



Easter Term

[2020] UKPC 11

Privy Council Appeals No 0098 of 2019

and 0099 of 2019

JUDGMENT

**Commissioner of the Independent Commission of Investigations (Appellant) v Police
Federation and others (Respondents) (Jamaica)
Dave Lewin (Director of Complaints of the Independent Commission of Investigations)
(Appellant) v Albert Diah (Respondent) (Jamaica)**

From the Court of Appeal of Jamaica

before

Lord Kerr

Lord Hodge

Lord Lloyd-Jones

Lord Briggs

Lord Kitchen

JUDGMENT GIVEN ON

4 May 2020

Heard on 3 and 4 February 2020

Appellant (INDECOM)

Edward Fitzgerald QC

Richard Small

Krystle Blackwood

(Instructed by Simons Muirhead & Burton LLP)

Respondents

Phillippa Kaufmann QC

Thalia Maragh

Althea Grant

(Instructed by Sheridans)

Appellant (Dave Lewin)

Terrence F Williams

Yanique Taylor Wellington

(Instructed by Simons Muirhead & Burton LLP)

LORD LLOYD-JONES:

1.

There are two appeals before the Board both of which raise important issues as to the interpretation and effect of the Independent Commission of Investigations Act 2010 ("the 2010 Act"). This statute came into operation on 16 August 2010, repealing the Police Public Complaints Act and establishing the Independent Commission of Investigations ("the Commission") to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of rights of persons. The first appeal ("the Indecom appeal") concerns the question whether the Commission has the power under the 2010 Act, other statutory provision or at common law to initiate a prosecution for an offence which has been the subject of investigation by the Commission ("an incident offence"). It also concerns the powers of the Commissioner and the investigative staff of the Commission to initiate a prosecution and restrictions or limitations on prosecutions initiated by the Commissioner or the investigative staff in the exercise of any common law right as private citizens and in their respective private capacities. The second appeal ("the Lewin appeal") concerns the question whether Mr Dave Lewin, one of the Commission's Directors of Complaints, had the power to initiate a prosecution for breaches of section 33 of the 2010 Act. It also concerns the question whether the respondent, Mr Albert Diah, had a lawful justification or excuse for obstructing or failing to comply with a request by a Commission investigator and its relevance to the respondent's conviction for breaches of section 33 on 31 October 2014.

The provisions of the 2010 Act

2.

The long title of the 2010 Act is "An Act to repeal the Police Public Complaints Act; to make provision for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigations to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons; and for connected matters".

3.

Section 3(1) constitutes a Commission of Parliament to be known as the Independent Commission of Investigations. Section 3(2) provides that the Commission shall consist of a Commissioner. The functions of the Commission, which are defined in section 2 of the 2010 Act as including its powers and duties, are set out in section 4 which provides:

"4(1) Subject to the provisions of this Act, the functions of the Commission shall be to -

(a) conduct investigations, for the purposes of this Act;

(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable -

(i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;

(ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials;

(c) take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.

(2) In the exercise of its functions under subsection (1) the Commission shall be entitled to -

(a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;

(b) require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or

(c) make such recommendations as it considers necessary or desirable for -

(i) the review and reform of any relevant laws and procedures;

(ii) the protection of complainants against reprisal, discrimination and intimidation; or

(iii) ensuring that the system of making complaints is accessible to members of the public, the Security Forces and specified officials;

(d) take charge of and preserve the scene of any incident.

(3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be entitled -

(a) upon the authority of a warrant issued in that behalf by a Justice of the Peace -

(i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;

(ii) to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in sub-paragraph (i) or any property which is relevant to an investigation under this Act; and

(iii) to enter any premises occupied by any person in order to make such enquiries or to inspect the documents, records, information or property as the Commission considers relevant to any matter being investigated under this Act; and

(b) to retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(4) For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and at such times as may be specified by the Commission, information which, in the opinion of the Commission, is relevant to any matter being investigated under this Act."

"Incident" is defined in section 2 as follows:

"'incident' means any occurrence that involves misconduct of a member of the Security Forces or of a specified official -

(a) resulting in the death of, or injury to, any person or that was intended or likely to result in the death of, or injury to, any person;

(b) involving sexual assault;

(c) involving assault or battery;

(d) resulting in damage to property or the taking of money or other property;

(e) although not falling within paragraphs (a) to (d), is, in the opinion of the Commission, an abuse of the rights of a citizen.”

Section 5(1) provides that subject to the provisions of the Constitution of Jamaica, in the exercise of the powers conferred upon it, the Commission shall not be subject to the direction or control of any other person or authority.

4.

Part III of the Act deals with complaints. A complaint may be made to the Commission by a person who alleges that the conduct of a member of the Security Forces or any specified official resulted, inter alia, in the death of or injury to any person or was intended or likely to result in such death or injury (section 10(1)). On receipt of a complaint, the Director of Complaints is required to cause an investigation into the complaint to be made forthwith and, if in the opinion of the Commission the conduct complained of constitutes an offence, forward a copy of the complaint to the Director of Public Prosecutions (“DPP”) forthwith (section 10(3)). The responsible head of a relevant Force or the responsible officer of a relevant public body, having been made aware of an incident, is required to make a report to the Commission of the incident forthwith where the incident involves conduct that resulted in the death of or injury to the person, and within 24 hours in any other case (section 11(1)). Where the Commission is satisfied that an incident is of such an exceptional nature that it is likely to have a significant impact on public confidence in the security forces or a public body, the Commission must require the relevant Force or the relevant public body to make a report of that incident to the Commission, in the form and containing such particulars as the Commission may specify (section 12).

5.

Section 13 provides that an investigation under the Act may be undertaken by the Commission on its own initiative. Section 14 provides:

“14(1) The Commission shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of -

(a) the seriousness of the case;

(b) the importance of the investigations;

(c) public interest considerations;

(d) the particular circumstances in which the incident occurred.

(2) The Commission may manage, supervise, direct and control an investigation carried out by the Security Forces or the relevant public body in relation to an incident, where, in the opinion of the Commission, it is necessary to direct and oversee that investigation.

(3) Where the Commission takes action under subsection (2), it shall notify the responsible head or the responsible officer, as the case may be, and direct that no action shall be taken until the Commission has completed its investigation.”

6.

