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## OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

P.O. BOX 633,  
KINGSTON  
JAMAICA

17<sup>th</sup> May, 2017.

# MEDIA RELEASE

**RE: REGINA V LATOYA NUGENT FOR BREACHES OF THE CYBERCRIMES ACT, 2015, SECTION 9 – USE OF A COMPUTER FOR MALICIOUS COMMUNICATION**

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Today, the 17<sup>th</sup> day of May, 2017, the Director of Public Prosecutions' representative appeared before the Corporate Area Parish Court and offered no evidence on all charges against Miss Latoya Nugent after having previously intervened and taken over the conduct of the captioned matter in the interests of justice.

In the interest of transparency and accountability I now outline my reasons for directing that no evidence be offered in the matter.

### **BACKGROUND**

1. **On Tuesday, March 14, 2017** Miss Latoya Nugent was charged by the Police for breaching **section 9 of the Cybercrimes Act, 2015** which creates the offence of *the Use of a Computer for Malicious Communication*. These charges stemmed from a Facebook post dated December 30, 2016 allegedly attributed to Miss Nugent who used the account name Stella Gibson, in which certain allegations of an offensive nature were made against the complainants Mr. Paul Thompson, Mr. Canute Thompson and Mr. Livingston Thompson.

2. **On Wednesday, March 15, 2017** Miss Nugent was placed before the Corporate Area Parish Court to answer to the said charges. Subsequently, **on the 20<sup>th</sup> day of March, 2017**, a copy of the file was submitted by the Police to the Office of the Director of Public Prosecutions for advice/ruling.
3. As a result of this request, the file was reviewed by me, the Head and Deputy Head of my Cybercrimes and Digital Evidence Unit. A meeting was also held with the Investigator on March 21, 2017.
4. Our initial review of the file revealed that it was incomplete as the Investigator was still awaiting the report and statement from the Communication and Forensic Cybercrimes Division amongst other things. Additionally based on our review of the issues contained in the file and the novelty of the charge I felt that it was an appropriate matter for the ODPP pursuant to my powers under section 94 of the Constitution to take over the prosecution of the matter in the interests of justice. I thereafter assigned conduct of the prosecution of the matter to the Deputy Head of my Cybercrimes and Digital Evidence Unit, Mrs. Yanique Gardener Brown, Assistant Director of Public Prosecutions, Ag.
5. In examining this file reference was made to *A Decision to Prosecute: the Jamaican Protocol* which can be found at [www.dpp.gov.jm](http://www.dpp.gov.jm).

### **ALLEGATIONS**

6. **On January 16, 2017**, the first complainant Mr. Canute Thompson was alerted to a post on Facebook dated December 30, 2016 made by one Stella Gibson implicating him and other members of the Moravian church as sexual predators and rapists. Due to the nature of this post I have made the decision not to outline its actual contents to guard against any further damage to reputation or further offend the complainants in this matter. *However we have formed the view that the contents of this post without any criminal conviction pursuant to due process of law to support them are offensive.*
7. As a result of the contents of this post, **on the 24<sup>th</sup> day of January 2017** Mr. Canute Thompson visited the offices of the Counter Terrorism and Organized Crime Investigation Branch (CTOC) where he made a report. Thereafter Messrs. Livingston Thompson and Paul Thompson made complaints to CTOC as their names also appeared in this post. CTOC commenced investigations into the matter which led them to Miss Latoya Nugent who they attributed to the Facebook account of Stella Gibson.

8. Following on this initial post other posts which may be perceived as inflammatory and offensive were made by the person using the Facebook account Stella Gibson with a picture bearing resemblance to Miss Nugent. It should be noted however that it is the initial post *of December 30, 2016* that forms the subject of the charges that were ultimately laid before the Court.
9. One example of these subsequent posts occurred after the initial offensive post when the Complainant's Attorney wrote to Miss Nugent and asked her to remove the post of December 30, 2016 and desist from making these comments. She responded by posting the Attorney's letter on Facebook and adding the following words:

