STATEMENT BY THE HONOURABLE MINISTER OF JUSTICE TO THE HOUSE OF THE REPRESENTATIVES-
REFORM OF THE LAW RELATING TO PLEA NEGOTIATIONS AND AGREEMENTS

This Honourable House is asked to note that a Cabinet Submission is to be tabled to pass new Plea Bargaining Legislation in Jamaica.

The principle of Plea Bargaining is a time honoured common law tradition and has been utilized in many jurisdictions to reduce the caseload of the Courts; have offenders take responsibility for their actions, which is an important pre-requisite for rehabilitation; save the complainant the trauma of re-living the traumatic experience in a pressurized setting; and to save the time and resources of the State by avoiding lengthy trials.

MS, The Criminal Justice (Plea Negotiations and Agreements) Act, 2005 was passed in 2005 and amended in 2010. It only came into effect in 2010 when the Regulations were passed. It has been rarely used. The Act allows an accused person to enter into an agreement with the prosecution for a reduced penalty where information or

other co-operation is given (make a plea deal). Between 2010 and 2013, only 10 plea agreements under the Act were entered.

In Jamaica, Guilty pleas are frequently entered for:

-traffic offences (largely because the time and effort to have a matter tried is time-consuming and more costly to the individual than the fine)

- Sexual offences involving two minors (as Accused and complainant)

-Fraud matters where the evidence is indisputable.

The Defence and Prosecution at times have informal discussions which lead to a guilty plea being proffered but this is done in an unstructured way, and depends largely on the parties involved and the Judge who is sitting.

THE LANDSCAPE PRIOR TO THE ACT

Prior to the Act, guilty pleas were often entered after discussion between the Crown and Defence Attorney. It could also be initiated by the Judge, depending on the strength of the Crown's case.

Prior to the passing of the Act, an accused person had the option of entering a guilty plea:

-if remorse so moved him

-based on the strength of the Crown's case

-an unwillingness to submit himself to lengthy Court proceedings.

-on the advice of Counsel

It must be pointed out that the onus is not on the Defence Attorney to secure a guilty plea. Counsel is often asked the moral question; how do they represent someone who is guilty. It is not for the Defence Attorney to judge guilt but to act on instructions given. However, if there are clear gaps in those instructions or where an Accused person instructs that he committed an offence, then the Accused is instructed to plead guilty. The Attorney would then look for mitigating circumstances to place before the Judge in determining the sentencing.

Based on the Canons of the legal profession, an Attorney is duty bound to offer any possible defence based on the facts and to represent the Accused to the best of his/her ability. It is not for the Attorney to judge or force the client to plead guilty.

The burden of proving a case lies with the Crown and it never shifts. If the case is strong against the Accused, then there is a greater chance of a plea.

Usually a benefit was contemplated to encourage such pleas. If there were multiple charges, then one or more could be discontinued or dropped.

The Accused may enter a plea of guilt to a lesser offence. Such as rape reduced to Carnal Abuse (now sex with a person under 16 under the Sexual Offences Act); Murder reduced to Manslaughter, Wounding reduced to Assault, Dangerous driving reduced to Careless driving. There would generally need to be a factual basis for offering the lesser offence, which would carry a lighter sentence.

A major challenge in the past with offering guilty pleas, is that there was no certainty or guarantee in terms of the sentence which would be delivered.

In other jurisdictions, it has been a long established principle that a guilty plea would afford the Accused person a reduction or discount in the sentence he would have received if the matter had been tried and he was found guilty by a Judge or Jury. A 1/3 to 1/2 discount was generally considered a starting point based on case law.

Legislation has been enacted to stipulate the discount given in sentences when guilty pleas are given depending on the stage of the proceedings. The Criminal Justice (Administration) (Amendment) Act 2015 however the process is complicated and time-consuming.

The Criminal Justice (Plea Negotiations and Agreements) Act, 2005 made it a condition for entering a guilty plea under the Act, that the Accused would give assistance to the Crown and fulfill the obligations

of the assistance undertaken. This requirement was very restrictive and was largely responsible for the Act being underutilized. It has not been popular in the anti-informer culture and posed the risk of contrived whistle-blowing in order to receive the benefit of a lower sentence.

Without information coming from the Accused, there is no benefit to the Crown in pursuing a plea agreement. Based on the Act itself and how it operates in practice, there is little benefit to the Accused.

As a result of the under-utilization of Plea bargaining in Jamaica despite legislative provisions, a multi-stakeholder Consultation was held in 2012 to canvass the views of a wide cross-section of practitioners. Subsequently, a working group was convened which was chaired by the Hon. Mr. Justice Karl Harrison (ret.). The group made several recommendations, primarily that the uncertainty and perceived inconsistency in sentencing militated against the use of the provisions.

DISCOUNT OR CREDIT FOR THE PLEA OF GUILTY

It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. This, it is believed will save the Court both time and resources. However, the Courts may, in the exercise of their discretion, in exceptional cases, refuse to grant any discount.