Sections 15 and 16 deal respectively with informal resolution of complaints and mediation or other alternative dispute resolution proceedings. Section 17 deals with the formal handling of complaints. Where a complaint is not resolved in accordance with sections 15 or 16, the Commission shall cause an investigation to be made forthwith into the complaint, unless satisfied that the complaint may be justly and adequately resolved otherwise than by an investigation (sections 17(1) and 17(2)). During

the course of the investigation the Commission is required, at intervals of not more than six months, to submit to Parliament a report on the investigation (section 17(3)). On the completion of the investigation, the investigator shall submit a final investigation report and proposed recommendations to the Director of Complaints who shall submit it to the Commission (section 17(7)). The Commission is then required to make its own assessment of the investigation and form its own opinion as to the matter under investigation (section 17(8)). The Commission must then prepare a report on the investigation including its recommendations arising therefrom (section 17(9)) and furnish a copy of the report to, inter alia, the complainant, the concerned officer or the concerned official, the responsible head or responsible officer, and the DPP (section 17(10)).

7.

Section 20 provides:

“20 For the purpose of giving effect to sections 4, 13 and 14, the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under this Act, have the like powers, authorities and privileges as are given by law to a constable.”

8.

Section 21 confers powers for the purpose of obtaining evidence or securing the attendance and examination of witnesses and the production of documents. Section 22 imposes duties for the preservation of evidence. In particular, the Commission has primary responsibility for the preservation of the scene of an incident or alleged incident and may issue directions to the Commissioner of Police or any other authority for the purposes of section 22 (section 22(1)). Where a report of the Commission contains recommendations for action to be carried out by the relevant force or the relevant public body, these are required to be complied with in the manner and within the time specified (section 23(1)). Where the relevant force or the relevant public body does not comply with the recommendations of the Commission, the Commission is required to cause a report thereon to be laid on the Table of each House of Parliament (section 23(3)).

9.

Section 25 provides:

“25. An investigator shall, on a request by the Director of Public Prosecutions, in relation to a prosecution arising out of an incident, attend court and provide such other support as the Director of Public Prosecutions may require, in relation to the proceedings instituted against the concerned member or the concerned official under this Act.”

10.

Section 26 provides that the functions of the Commission may be performed by any member of its staff or by any other person (not being a member of the Security Forces or a specified official) authorised for that purpose by the Commission. Section 28 imposes duties of secrecy and confidentiality on the Commissioner and every person concerned with the administration of the Act.

11.

Section 33 creates certain offences:

“33. Every person who

(a) wilfully makes any false statement to mislead or misleads or attempts to mislead the Commission, an investigator or any other person in the execution of functions under this Act;

(b) without lawful justification or excuse -

(i) obstructs, hinders or resists the Commission or any other person in the exercise of functions under this Act; or

(ii) fails to comply with any lawful requirement of the Commission or any other person under this Act; or

(iii) wilfully refuses or neglects to carry out any duty required to be performed by him under this Act; or

(c) deals with documents, information or things mentioned in section 28 in a manner inconsistent with his duty under that section;

commits an offence and shall be liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

The status of the Commission: capacity to act

12.

It is necessary to consider as a preliminary issue the legal status of the Commission and its capacity to act. Section 3 of the 2010 Act provides:

"3(1) For the purposes of this Act, there is hereby constituted a Commission of Parliament to be known as the Independent Commission of Investigations.

(2) The Commission shall consist of a Commissioner, who shall be appointed by the Governor General by instrument under the Broad Seal, after consultation with the Prime Minister and the Leader of the Opposition, from persons of high integrity, who possess the qualifications to hold office as a Judge of the Supreme Court of Judicature of Jamaica.

(3) The provisions of the First Schedule shall have effect as to the constitution of the Commission and otherwise in relation thereto."

The First Schedule addresses matters such as the Commissioner's tenure of office, disqualification from office, pensions and gratuities. The current Commissioner, Mr Terrence F Williams, appeared before us on behalf of the appellant on the Lewin appeal.

13.

On behalf of the Commission it is submitted that it may do anything which any legal person may do, subject to any restrictions imposed directly or indirectly by the 2010 Act and other relevant legislation. In particular, it is submitted that at common law any person may bring a prosecution and that section 94(3)(b) of the Constitution and Jamaican statutes recognise the common law position. Section 3 of the Interpretation Act defines "person" as including any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons. Accordingly, it is submitted, the Commission being a body of one person, namely the Commissioner, has the capacity to bring a prosecution. On behalf of the respondents it is submitted that the 2010 Act establishes the Commission as a Parliamentary Commission with no legal personality. It necessarily follows, it is submitted, that it has no powers beyond those conferred expressly by the Act itself, those which fall to be implied into the Act or those that are conferred by other enactments. It does not have any powers

conferred under the common law on individuals because it does not itself have legal personality. It is not an individual for the purposes of the common law.

14.

Although the 2010 Act does not expressly incorporate the Commission, its provisions do confer on it many of the characteristics of a corporation. Section 3(1) clearly creates the Commission as a distinct entity. The Commission also seems to have perpetual succession. Thus, for example, section 8(1) provides that the Commission may appoint and employ employees and agents as it considers necessary to assist it with the proper performance of its functions under the 2010 Act. It does not appear to envisage that employment or agency contracts should cease or be transferred each time a Commission is reconstituted because a Commissioner retires and a new one is appointed. Similarly, an investigation initiated by the Commission (for example, under section 13) would not need to cease or be re-initiated if the Commissioner changes during the investigation. It seems, therefore, that the Commission is in a position analogous to that of a statutory corporation sole. It is a quasi-corporation sole. Although the Commission is not incorporated by the 2010 Act, the courts have previously recognised unincorporated bodies as quasi-corporations. In *Inland Revenue Comrs v Bew Estates Ltd* [1956] Ch 407, Roxburgh J held that the War Damage Commission, constituted under the War Damage Act 1943, was a quasi-corporation which he described (at p 415) as “bodies different from the aggregate of the members, eg a members’ club, and yet not corporations in the language of jurisprudence.” Similarly, in *In re Edis’s Declaration of Trust* [1972] 1 WLR 1135, Goulding J held (at p 1146) that an unincorporated volunteer corps governed by the provisions of the Volunteer Act 1863 was established by Parliament as a “sort of quasi-corporation”. This meant that assets given to it could be “directed to purposes defined by its objects and constitution in much the same way as if it were a corporation”. In the same way, the Chamberlain of London has been held to be a quasi-corporation sole even though the office was not expressly incorporated (*Byrd v Wilford* (1592) Cro Eliz 464, Ex Ch).

