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24th March 2021

Ms. Sherma Dalrymple
Director of Public Prosecutions (Ag.)
Office of the Director of Public Prosecutions
38 Independence Street
Roseau
Dominica

Dear Madam DPP (Ag)

Re – In the matter of the Complaints # DOMMCR 2015/0705, 2015/0706, 2015/0707 filed in the Magistrate's Court by Antoine Defoe and Others against Roosevelt Skerrit and Others

I represent Prime Minister Roosevelt Skerrit and Others named in the captioned complaints laid before the Magistrate of District E on 26th May 2015 by Antoine Defoe, Edingcot St. Valle and Mervin John Baptiste.

Madam DPP, let me state straightaway that I fully appreciate and respect that the powers vested in you under the *Constitution of Dominica* ("the Constitution") is to the exclusion of any other person or authority and that, in the exercise of those powers, you shall not be subject to the direction or control of any other person or authority except of course for the Attorney General as provided for under the proviso to section 72 (6) of the Constitution.[1] [See Dana S Seetahal **Commonwealth Caribbean Criminal Practice and Procedure** at page 64 where she said

[1] Section 72 (6) provides

"In the exercise of the powers vested in him by subsection (2) of this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority:

"In Dominica, the AG may give directions to the DPP in relation to his power of discontinuance."

I have therefore decided to write to you, and copied the Attorney General, as one of the attorneys-at-law for the Defendants in the above-captioned matter due to the fact that the complaints have been laid as private prosecutions, and are therefore not currently under your purview. However, for the compelling reasons which I set out below, I believe this matter should attract your immediate attention and intervention, and that of the Attorney General.

The complainants in this matter deliberately failed to make any report to the Police Department to investigate and / or seek out the DPP's office for advice on whether an offence was made out, and if yes, to prosecute. Instead, they resorted to launching private prosecutions in the Magistrate's Court some months after the 2014 election.

Private criminal complaints

As you are aware, there is no express right to private prosecutions under the Constitution. The **Magistrate's Code of Procedure** makes an oblique reference that a complaint "may be laid or made by the complainant in person", but that is all. While, admittedly, our law has long recognized a common law right to private prosecution, that right should be exceptionally allowed especially in view of the establishment of the Police Force, and the modern Independence Constitutions which have reposed

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Provided that the powers vested in him by paragraph (c) of that subsection (2) shall be exercised by him in accordance with such general or special directions (if any) as the Attorney General may give him."

the control of all prosecutions squarely and exclusively in the State. Even in the United Kingdom, which does not have a written Constitution, Lord Bingham stated in **Jones** *v* **Whalley** ([2007] 1 AC 63),

> *"A crime is an offence against the good order of the State. It is for the State by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value and can be exercised in a way damaging to the public interest".*

Further, in her well-known text **Commonwealth Caribbean Criminal Practice and Procedure** Dana S Seetahal at page 70 wrote:

> *"In Commonwealth Caribbean jurisdictions anyone may file a criminal complaint in the magistrates' courts. In practice, however, this only happens if the police fail to do so and the complainant is dissatisfied. It is always preferable that the police lay the charge and they or the DPP prosecute the matter. This is so because the police have not only powers and duties to investigate and detect crimes, but also the resources to do so. These are not readily available to the private citizens. Invariably, then, private prosecutions occur only in respect of fairly trivial matters, breaches of peace as between neighbours, or where the complainant is seen by the police as a recurrent troublemaker and so they elect not to prosecute."*

There ought to be no question that this matter is not a fairly trivial matter.

I respectfully point out that this is the quintessential case for you, subject to any directions from the Attorney General, to exercise your power under section 72(2)(c) of the **Constitution** to discontinue any private criminal proceedings on the well-established grounds enunciated by the Eastern

Caribbean Supreme Court,[2] some of which are found in the **Code for Prosecutors (Dominica)**; in summary, a DPP should intervene in private complaint matters where the complaints disclose no offence under the law, and/ or have no reasonable prospect of conviction, and/ or are an abuse or potential abuse of the process, and/ or it is not in the public interest to prosecute.

Reasons for an intervention and discontinuance

Firstly, the complaints should be discontinued because they do not disclose the statutory offence of treating under section 56 of the **House of Assembly (Elections) Act** and, in any event, have no reasonable prospect of resulting in conviction. I say so for the following reasons:

(i) Section 56 of the *House of Assembly (Elections) Act* provides that

> "The following persons shall be deemed guilty of treating within the meaning of this Act:
> (a) **Every person**[3] who corruptly, by himself or by any other person, either before, during, or after an election, directly or indirectly, gives or provides or pays wholly or in part the expenses of giving or providing any food, drink, entertainment, or provision **to or for any person** for the purpose of corruptly influencing **that person, or any other person**, to vote or to refrain from voting at the election, or on account of **that person or any other person** having voted or refrained from voting at the election;
>
> (b) **Every voter** who corruptly accepts or takes any such food, drink, entertainment or provision."