*“Institute onnu bo\*\*cl\*\*t proceedings, oonu and Canute can f\*\*k off, oonu sick stomach. Fi a law firm onnu nuh have no r\*\*s sense. Move oonu p\*\*\*ycl\*\*t from yah soh.”*

10. **On March 14, 2017** armed with a warrant on information, Miss Nugent was taken into custody by a team of CTOC officers. This was after previous attempts for her to surrender herself willingly to the Police were ignored by her. A computer, a USB thumb drive and an external hard drive were also seized from her at the time of her apprehension.
11. **On the said 14<sup>th</sup> of March, 2017**, Miss Nugent was charged by the Police on information for three counts of the offence of *Use of a Computer for Malicious Communication* pursuant to **section 9 of the Cybercrimes Act, 2015**. The information laid reads:

- i. *“ Latoya Nugent on the 20<sup>th</sup> day of December 2016 in the parish of Saint Andrew, did use a computer for malicious communications which was menacing in nature and caused annoyance, distress and harm to Mr. Livingston Thompson.*
- ii. *Latoya Nugent on the 20<sup>th</sup> day of December 2016 in the parish of Saint Andrew, did use a computer for malicious communications which was menacing in nature and caused annoyance, distress and harm to Mr. Canute Thompson.*
- iii. *Latoya Nugent on the 20<sup>th</sup> day of December 2016 in the parish of Saint Andrew, did use a computer for malicious communications which was menacing in nature and caused annoyance, distress and harm to Mr. Paul Thompson.”*

12. In Court today we applied for and were granted an amendment to the information to reflect the correct date of December 30, 2016.

**THE LAW**

13. Section 9 of the Cybercrimes Act, 2015 states that:

*“(1) A person commits an offence if that person uses a computer to send to another person any data (whether in the form of a message or otherwise) –*

*(a) That is obscene, constitutes a threat or is menacing in nature;*

*and*

*(b) with the intention to harass any person or cause harm, or the apprehension of harm, to any person or property,*

.....

14. A section 9 offence is triable in either the Parish Court on information or in the Circuit Court on indictment.

**DECISION OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

15. In making a decision as to whether or not a prosecution should continue Prosecutors are guided by the two stage test contained in *A Decision to Prosecute: the Jamaican Protocol* which can be found at [www.dpp.gov.jm](http://www.dpp.gov.jm). The first test is the evidential stage which looks at whether or not there is sufficient evidentiary material on which there is a reasonable prospect of conviction. If this is satisfied the second test is the public interest stage which is whether or not a prosecution would be justified in the public interest. The evidential test must be satisfied before we can move on to the public interest test.

16. There are three ingredients that must be proved by the material presented to an Investigator before a prosecution can be initiated under **Section 9 of the Cybercrimes Act**. They are:

A. That a person used a computer to send to another person data.

*Send* is not defined under any current legislation and as such arguably it may include the publishing/posting of material by a person to a social media site as was allegedly done in this matter by the posting of this material to Facebook.

- B. That the data sent is **obscene or constitutes a threat or is menacing in nature**. These terms are also not defined by the legislation.

*Material that is obscene* is of a sexual nature or offends against society's morality and tends to deprave or corrupt minds open to immoral influences and into whose hands these publications would fall. *Material that is obscene will be indecent but indecent material may not qualify as being obscene as a much higher threshold is required in law to establish obscenity. Also, material will not be deemed obscene merely because it is offensive, untruthful and has the effect of or tends to damage one's reputation.*

*Threatening material* is material that unconditionally intimates that harm/danger/punishment will befall a person and may be similar to a menace.

*Material that is menacing in nature* is material that tends to threaten with harm or danger and may encompass material that constitutes a threat.

- C. **AND**, that the material which is either obscene or a threat or menacing in nature, or all three, or a combination of the three, was sent **with the intention** to harass any person or cause harm or the apprehension of harm, to any person or property.

Intention may be proved by direct evidence such as statements of the suspect showing their intention or it may be inferred from all the circumstances.