15.

The significance of this characterisation, for present purposes, is that a statutory corporation has only the powers conferred directly or indirectly upon it by statute. In *Attorney General v Manchester Corpn* [1906] 1 Ch 643, distinguishing the powers of a body incorporated by Royal Charter, Farwell J observed (at p 651):

“Now the difference between a statutory corporation and a corporation incorporated by Royal Charter is well settled; the former can do such acts only as are authorized directly or indirectly by the statute creating it; the latter (speaking generally) can do everything that an ordinary individual can do.”

(See also, *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473, per Lord Blackburn at p 481, considered further below.) Similarly, in public law, public officials are considered to have limited powers when they act in a public capacity even if they are natural persons. When natural persons hold a statutory office, their public law powers are limited to those conferred on them by Parliament. Thus, judicial reviews of the conduct of chief constables, coroners and prison governors, for example, on grounds that they have exceeded their powers are an everyday occurrence. In the Board’s view, therefore, the starting point for the examination of the powers of the Commission is clear: the Commission only has the powers that are conferred on it directly or indirectly by the 2010 Act or other relevant legislation.

The approach to the interpretation of the 2010 Act

16.

On behalf of the Commissioner it is submitted that the Court of Appeal erred in its interpretation of the 2010 Act because it failed to construe it in accordance with the mischief rule ie it failed to construe it in the manner which would best secure the suppression of the mischief at which it was directed (Heydon's case (1584) 3 Co Rep 7a; (1584) 76 ER 637). It is submitted that one main mischief which the passing of the 2010 Act was intended to address was the securing of the constitutional and internationally recognised right to life and, in particular, the procedural obligation which requires the investigation of unlawful killings to be independent, adequate and effective.

17.

The background to the enactment of the 2010 Act is important in this regard. The Act was passed following the decision of the Inter-American Commission on Human Rights in *Michael Gayle v Jamaica*, (Case 12.418) Report No 92/05, 24 October 2005. It concluded that Jamaica was responsible for violations of the American Convention on Human Rights in respect of the death of Mr Gayle following an assault perpetrated by Jamaican security forces and the State's subsequent investigation of the matter. It considered that it was essential to view the investigation in that case in the broader context of the problem of impunity for police killings in Jamaica. It observed that:

"... the information presented to the Commission indicates that despite the high incidents of killings involving the security forces in Jamaica, these incidents rarely result in the prosecution or conviction of the officers involved. This in turn has led to the perception in Jamaica that the police are above the law and has adversely affected the relationship of trust that should exist between a population and the forces responsible for protecting them." (para 93)

It considered that the investigation into Mr Gayle's death should have been conducted from the outset by a body independent from both the Jamaica Constabulary Force and the Jamaica Defence Force, with the authority to investigate fully and effectively both of these bodies and their respective roles in Mr Gayle's wrongful death in a manner that would result in the criminal prosecution and punishment of those responsible (para 94). In particular, it noted that there was no information on the record to indicate that the Police Public Complaints Authority ("PPCA") became involved in the investigation into Mr Gayle's death, nor did it appear that the PPCA would have authority to investigate the conduct of members of the Jamaica Defence Force (para 96). Accordingly, it recommended, *inter alia*, that Jamaica adopt such legislative or other measures as may be necessary to undertake a thorough and impartial investigation into the human rights violations committed against Mr Gayle for the purpose of identifying, prosecuting and punishing all the persons who might have been responsible for those violations (para 114(2)). It was common ground before us that this decision led directly to the enactment of the 2010 Act and the replacement of the PPCA by the Commission.

18.

For present purposes, it is not necessary for the Board to rule on whether the procedural rights on which the Commission seeks to rely form part of the domestic law of Jamaica. This is an issue which has not been fully argued before us and on which we express no opinion. The Commission is, nevertheless, entitled to say that the mischief at which the 2010 Act was directed was clearly identified in the *Michael Gayle* decision. (See, for example, the observations of the Supreme Court in *Gerville Williams v The Comr of the Independent Commission of Investigations* [2012] JMFC Full 1, paras 115-117, 232.) However, while in other circumstances the mischief rule of interpretation may well be of assistance, resort to that rule is of no assistance in resolving the issue in the present appeal because at no point does the identified mischief bear upon the precise point in issue here. While the need for legislative change in order to secure independent and effective investigation which could lead to independent prosecution was clearly identified in the *Michael Gayle* case, at no point was it

suggested that investigation and prosecution should be undertaken by the same body. Nor can it be said that there is an obligation, whether under the Jamaican Constitution or international human rights law, that Jamaica must organise its machinery of investigation and prosecution so as to secure that the independent body which investigates is also the independent body which prosecutes. The investigative and prosecutorial functions are distinct. If the intention of the legislature was to confer on the Commission only an investigative function, that is entirely consistent with the procedural obligation to conduct an independent and effective investigation. For similar reasons, the Commissioner's reliance on the golden rule of interpretation, whereby a statute is to be interpreted so as to give it effect rather than to render it invalid, is of no assistance here. The whole question is whether the legislature intended that the Commission should have a prosecutorial role in addition to an investigative role.

The Indecom appeal

19.

In the Indecom appeal the appellant is the Commissioner and the respondents are the Police Federation, the Chairman of the Police Officers Association, Mr Merrick Watson, the Special Constabulary Force Association, the President of the United District Constables Association, Mr Delroy Davis, and the Attorney General of Jamaica.

20.

On 4 November 2010 Mr Frederick Mikey Hill was shot dead by the police in the Parish of Westmoreland. Corporal Malica Reid was a member of the police party present at the time of the fatal shooting. The Commission commenced an investigation into this incident and Corporal Reid was interviewed by Commission investigators. On 25 February 2011 he attended at the Savanna-la-Mar Police Station, Westmoreland where he was arrested by Mr Isaiah Simms, a Commission investigator and was charged with the murder of Mr Hill. Corporal Reid was immediately brought before the Westmoreland Resident Magistrates' Court ("the Magistrates' Court") where it was confirmed that Mr Simms was acting as an investigating officer and was not yet prosecuting the case. Corporal Reid was remanded in custody by the Resident Magistrate. Later that day Corporal Reid was again brought before the Westmoreland Resident Magistrates' Court which was informed that there may have been a possible irregularity in the procedure by which Corporal Reid had been brought before the court. The Resident Magistrate ordered that Corporal Reid be released immediately.