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[2] See for example the judgments of the High Court and Court of Appeal in **Michelle Andrews** v **the DPP and others,** and **Sonya Young v Vynette Frederick** CA No 20 of 2011 referred to below

[3] My emphasis

(ii) The sole premise of fact relied on by the complainants is two free music concerts open to the public on two different days during an election. However, in **John Abraham** v **Kelver Darroux** (Claim No. DOMHCV2010/0003) at paragraph 66, and **Annette Sandford** *v* **Cozier Frederick and Others** (DOMHCV2019/0307A) at paragraphs 141 and 142, the respective Judges rejected the argument that a music concert during an election constituted an offence of treating under the **House of Assembly (Elections) Act**. These decisions represent the law of the land. On this basis alone the complaints ought not to be allowed to proceed any further. But there is more.

(iii) Further and/ or alternatively, as required by section 56 of the **House of Assembly (Elections) Act,** there must be mention of a specific, identified person (a specific human being) who "treats" as well as a specific, identified person/s who is/are "treated", and corruptly influenced to vote at an election. These material facts or language must appear in the complaints as they form indispensable cores of the offence of treating. The complaints have not done so.

(iv) The complaints manifestly fail to allege which specific person (a specific human being) corruptly treated on the days alleged, which specific persons were thereby corruptly influenced, and who were in fact influenced to vote by or for a particular candidate. In other words, the complaint must allege specific acts of treating against each accused in relation to named, specific persons (human beings) who were in fact treated and thereby corruptly influenced to vote for the "treater" in the 2014 election.

A perusal of the complaints will readily reveal that they completely fail to address or satisfy these statutory requirements and therefore are bad in law, and have no prospect of resulting in convictions. [See **John Abraham** v **Kelver Darroux** (Claim No. DOMHCV2010/0003) at paragraphs 62 to 69 especially paragraph 66 where the "lack of material facts" was fatal to the treating allegation.]

(v) It was precisely this kind of failure to identify who were the persons treated, whether and how they were influenced by an identified candidate (or by identified agents of a candidate/s) and for whom those persons were influenced to vote, that was also fatal to the petition in **Annette Sandford** *v* **Cozier Frederick and Others** (DOMHCV2019/0307A),[4] and that occasioned Rawlins J to state in **Ferdinand Frampton** (DOMHCV2005/0149) that there must be the relevant material particulars or facts pleaded in order to disclose a cause of action.

(vi) These basic principles apply to complaints of treating filed in the Magistrate's Court. I accept that section 207 of the Magistrate's Code of Procedure provides that the offence can be described by the words or similar words of section 56 of the **House of Assembly (Elections) Act**. But the words of the complaints simply do not reflect the words or similar words of section 56, which create the offence of treating. For example, there is no mention in any complaint of any single person being treated by any of my clients, or that any person was in fact corruptly influenced to vote or refrain from voting in the 2014 election.

[4] See paragraphs 58, 134 to 140, and 141 to 142

(vii) To say therefore that my clients as a team acting on behalf of the DLP attempted to corruptly influence the "Dominican electorate" does not reflect or comply with section 56 of the **House of Assembly (Elections) Act**. The "Dominican electorate" is not a person and cannot be corruptly influenced, vote, or give evidence. The "Dominican electorate" would, I assume, mean every registered elector on the Register in Dominica. However, the complaints do not even allege that any person who is a registered elector or voter in fact attended the concerts. In fact, the complaints fail to (a) identify any interaction or act on the part of any named candidate, far less my clients, with any person to influence the vote of that person or other person; (b) state whether and how those persons who may have attended the concerts were in fact corruptly influenced by any of my clients to vote or refrain from voting; (c) state whether they were plied with food and drink; and (d) whether they in fact voted and for whom, or refrained from voting.

(viii) Further, the complaints must, as a matter of law, allege which specific individuals provided entertainment by way of food and drink to which specific persons for the specific and corrupt purpose of influencing him or her or them to vote for the individual doing the treating. In this regard I respectfully commend to you the learning in **Corrupt and Illegal Practices Prevention Act 1883 Annotated and Explained** by H.C. Richards (1893), **The Powers, Duties and Liabilities of an Election Agent and of a Returning Officer at a Parliamentary Election** by Frank Parker (6 ed.), **Rogers on Elections Vol II Parliamentary Elections and Petitions** (17th ed.) and **Halsbury**

Laws of England, all of which speak to the fact that the offence of treating requires the provision of food, drink or refreshment for the purpose of corruptly influencing the vote or voter.