Currently, it is frowned upon and almost seen as improper for Defence Attorneys to canvass what sentence their client is likely to receive if they plead guilty, and so they are not able to advise the Accused of the likely sentence with any certainty. This should not be so and this means of operating is contrary to the principles of Plea bargaining. In the past lawyers have complained of exposing their clients to a heavy sentence after advising them to plead guilty.

SENTENCING GUIDELINES

The promulgation of the Sentencing Guidelines will certainly assist in the process of plea bargaining and should encourage guilty pleas, as the Accused person will have a better idea of the likely sentence for a given offence. The sentence would still be based on the circumstances, but at least there will be a starting point, then aggravating or mitigating factors will be applied.

PROPOSED AMENDMENTS

To address these concerns, a new Plea Bargaining Act is being proposed to accomplish the following:

1) In both the Supreme Court and the Parish Courts all Judges would be designated to be Plea Judges and would be able to deal with matters concerning plea negotiations.

2) Broaden the framework for Plea negotiations and not restrict them only to cases where the Accused gives assistance to the Crown, or make that the only condition.

3) Where the Accused gives assistance to the Crown, a further reduction in sentencing will be considered.

4) Allow either the Defence or the Prosecution to initiate Plea bargaining discussions

5) Enable both the Prosecution and Defence Counsel to propose the sentence which the Accused will receive. This will be done in Chambers. The Judge however will have the final decision to accept the Plea agreement and in the sentence to be delivered, the sentence shall be handed down in open Court. By Practice Direction No. 2 of 2016 issued by the Chief Justice on Advance Sentence Indications, guidance is given to Judges as to the procedure for the Judge to give an indication of the sentence an Accused will likely receive if he or she pleads guilty.

6) Allow Crown Counsel, Clerks of the Court and Attorneys granted a fiat by the DPP to prosecute to enter into plea negotiations without first having to obtain the written permission of the DPP. Only where the Plea negotiation is to

be concluded, would the written authorization of the DPP be necessary.

7) Permit persons who do not prosecute under the authority of the DPP, such as INDECOM to conduct plea negotiations.

8) Provide that the victim may make representation but not make this mandatory, as it was in the existing legislation. The victim is also entitled to be present when the Court considers the plea agreement but again this is not mandatory. Plea agreements can be sensitive and it is not always appropriate to consult the victim. It may also not be feasible. As a result, it was felt that consultations with the victim should be discretionary on the part of the Prosecutor and not mandatory.

9) Post-sentence plea negotiation is recommended and would occur where a prisoner, who is serving a term of imprisonment, wishes to assist the prosecution and in so doing have his sentence reduced. This recommendation is based on and

would be similar to section 74 of the Serious Organized Crime and Police Act 2005 of the United Kingdom.

10) Amend the relevant forms to make them simpler and more user friendly.

In light of the proposed extension of the Plea Negotiation model to apply to all guilty pleas, regardless of whether the Defendant has assistance to offer and the change in procedure to allow for ease and transparency in conducting negotiations, it is proposed that new Legislation be enacted to provide for this new approach which will repeal and replace the Criminal Justice (Plea negotiations and Agreements) Act and sections 42A-42J of the Criminal Justice (Administration) (Amendment) Act 2015.

STRONGER, EVIDENCE BASED INVESTIGATION

It is easier to secure guilty pleas where the case against the Accused is stronger and there is therefore a greater likelihood of conviction.

One helpful solution in ensuring this is to strengthen and enhance the investigative capacity and forensic techniques of the police in solving crime, so that there is not this over-reliance on witness testimony, which is often the only material evidence the Crown has. With this as common knowledge, witnesses are made very vulnerable.

Another solution is to utilize technology such as video link evidence to protect witnesses and save them the vagaries of attending Court. Video-link equipment has been installed in three Courts, the Supreme Court, Half-Way-Tree Parish Court and St. James parish Court. Steps are being taken to retrofit Courts across the island with this equipment.

A more effective Justice system where cases which are set down for trial are tried within a timely manner, will reduce the practice of Accused persons taking their chances with the system, expecting that the matter will break down or be thrown out.

NEED FOR CO-OPERATION

For Plea Bargaining to work effectively, there must be trust and co-operation between the Defence Bar and Prosecuting Attorneys.

They are required to give and obtain full disclosure, have discussions on the charges and the possible sentences. These discussions need to take place in a cordial and civil manner and on the basis that what is said will not be used against the other side, should the discussions fail. It should be agreed by both sides that the discussions serve the sole aim of resolving the manner expeditiously and in the interest of justice.

Plea bargaining needs to be understood and appreciated as an acceptable manner of resolving cases before the Court.

It is in the interest of the Jamaican people, to take necessary action to enhance and improve the Justice system, reduce the backlog of cases and also reduce the time it takes for matters to be tried. With greater dissemination of information and sensitization of all

stakeholders, there should be greater co-operation and we will go a far way in improving the administration of justice.

Delroy Chuck, QC, MP
Minister of Justice
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