21.

On 1 March 2011 it was confirmed to the Magistrates' Court that the Commission's investigators had been acting in their capacity as private citizens when they arrested and charged Corporal Reid. In arresting and initiating the prosecution of Corporal Reid the Commission had not awaited a ruling from the DPP as to whether charges might be laid for the alleged murder. The DPP then entered a nolle prosequi terminating the charges brought in this way against Corporal Reid and the DPP herself then laid a charge of murder against him.

22.

On 3 March 2011 Corporal Reid filed a claim for judicial review in the Supreme Court seeking constitutional redress and administrative orders against the Commissioner and the relevant Commission investigators. On 29 July 2011 Corporal Reid's claim was struck out by Brooks J in the Supreme Court due to a procedural error. The respondents, by amended Fixed Date Claim Form dated 10 October 2011 then brought an action in the Supreme Court seeking administrative orders and

constitutional redress under section 25 of the Constitution of Jamaica, inter alia on the ground that the Commission had exceeded its powers.

23.

On 30 July 2013 the Supreme Court (Full Court) (Marsh, Campbell and Fraser JJ) dismissed the claim. It held that

(1)

The Commissioner and Commission investigative staff have a power of arrest at common law and under the 2010 Act as section 20 gives them the powers of a constable.

(2)

Although the Commissioner and Commission investigative staff do not have powers under the 2010 Act to charge and initiate prosecutions of members of the Police Force, they have such powers at common law.

(3)

There is no legal requirement for a ruling of the DPP before members of the Police Force may be arrested and charged by the Commissioner or by officers of the Commission.

(4)

The powers possessed by the Commissioner and officers of the Commission to arrest, charge and prosecute members of the Police Force in no way undermine the constitutional authority of the DPP who still retains authority to take over and/or to discontinue any prosecution.

24.

The respondents appealed to the Court of Appeal (Phillips, Brooks and F Williams JJA) where the appeal was heard between 30 May and 2 June 2016 and judgment, reversing in part the decision of the Supreme Court, was delivered on 16 March 2018. For the purposes of this judgment, the principal grounds of the decision may be summarised as follows.

(1)

The Court of Appeal held unanimously that the Commission is not a legal person and is therefore constrained to act within the confines of the power that created it. The function of the Commission is to investigate. The Act does not authorise the Commission to bring a prosecution against anyone for any offence whatsoever. Nor does it have a common law power to prosecute in respect of an incident offence or a section 33 offence.

(2)

It held unanimously that section 20 of the 2010 Act does not confer on the Commissioner or the Commission's investigators the powers, authority or immunities enjoyed by a constable concerning an arrest, charge or prosecution. The powers conferred by section 20 are only for the purposes of investigation.

(3)

It held by a majority (Brooks and F Williams JJA, Phillips JA dissenting) that the rights of the Commissioner and the Commission staff as private citizens to arrest and prosecute were not abrogated by the 2010 Act and, accordingly, they might bring private prosecutions in their private capacity in respect of both incident offences and section 33 offences. Brooks JA (with whom F Williams JA agreed) added the reservation that the right to prosecute arose solely in their capacity as private individuals and not as officials of the Commission. In his view it would be very challenging for

a Commission investigator in a private capacity to exercise any common law rights to arrest or prosecute for an incident offence. An investigator would not have the powers of arrest of a constable, would have difficulties in securing the attendance in court of witnesses and would not have the protection of the defences available to a constable against allegations of wrongful arrest and malicious prosecution.

25.

The Commissioner sought leave to appeal to the Judicial Committee of the Privy Council. Conditional leave pursuant to section 110(2)(a) of the Constitution of Jamaica was granted by the Court of Appeal (Phillips, McDonald-Bishop and Pusey (Ag) JJA) on 20 December 2018. Final leave to appeal was granted by the Court of Appeal (Morrison P, Straw and Edwards JJA) on 17 June 2019 in respect of the following issues:

(1)

Whether the Commission has the authority, by virtue of the 2010 Act, other statutory provision or the common law, to initiate a prosecution in respect of any offence arising from a completed or ongoing investigation conducted by it. If the answer to this question is in the affirmative, how should this authority be exercised?

(2)

Whether the Commissioner and/or the investigative staff of the Commission are authorised by the 2010 Act to initiate a prosecution arising from a completed or ongoing investigation conducted by the Commission.

(3)

Whether section 20 of the 2010 Act, which confers on the Commissioner and the investigative staff of the Commission the like powers, authorities and privileges given by law to a constable for the purpose of giving effect to sections 4, 13 and 14 of the 2010 Act, also confers the said like powers, authorities and privileges given by law to a constable for other purposes, for example the power to arrest.

(4)

Whether prosecutions initiated by the Commissioner and/or the investigative staff of the Commission, in the exercise of their common law right as private citizens or in their respective private capacities, are subject to any restrictions or limitations. If the answer to this question is in the affirmative, what are such restrictions or limitations?

Express power of prosecution

26.

The long title to the 2010 Act and section 4 which sets out the Commission's functions make clear that the Commission's role is investigative. Its function is "to undertake investigations" and the functions identified in section 4 all focus on an investigative role. None of the provisions of the Act, considered individually or in combination, expressly confers on the Commission the power to bring a prosecution in respect of an incident offence.

27.

The Commission submits, however, that this is the effect of section 20 which provides that for the purpose of giving effect to sections 4, 13 and 14 the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under the Act, have "the like powers, authorities and privileges as are given by law to a constable." The Full Court accepted this submission and held that

this provision conferred the power to arrest and charge. In the Board's view, the Court of Appeal was clearly correct in rejecting this reading of the statute (Phillips JA at paras 87, 88; Brooks JA at para 195). Under section 20, the like powers, authorities and privileges of a constable are conferred for the purpose of giving effect to sections 4, 13 and 14. Each of those sections is concerned solely with the manner in which the Commission undertakes investigative functions pursuant to the Act. Powers are conferred by section 20 only for the purposes of investigation and in the particular respects identified by sections 4, 13 and 14. As Ms Philippa Kaufmann QC puts it, on behalf of the respondents, the power to arrest for the purpose of charging and the power to charge and prosecute a criminal offence arising from an incident under investigation are not powers which are capable of being exercised to give effect to the investigative functions contained in sections 4, 13 and 14. Such powers are exercisable when an investigation is complete. They do not further the investigation, nor do they support the taking of any step in the investigation. Nothing in these sections, therefore, considered singly or cumulatively, can be read as conferring on the Commissioner, the Commission or its staff the power to arrest, charge or prosecute officers or officials for an incident offence.