(ix) None of the learning, treatises or texts on the election offence of treating contain examples of the providing of free music to the general citizenry (without attempting to target or select any particular individual or group of individuals with free food and drink) as amounting to treating. There is no allegation in the complaint that free food and drink were provided by my clients at that event or indeed at all. In the English case of **Andrew Erlam and Others** *v* **Mohammed Rahman and Another** [2015] EWHC 1215 (QB)) the Court said,

> *"In essence, treating consists of corruptly plying electors with food and drink to obtain their votes."* (para 136)

(x) There is no allegation whatsoever in the complaints that my clients, or anyone whatsoever, provided free alcohol and food to those who attended the concerts.

(xi) To prosecute charges of election offences for an election that occurred six years ago and has since been overtaken by another election is clearly an abuse of the Court's process, especially when every elected Member was charged, some of which have retired, or are no longer in parliamentary politics.

Secondly, it could never be in the public interest that unsuccessful candidates or their agents or supporters at a general election (held six years ago) with an obvious political axe to grind should be allowed to circumvent the existing State prosecution machinery, and institute their

own private prosecution of sitting members of Parliament on an assumed election offence of treating. This would lead to chaos and political persecution, and is certainly not the way in which private prosecutions – whatever little (if any) value it retains – was intended to be used. Put simply, there is no issue of higher constitutional importance than the question of who the legitimate persons elected to govern the State are. And, as Dana S Seetahal said in **Commonwealth Caribbean Criminal Practice and Procedure** at page 70

> *"Invariably, then, private prosecutions occur only in respect of fairly trivial matters, breaches of peace as between neighbours, or where the complainant is seen by the police as a recurrent troublemaker and so they elect not to prosecute."*

This present case is manifestly a case in which the public interest and the interests of justice loom large. None of complainants made any attempt to report the matter to the police for an independent investigation. There is therefore no basis whatsoever for alleging impropriety on the part of the prosecution authorities. The motives for this private prosecution are very plainly political in that the case is brought by partisan political activists, agents and supporters of losing candidates against elected representatives; in this instance, the interests of justice are thereby subordinated to both personal and partisan political motives. This, to repeat, is the quintessential example of why there is need for a constitutionally protected independent Director of Public Prosecutions to act , and in particular on the advice or directions of the Attorney General.

Thirdly, and without prejudice to the above, there are precedents from, among others, St Vincent and the Grenadines and St Christopher and Nevis and Caricom where the Director of Public Prosecutions took over private complaints relating to election and other matters, and requested

evidence from the complainants. In the case of St Vincent and the Grenadines, the Director of Public Prosecutions discontinued the complaints. These authorities establish that the DPP is justified in intervening if, for example, the charge is bad, there is no evidence capable of supporting a conviction, or its not in the public to prosecute. [See for example the judgments of the High Court and Court of Appeal in **Michelle Andrews** v **The DPP and others,** and **Sonya Young** v **Vynette Frederick** CA No. 20 of 2011[5].]

Fourthly, the DPP has a clear constitutional authority to regulate access to the criminal justice process. In **Michelle Andrews** v **The DPP and others** Chong JA at paragraphs 6 and 7 said:

> *"From a reading of the above Section (in particular s.64(2)(a), (b) and (c)) it is clear and without question that the Director of Public Prosecutions has the constitutional authority to discontinue private criminal complaints instituted in the Magistrate's Court, in this case, Criminal Complaints Nos. 61/08 and 62/08 filed by the applicant on the 31st January, 2008 at the Magistrate's Court, Kingstown (hereinafter referred to as "the Complaints")*
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> *This view finds support in the case of Tappin v Lucas. In delivering the judgment of the Court on provisions in identical terms to those in section 64 (2)(b) and (c) – Bollers CJ had this to say:*
>
> > *"Under b. he (i.e. the DPP) has the power to take over and continue criminal proceedings instituted by any other person or authority, which means a private prosecution, and therefore under (c) the clear and unambiguous meaning of the language used must be that he had the power to discontinue those proceedings at any stage before judgment is delivered."*

[5] Should you require additional authorities I will be happy to provide them.

In other words to use the language of the court in Matalulu and Another v DPP

> *"the Director of Public Prosecutions is empowered to regulate access to the criminal justice process".*

There is no more pressing case than this one which requires that access to the criminal justice process be regulated and discontinued.

These reasons provide ample and compelling bases for you to intervene to prevent a potential or manifest abuse of the court's process. It could never be said that any decision on your part or that of the Attorney General to intervene and discontinue these proceedings is so outrageous, in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Kindly be advised that I have copied the Honourable Attorney General for his attention and consideration because of the proviso to section 72 (6) of the Constitution.

Sincerely,

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Lennox Lawrence
Attorney at Law

cc. Honourable Attorney General of Dominica
Her Worship, Chief Magistrate
Anthony W. Astaphan SC, lead attorney for the Defendants
Mrs. Heather Felix-Evans, co-attorney for the Defendants
Miss Cara Shillingford, attorney for the Complainants