***These three elements referred to above must all exist in order for a section 9 offence to be created.***

17. In the instant case, our examination of the evidentiary material presented revealed the post in question did not reach the criminal threshold of being deemed obscene nor was it threatening or menacing in nature. Though the post may be deemed indecent or offensive and has the potential to cause significant damage to reputation, this is not the legal requirement to bring it under ***section 9 of the Cybercrimes Act***.

18. Having concluded that the post was not obscene or threatening or menacing there would be no utility in assessing whether or not at the time of the post Miss Nugent intended to harass or cause harm or the apprehension of harm as **section 9 (1)** is to be read conjunctively as outlined above. This is so even though inflammatory comments as outlined in paragraph 9 above were made after the post of December 30. In interpreting **Section 9 of the Cybercrimes Act** if one element out of the three is not established then

the entire section fails and there can be no viable prosecution. This is so even where it would be in the public interest on the face of it to proceed with a prosecution. It must always be remembered that in assessing whether to proceed with a prosecution the evidential stage must be satisfied before proceeding to consider whether it is in the public interest to prosecute.

## **CONCLUSION**

19. The Office of the Director of Public Prosecutions has recently published **Guidelines for Prosecuting Malicious Communications, Section 9 of the Cybercrimes Act, 2015** which have as its aim the provision of clear guidance to Prosecutors who have been asked for early advice by the Police, and to guide the process when reviewing those cases which have been charged by the Police. These guidelines will be periodically updated and should serve to assist in the transparency and the understanding by Prosecutors, Law Enforcement and Members of the Public in the use of **section 9 of the Cybercrimes Act, 2015**.

20. We wish to make it clear that our decision to discontinue these proceedings is in no way a comment on the correctness of the decision of the Investigator in this matter to initiate these prosecutions by laying the information. It is well known that an Investigator operates at a different threshold when initiating prosecutions than a Prosecutor preparing a matter for trial who has the very high standard of proof beyond a reasonable doubt. This burden remains on the prosecution throughout and never shifts. Additionally though it is desirable that Prosecutors and Investigators communicate prior to charge especially in matters of this nature, there is no mandatory requirement in our jurisdiction for Investigators to communicate with Prosecutors before charges are laid. However as we have stated in our *Guidelines* going forward given the characteristics and novelty of this offence we would recommend early consultation with our office by Law Enforcement so that the interests of justice will be enhanced in the use of **Section 9**.

21. The Police usually have primacy of decision making in investigations totally independent of the Prosecutor. This was recognised in *Commissioner of Police and another v Steadroy C.O. Benjamin [2014] UKPC 8*, Lord Wilson quoted with approval from the judgment of Lord Denning MR in *R v Commissioner of Police of the Metropolis, Ex p Blackburn [1968] QB 118*:

*“I hold it to be the duty of the Commissioner of Police of the Metropolis..... to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if*

*need be, to bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so ..... He is answerable to the law and to the law alone.*

22. The DPP's office remains committed to ensuring that fairness is maintained and adhering to the strictures of the law. We recognise the egregious nature of these postings and the potential to cause annoyance, hurt, distress and damage to reputation to the complainants. However, these factors are not the legal requirements of section 9. We would recommend in all the circumstances that the complainants vigorously pursue their civil remedies in this matter and we have in the interest of transparency explained our position and recommendation as outlined here to the Attorney for the complainants.
23. Finally, the decision to discontinue these proceedings must not be taken to mean that if postings/comments are made via social media that satisfy the section 9 requirements that an individual will be exempt from criminal prosecution. On the contrary, once the ingredients have been made out, we would certainly recommend to the Police that they lay charges against the offending individual immediately.
24. All citizens are entitled to their good name or reputation unless due process of law has rebutted the presumption of innocence and they have been found guilty of committing a crime. We will always applaud and encourage freedom of expression that is enshrined in the Charter of Rights but it must always be remembered that a fundamental rule of criminal practice and procedure is that **he who alleges must prove.** Communication via the internet is instant and global and one would hope that all well-thinking persons would recognise that there is a social responsibility to refrain from conduct which though it may not necessarily offend the criminal law will nonetheless offend the moral sensibilities of their fellow citizens.

**Paula V. Llewellyn, QC**  
**Director of Public Prosecutions**