Implied power of prosecution

28.

The implication of powers was considered by Lord Templeman in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, 29 where he cited with approval the observations of Lord Blackburn and Lord Selborne LC in *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473.

"In *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473, Lord Blackburn said, at p 481:

'where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited; ...'

In the same case Lord Selborne LC said, at p 478, that the doctrine of ultra vires:

'ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.'

In the same vein Lord Blackburn said, at p 481:

'those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.'"

29.

It is therefore necessary to consider whether the Commission is, nevertheless, empowered to initiate a prosecution in respect of an incident offence because such a power is necessary for, reasonably incidental to or consequential upon the performance of its functions under the 2010 Act.

30.

The scheme and the express provisions of the 2010 Act provide no support for the implication of a prosecutorial power in the case of incident offences. The long title to the Act and the statement of the Commission's functions in section 4 are strong indications that its role is investigative and does not extend to prosecution of incident offences. More generally, had it been the intention of Parliament that

the Commission should have such a prosecutorial function, it is surprising that an Act which makes such detailed provision for the performance of the Commission's investigative function should make no provision whatsoever for the performance of a prosecutorial function.

31.

This impression is fortified when one considers the provisions of the Act concerning the relationship of the Commission and the DPP. When the Commission receives a complaint it is obliged to forward a copy of the complaint to the DPP forthwith, if in its opinion the conduct complained of constitutes an offence (section 10(3)(c)). Before the Commission may decide that a matter may be dealt with by mediation or other alternative dispute resolution proceedings, it must first consult with the DPP (section 16(1)). Where the Commission proposes to hold a hearing wholly or partly in public in the course of an investigation, it must first consult with the DPP (section 18(3)). When the Commission has prepared a completed investigation report containing its recommendations for action, it is obliged to provide a copy to the DPP (section 17(10)(d)). Where a prosecution arises out of an incident, a Commission investigator is required, on a request by the DPP, to attend court and to provide such other support as the DPP may require (section 25). These provisions are wholly incompatible with any implied power in the Commission to prosecute for an incident offence and they demonstrate an allocation of functions under which the Commission's role is limited to investigation. Prosecution is the function of the DPP, whether on the recommendation of the Commission or otherwise.

32.

A further provision which is particularly significant in this regard is section 23(3). Section 23(1) imposes on a relevant force or public body in respect of which a recommendation for action is made in a Commission report, an obligation to comply with that recommendation in the manner and within the time specified by the report. Section 23(3) provides that where the relevant force or public body does not comply with the recommendations of the Commission, the Commission shall cause a report to be laid on the Table of each House of Parliament. It is a striking feature of the statutory scheme that, with the exception of this limited provision, there is no power conferred on the Commission itself to pursue or give effect to any recommendation it makes, including a recommendation to the DPP to prosecute. This strongly supports the view that the Commission's function does not extend to prosecution which is the responsibility of the DPP.

33.

Further light is cast on this issue by section 28 of the Act which provides:

"28(1) The Commissioner and every person concerned with the administration of this Act shall regard as secret and confidential all documents, information and things disclosed to them in the execution of any of the provisions of this Act, except that no disclosure -

(a) made by the Commissioner or any such person in proceedings for an offence under section 33 of this Act or under the Perjury Act by virtue of section 21(3) of this Act; or

(b) which the Commissioner or any such person thinks necessary to make in the discharge of their functions, and which would not prejudice the security, defence or international relations of Jamaica, shall be deemed inconsistent with any duty imposed by this section.

(2) Neither the Commissioner nor any of the persons aforesaid shall be called upon to give evidence in respect of, or produce any such document, information or thing in any proceedings, other than proceedings mentioned in subsection (1) or section 25."

Section 33(c) provides that every person who deals with documents, information or things mentioned in section 28 in a manner inconsistent with his duty under that section commits an offence. These provisions are inconsistent with the Commission, the Commissioner or the Commission's staff having a power deriving from the 2010 Act to prosecute for an incident offence. In order to be able to bring a prosecution, the Commission or its officials would have to be able to rely on documents and information which had been gathered in the course of an investigation. However, section 28 prohibits any such use on the ground that it would be a breach of confidentiality. The exceptions created by subsection 28(1) do not apply to an incident offence. Subsection 28(1)(a) applies only to disclosure in proceedings for an offence under section 33 or under the Perjury Act by virtue of section 21(3) of the 2010 Act. These provisions relate to prosecutions arising from matters occurring in the course of a Commission investigation. If it had been intended that the Commission should have a general power to prosecute for incident offences, it is inconceivable that the statute would make such an exception for proceedings for section 33 offences and offences contrary to the Perjury Act but none for incident offences. Similarly, the exception created by subsection 28(1)(b) applies only to a disclosure which is thought necessary in the discharge of the functions of the Commission. For the reasons stated above, however, there is no basis for the suggestion that the 2010 Act, either expressly or impliedly, confers a general prosecutorial function on the Commissioner, the Commission or its staff. The power to prosecute offences contrary to section 33 is considered further below.

34.

On behalf of the Commission Mr Edward Fitzgerald QC has drawn our attention to a number of authorities which, he claims, support the Commissioner's case that the prosecution of an incident offence is a function of independent investigation and therefore a power that it is within the Commission's authority to perform.

35.

In *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775 the defendant, who had been convicted of manslaughter and ordered to be detained in a special hospital, wrote a book which described how he had killed his victim and which identified other patients and gave details of their offences and mental states. The Hospital Authority was concerned that, if published, the book would be likely to expose the defendant to risk of assault, undermine his mental state and cause distress to other patients and his victim's family. Accordingly, it sought injunctions to prevent, inter alia, the publication of the book. At first instance Poole J discharged orders which had been made without notice to the defendant. On appeal to the Court of Appeal Lord Woolf MR (at para 1) identified the essential issue as "whether a statutory body is entitled to be granted an injunction in civil proceedings to support its performance of its statutory duties." In the present case Mr Fitzgerald places particular reliance on the following passages in Lord Woolf's judgment (at para 25):

"A statute can expressly authorise a public body to bring proceedings for an injunction to support the criminal law. ... In relation to many statutory functions the power to bring proceedings can be implicit. The statutes only rarely provide expressly that a particular public body may institute proceedings in protection of specific public interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions.

