legislatively for post mortem reports to be admitted into evidence with the consent of the prosecutor and defence.

Our inability to adduce the video evidence which is ‘clear as day,’ if we accept that it is unaltered, draws attention to the need for our citizenry to play an active role in the administration of justice beyond the mere expression of public outrage, that is, to make themselves known and available to give evidence when called upon so to do, in the public interest.

It is unfortunate that this matter as discussed in the public domain has suffered from uninformed commentary. The prosecution of any case has to be within the context of the law, prosecutorial best practices as well as ethics and must transcend petty mindedness as well as prejudice or sympathy for any party in this matter.

In the final analysis, each case has to be assessed on its own particular merits and the relevant law. The prosecutorial authority which I head welcomes constructive criticism and will always strive to facilitate clarity in the public interest. It must nonetheless still always be remembered that a prosecutor’s case is only as good as the quality and cogency of its witnesses who make themselves available to give that evidence.

Best Regards,
Paula V. Llewellyn, Q.C.
Director of Public Prosecutions