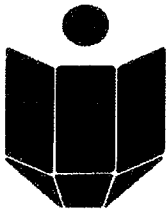


**Law Association
of Trinidad and Tobago**
established by the
Legal Profession Act 1986



3rd Floor,
Henry Hudson Phillips Bldg.
33 St. Vincent Street
P.O. Box 534,
Port-of-Spain,
Trinidad, West Indies.

Tel/Fax:
1-868-625-9350
1-868-623-2478
E-mail:
lawassociationtt@gmail.com
Website:
www.lawassociationtt.com

PRESS RELEASE

The Law Association acknowledges at the outset that both individual Judges and the administration of justice are subject to a genuine exercise of the right to criticize. "The path of criticism is a public way".¹ However, we note that the Standing Orders of the House of Representatives provide that except for a motion moved for that purpose, Members of Parliament are prohibited from criticizing judges, among others.²

Nevertheless, since the Attorney General took the unprecedented step of attacking the decision of a High Court Judge in his statement to Parliament on Monday 14th September, 2009, considered legal analysis of this event is required.

In this ministerial statement the Attorney General criticized in very strong terms the decision of the Honourable Mr. Justice Narine in the matter of ***The Attorney General -v- Lennox Phillips & Ors*** [H.C.A. 2292 of 1994] to direct that the contents of an affidavit of Mr. Abu Bakr making allegations against the Prime Minister be sent to the Acting Director of Public Prosecutions (the 'DPP') and the Acting Commissioner of Police (the 'Commissioner') for investigation.

President - Martin G. Daly S.C. • **Vice President** - Hendrickson R. M. Seunath S.C.
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Case law establishes that a filed document may be used even after an order removing the document from the file has been made³. Accordingly, the fact that the Court of Appeal and the Privy Council held that the document should be struck out and removed from the record, did not preclude the use of the affidavit after the order for striking out and removal had been made.

Mr. Justice Narine had jurisdiction to have directed that the contents of the affidavit be referred to the Commissioner and the DPP. Indeed, to do otherwise would arguably be contrary to the role of a judge as the guardian of the rule of law.

It is certainly not unusual for judges to refer to the DPP and/or the Commissioner matters which are of concern to the Court for the appropriate investigation. This is established practice and is an important aspect of a judge's inherent jurisdiction and duty to maintain the rule of law. It would however be wrong to form any conclusion on the truth of the allegations.

It is of course open to any person to agree or disagree with the decision of Mr. Justice Narine. Where there is disagreement, the manner in which this disagreement is expressed is extremely important. This is so because as one author puts it:-

“When politicians, lawyers, or citizens publicly criticize a judge, the judge is generally precluded from responding by ethical rules. It generally is undesirable for a judge to respond to criticism of her or his own actions by appearing in the news media. This policy has been developed to insure

the dignity of the administration of justice, to prevent interference with pending litigation, and to reaffirm the commitment to an independent judiciary dedicated to making decisions based on facts and law as presented in court. These considerations underlie the ethical restrictions relating to a judge's ability to engage in public comment. These ethical restrictions often prevent a judge from responding to criticism, even when the criticism is misinformed or unjust. Unless someone, such as a law society or bar organization representative, addresses the claims, the public gets a biased view of the judge or case at issue.”⁴

It is our considered view that the Attorney General was wrong in law, as indicated above by reference to case law, to suggest to the House that Mr. Justice Narine had defied the order of the Court of Appeal and the Privy Council. While the affidavit in question had been struck out and removed from the record, that did not preclude the Learned Judge, if he thought it necessary, from dealing with it in the way that he did.

It was also a source of great concern that the Attorney General before the Parliament referred to the fact that this was “*the very same affidavit which the Court of Appeal held was scandalous and irrelevant*”. In making these observations the Attorney General did not disclose that the Privy Council in affirming the decision of the Court of Appeal did so solely on the ground that the material contained in the affidavit was irrelevant, and not scandalous as had been held by the Court of Appeal.

The Privy Council stated in paragraph 21 of its decision:

“It is on the ground of irrelevance, rather than that of any inconvenience or embarrassment to the Prime Minister that the Board considers that the decision of the Court of Appeal should be affirmed.” (emphasis ours)

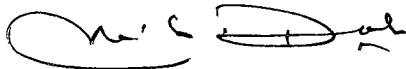
In any event if the Attorney General had a difficulty with the direction of Mr. Justice Narine it was certainly open to him, as a party to the proceedings, to appeal against that direction to the Court of Appeal. To opt instead to level a public rebuke of the Judge was wrong and had the tendency to bring the administration of justice into disrepute. According to the author previously referred to:

“It follows that politicians should only criticize the actions of judges with caution, since the politicians lack the requisite technical skills and experience to fully appreciate judicial reasoning. The notion that all are equal before the law implies that the State, if a litigant, will be treated essentially the same as any subject. For this reason Ministers of the Crown, and also Members of Parliament, should not be seen to place undue influence on judges. This influence can include criticizing the judges.”⁵

The Council is also disturbed that a sitting member of the Judicial and Legal Service Commission (the “JLSC”) should have made public and derogatory statements concerning the decision of Mr. Justice Narine. Moreover, in circumstances where the Attorney General told Parliament that he had written a letter to the Chief Justice concerning the decision. The Chief Justice is the Chairman of the JLSC, and if he thinks the Attorney General’s complaint has any merit he may choose to

refer it to this body or consult his colleagues on that Commission.
In addition, the case law cited runs contrary to the view expressed by
the member that the affidavit of Mr. Abu Bakr did not exist legally.

The Council wishes to make it clear that it deplores ill-considered
remarks against any sitting Judge.



Martin G. Daly S.C.
President
Saturday 19th September, 2009

¹ Ambard v. Attorney General of Trinidad and Tobago [1936] AC 322.

² Under the rubric "Contents of Speeches" Standing Order 36(10) provides:-

"(10) The conduct of the Governor, Members of the Senate or the House of Representatives, or of judges or other persons engaged in the administration of justice shall not be raised except upon a substantive motion moved for the purpose; and in any amendment, question to a Minister, or debate on a motion dealing with any other subject any reference to the conduct of any such person as aforesaid shall be out of order."

³ Midland Bank Trust v. Green [1980] 1 Ch. 570 citing Jones v Trinder, Capron & Co [1918] 2 Ch.7.

⁴ Criticism of Judges by Politicians: Reflections from New Zealand - Noel Cox

⁵ See 4 *supra*.