...

I would therefore summarise the position by stating that if a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the courts should grant such an application when 'it appears to the court to be just and convenient to do so'."

36.

However, *Robinson* itself, where the appeal was dismissed, demonstrates that the implication of a power to bring proceedings will depend on the specific characteristics of the statutory regime in question. Lord Woolf considered (at para 30) that the Authority could apply for an injunction if that was justified in order to enable the Authority to perform its statutory functions but recognised that primarily these responsibilities related to what happens within the hospital. The Authority could not bring proceedings to protect any patient's right to privacy or confidence or to protect the family of the defendant's victim, unless the conduct complained of affected its responsibilities within the hospital. Lord Woolf recognised that what happens outside the hospital can affect what happens inside it, but he refused injunctive relief in the exercise of his discretion. Morritt LJ considered (at paras 42-43) that the real issue was whether a right or power for a special hospital to control publications liable to frustrate or undermine the treatment of one of its patients could be implied from the duties and functions imposed on it by statute. In his view such a power could not be implied and if Parliament was to grant such a power it would have to do so in terms which admitted of no doubt as to its intention. He observed (at para 44) that while it may be desirable to have such a power, he was not satisfied there was any necessity for it. Waller LJ, agreed (at para 55) with the final section of Lord Woolf's formulation at para 25, cited above. Nevertheless, (at para 57) he considered it impossible to categorise the activity of the defendant as interfering with the performance of the Authority's public responsibilities because the defendant's conduct could not be said to have been designed to frustrate his treatment or the treatment of others.

37.

In *R (Hunt) v Criminal Cases Review Commission* [2001] QB 1108 the applicant, who had been convicted of conspiracy to cheat the public revenue in a prosecution brought by the Inland Revenue, sought to challenge the refusal of the Criminal Cases Review Commission to refer his case to the Court of Appeal. He maintained that his conviction was a nullity because the Inland Revenue had no common law power to prosecute in the Crown Court without the consent of the Attorney General. Mr Fitzgerald relies in particular on the following passage in the judgment of Lord Woolf CJ, delivering the judgment of the Queen's Bench Divisional Court (at para 20):

"If [counsel for the applicant] was right, that would be surprising because clearly there is a category of criminal behaviour in respect of which the Inland Revenue Commissioners would be in a peculiarly advantageous position to prosecute. To confine the revenue's ability to bring a prosecution to situations where the Attorney General consents would be out of accord with the general position. Great importance has always been attached to the ability of an ordinary member of the public to prosecute in respect of breaches of the criminal law. If an ordinary member of the public can bring proceedings for breaches of the criminal law, it would be surprising if the Inland Revenue were not in a similar position."

This decision turns, however, on the fact that, although the Inland Revenue Commissioners had a distinct constitutional existence, they remained officers of the Crown. The common law power to prosecute recognised in this case was a part of the Crown's prerogative powers which form part of

the common law. (See Lord Woolf at paras 23-25.) This is also, in the Board's view, the true basis of the following observation made by Rose LJ in *R v W* [1998] STC 550, 557:

"It is clear, on principle and authority, that the revenue's common law power to prosecute is ancillary to, supportive of and limited by their duty to collect taxes."

38.

There has been no suggestion in the present case that the Commissioner is an officer of the Crown exercising prerogative powers. As a result, Hunt does not support a wider principle of implication of prosecutorial powers for which Mr Fitzgerald contends. Equally - and this will become relevant later in this judgment - the decision does not mean that a power to prosecute must necessarily be implied into a statute simply because private citizens enjoy a common law right to prosecute.

39.

Mr Fitzgerald also relied upon *R (Securiplan) v Security Industry Authority* [2008] EWHC 1762 (Admin); [2009] 2 All ER 211, where the Authority was established under the Private Security Industry Act 2001 which made provision for the regulation of that industry. The Authority's express functions included functions relating to licensing, monitoring of persons providing security industry services and inspections of persons engaging in licensable conduct. Section 1(3) provided that the Authority "may do anything that it considers is calculated to facilitate, or is incidental or conducive to, the carrying out of any of its functions". The 2001 Act created a number of criminal offences including engaging in licensable conduct without a licence, using unlicensed security operatives and obstructing an investigation. The claimants were prosecuted before the Crown Court which rejected their submission that the Authority had no power to institute or continue a prosecution. The claimants then sought judicial review of the Authority's decision to prosecute. A Divisional Court of the Queen's Bench Division rejected the application. Maurice Kay LJ observed (at paras 12, 14):

"The first function referred to in section 1(2) is 'to carry out the functions relating to licensing'. In my judgment, that function is plainly facilitated by the enforcement of the sanctions prescribed by the Act. To the extent that it is an offence to engage in licensable conduct except under and in accordance with a licence (section 3(1)) or to use an unlicensed operative (section 5(1)), the 'functions relating to licensing' are facilitated by resort to the threat and the reality of prosecution. In the same way, prosecution is conducive to the carrying out of the licensing function because fear of prosecution will deter unlicensed activity.

...

I am wholly unpersuaded by a submission that the Act, whilst prescribing regulatory offences, by implication requires the SIA, as the body with knowledge of non-compliance, to outsource the prosecution function to an overstretched police force and Crown Prosecution Service. The SIA is in 'a peculiarly advantageous position to prosecute' to borrow the words of Lord Woolf CJ in *R (Hunt) v Criminal Cases Review Commission* ..., where he was considering the position of the Inland Revenue Commissioners, albeit outside the ambit of a statute and, admittedly, not a corporate body."

40.

The absence in the present case of an express power to do anything that is calculated to facilitate or is incidental or conducive to the carrying out of the Commission's functions is not fatal to the Commission's reliance on *Securiplan*. This is because in appropriate circumstances powers may be implied. However, whether such implication is possible will depend on the particular circumstances of each statutory scheme, in particular the express functions conferred on the statutory body. It is not

possible simply to transfer the reasoning from one statute to another. The fact that in Securiplan a power to prosecute for offences created by the statute facilitated the Authority's regulatory functions provides no basis for the implication in the present case of a general power to prosecute the offences which the Commission is charged with investigating. In any event, in the present case, as indicated above, there are features which point strongly against the implication of any general power to prosecute incident offences. Furthermore, contrary to the submission of Mr Fitzgerald, Hunt and Securiplan do not establish a general principle that a statutory body should be recognised as possessing a general prosecutorial power if it is in a particularly advantageous position to prosecute. This is simply one factor which may be taken into account in deciding whether such a power is to be implied. In the present context, the fact that the Commission will be well informed in relation to the subject matter of its investigations is insufficient to justify the implication of a general prosecutorial power.

41.

R v Rollins [2010] UKSC 39; [2010] 1 WLR 1922 concerned the prosecutorial powers of the Financial Services Authority ("the FSA"), a company limited by guarantee. The appellant, who had been charged with money laundering offences contrary to the Proceeds of Crime Act 2002, challenged the powers of the FSA to prosecute the offences under the 2002 Act. It was submitted on behalf of the appellant that the express powers to prosecute conferred by sections 401 and 402 of the Financial Services and Markets Act 2000 ("FSMA") provided, in conjunction with section 1(1), a complete code within which the FSA was required to operate and that the FSA's only powers to prosecute were those referred to in sections 401 and 402. In rejecting the submission, Lord Dyson observed (at paras 7-14) that before the enactment of FSMA the FSA had enjoyed the power of a private individual to bring any prosecution provided that this fell within the scope of its objects as defined by its memorandum and articles of association, subject to any restriction or condition that was imposed by the statute which created the offence. A corporation was entitled to bring a prosecution provided that it was permitted to do so by the instrument that gave it the power to act. The particular question which arose was, therefore, whether the effect of sections 1(1), 401 and 402 FSMA was to deprive the FSA of the general power it previously enjoyed to bring prosecutions and to confine it to the power to bring prosecutions falling within sections 401 and 402. The Supreme Court held that they did not have that effect. This is to be contrasted with the present case where the 2010 Act is the instrument that gives the Commission the power to act. The Commission therefore has only those powers conferred on it expressly or impliedly by the 2010 Act or other legislation and the 2010 Act, construed as a whole, makes clear that the Commission's functions are purely investigative.

42.

Comr of Police v Steadroy Benjamin [2014] UKPC 8, an appeal from Antigua and Barbuda upon which the Commission relies as establishing that the inviolability of a general power to prosecute cannot be encroached upon by implication, takes matters no further. That case was concerned with provisions in the Constitution of Antigua and Barbuda which are similar to section 94 of the Jamaican Constitution relating to the powers of the Director of Public Prosecutions. The question there was whether these provisions impliedly empowered the Director to prevent the police from instituting criminal proceedings in circumstances where, those provisions apart, there was no issue that the police had the power and duty to do so. In the present case, by contrast, the Commission has no powers other than those conferred on it, expressly or impliedly by the 2010 Act, and the terms of the Act make clear that the Commission has no power to prosecute for an incident offence.

43.

In summary, therefore, a power to prosecute for incident offences is not an incident of, ancillary to or consequential upon the Commission's statutory function, nor does the Commission require such a power in order to be able effectively to discharge its statutory function which, the Act makes clear, is an investigative function. It would not facilitate the discharge of that function or in any way enhance the fulfilment of the Commission's duties. There is nothing in the 2010 Act to suggest that it was intended that the Commission should perform any function in relation to the prosecution of incident offences. As a result, the implication of the powers contended for becomes an impossibility. For these reasons the Board considers that the Court of Appeal was correct in its conclusion that the Commission, and the Commissioner and Commission officials in their official capacity have no power to prosecute in respect of incident offences.

Power to prosecute offences contrary to section 33

44.

The preceding discussion has been limited to consideration of a power to prosecute in respect of incident offences. Different considerations apply, however, in respect of a possible power to prosecute in respect of the offences created by section 33 of the 2010 Act. This provision creates offences of misleading the Commission in the execution of its functions (section 33(a)), obstructing, hindering or resisting the Commission in the exercise of its functions, without lawful justification or excuse (section 33(b)(i)), failing to comply with any lawful requirement of the Commission, without lawful justification or excuse (section 33(b)(ii)), wilfully refusing or neglecting to carry out any duty required under the 2010 Act, without lawful justification or excuse (section 33(b)(iii)) and dealing with documents, information or things mentioned in section 28 in a manner inconsistent with a duty under that section (section 33(c)). It is now common ground between the parties to both the Indecom appeal and the Diah appeal, contrary to the view of the Court of Appeal, that the 2010 Act confers on the Commission, by necessary implication, a power to prosecute in respect of these section 33 offences. It is not disputed that a prosecution in respect of an offence under section 33 is capable of aiding the Commission in the discharge of its investigative functions and that the Commission therefore has an implied power, consistent with the express terms of the 2010 Act, to bring a prosecution for a section 33 offence. The Board considers that this concession is correctly made. Each of these offences is very closely related to the investigative functions of the Commission and is intended to promote the effective performance of those functions. By contrast with a general power to prosecute for offences which form the subject matter of the Commission's investigations, a power to prosecute for these offences is conducive and properly incidental to the effective performance of the Commission's investigative functions. These offences are created in order to promote and protect the Commission from obstruction in the performance of its investigative function and the necessary implication is, quite clearly, that the Commission should have the power to prosecute in respect of such conduct.

Private prosecutions

45.

The Commission advances an alternative case that prosecutions for incident offences may be initiated by the Commissioner or the investigative staff of the Commission, not in their official capacity but in their respective private capacity in the exercise of their common law right as private citizens, free of any restrictions or limitations. The starting point here is the general constitutional principle, expressly recognised in section 94 of the Jamaican Constitution, that the common law has conferred a power to institute criminal proceedings on every citizen. (See *Gouriet v Attorney General* [1978] AC 435, per Lord Wilberforce at p 477B-C, per Lord Diplock at pp 497H - 498B; *R v Rollins* per Lord Dyson at para

8; R (Gujra) v Crown Prosecution Service [2012] UKSC 52; [2013] 1 AC 484, per Lord Wilson at paras 11, 12, per Lord Mance at para 88; Comr of Police v Steadroy Benjamin per Lord Wilson at para 16.)

46.

The Court of Appeal was divided on this issue. The majority (Brooks and F Williams JJA) considered that the rights of the Commissioner and Commission staff to bring a private prosecution had not been abrogated by the 2010 Act as this could be achieved only by the use of clear express language or by necessary implication, neither of which was present here. Phillips JA dissented on this point, considering that the Act clearly contemplated that it was the police and the DPP who should arrest, charge, initiate and conduct prosecutions after the Commission had completed its investigation, without directions or interference from anyone. The majority, however, did qualify their conclusion with certain reservations. Brooks JA (with whom F Williams JA agreed) explained that it would be very challenging for any of the Commission's investigators, in their private capacities, to exercise any of their common law rights to arrest or prosecute anyone for any offence arising from any incident as they do not possess the right of arrest that a constable is entitled to exercise. Furthermore, the investigator would have difficulties in securing the attendance in court of the relevant witnesses and marshalling the relevant evidence. In addition, the majority considered that Commission staff prosecuting in a private capacity would not have the defences in law that a constable would have to claims of wrongful arrest and malicious prosecution.

47.

The Board agrees with the majority of the Court of Appeal that, when the issue is considered as a matter of principle, the legislation establishing the Commission does not expressly or impliedly abrogate the right of individuals to bring a private prosecution in respect of an incident offence which had been subject of investigation by the Commission. However, the Board is equally persuaded that the legislation has made such a private prosecution by the Commission or its staff a practical impossibility. As we have seen, section 28(1) requires the Commissioner and all persons concerned with the administration of the Act to regard as secret and confidential all documents, information and things disclosed to them in the execution of any of the provisions of the Act. Disclosure in breach of the section 28 duty is made a criminal offence by section 33(c). The exceptions to this provision would not apply to a private prosecution for an incident offence. In particular, disclosure for the purposes of such a prosecution, even if brought by the Commissioner or a member of the Commission's staff, would not be in discharge of their official functions. Furthermore, section 28(2) prohibits the Commissioner and his staff from giving evidence in respect of or from producing any such document, information or thing, save in proceedings mentioned in section 28(1) (proceedings under section 33 of the 2010 Act or the Perjury Act by virtue of section 21(3) of the 2010 Act) or section 25 (assistance to the DPP in relation to a prosecution arising out of an incident). Section 28 therefore imposes a total prohibition on the use by the Commissioner or a member of the Commission's staff in such a private prosecution of any information acquired as a result of the Commission's investigation, thereby defeating the entire exercise. Furthermore, the Commissioner and the Commission staff would be committing a criminal offence if they were to try to use any evidence gained in the course of the investigation in support of a private prosecution. In these circumstances, it is not necessary for the Board to express any view on matters such as an individual's power of arrest, an individual's power to secure attendance of witnesses at a court hearing or the possible exposure of an individual bringing a private prosecution to civil liability for wrongful arrest or malicious prosecution.

Conclusion on the Indecom appeal

48.

For these reasons, the Board will humbly advise Her Majesty that the Indecom appeal should be dismissed.

The Diah Appeal

49.

On 29 August 2013 a young woman, Felecia Latoya Henry, was shot and killed during an alleged shootout between police officers and gunmen in the Macca Tree area, Windsor Heights, St Catherine, Jamaica. The Police Control Centre of the Jamaica Constabulary Force ("JCF") informed the Commission of the incident in accordance with section 11 of the 2010 Act. The Commission launched an investigation and sent investigators and members of its forensic team to the Central Village Police Station where the investigation was led by the appellant, Mr Dave Lewin, who was at that time one of the Commission's Chief Investigators. At the police station, seven firearms (six service weapons carried by the officers involved in the shooting and one recovered from the scene of the incident) were handed to Mr Phillip Anderson, a forensic examiner employed by the Commission in order for him to process the weapons and to package them, in the presence of the initial police investigator, for submission to the Government Forensic Laboratory. The processing involved labelling and photographing the firearms, checking for blood samples and verifying serial numbers. The packaging was to preserve the exhibits and to prevent tampering.

50.

The respondent, a Deputy Superintendent of Police, who was in command of the group of police officers who had been involved in the shooting incident, took up the firearms and removed them from the room, thereby terminating Mr Anderson's access to them. Several requests were made of the respondent to return the firearms so that they could be processed and packaged before being taken to the laboratory for testing. The respondent refused to hand over the firearms but subsequently gave to Mr Anderson the firearm recovered during the incident. Acting on instructions given to him by his superior, Senior Superintendent of Police Colin Pinnock, the respondent escorted the six police firearms to the Government Forensic Laboratory on the same day, where they were tested and returned to him. The firearms were retested the following day, 30 August 2013, by the Commission following a request from Mr Floyd McNabb, one of the Commission's then Directors of Complaints, to the respondent.

51.

On 20 November 2013 the respondent was summoned to appear before the Parish Court for St Catherine charged with two offences contrary to section 33 of the 2010 Act. The charges were laid on an information sworn by the appellant, who is now one of the Commission's Directors of Complaints. The trial commenced on 17 July 2014. The case was prosecuted by Mr Richard Small, the Commission's legal representative, who informed the Parish Court Judge that this was a private prosecution. A preliminary objection on behalf of the respondent that Mr Small should have obtained a fiat from the DPP to bring the prosecution was rejected by the Parish Court Judge. The respondent was tried and convicted on two charges alleging that he:

(1)

Without lawful justification or excuse, obstructed the Commission in the exercise of its functions in that he terminated the Commission's access to weapons relevant to the Commission's investigations of an incident, contrary to section 33(b)(i) of the 2010 Act;

(2)

Without lawful justification or excuse, failed to comply with a lawful requirement of the Commission in that he disobeyed a requirement to produce weapons relevant to the Commission's investigations that were in his possession or control, contrary to section 33(b)(ii) of the 2010 Act.

On 20 November 2014 the respondent was sentenced to pay a fine of \$400,000.00 on each charge or six months imprisonment at hard labour on each count concurrent in default thereof.

52.

The respondent appealed against conviction and sentence to the Court of Appeal. The appeal was heard on 6 to 8 June 2016 by the same Justices of Appeal as had heard the Indecom appeal and on 16 March 2018 a majority judgment was handed down allowing the appeal against conviction and sentence. For present purposes we are concerned with two groups of issues on the appeal. First, the Court of Appeal held by a majority (Phillips JA dissenting) that the fiat of the DPP was not required to bring this prosecution and that the Commissioner and its investigators were entitled to bring a prosecution for offences contrary to section 33 of the 2010 Act in their private capacities. Brooks JA (at paras 170-179) emphasised that this was a private prosecution brought by the appellant and not by the Commission. He considered that in respect of offences contrary to section 33 there was neither an express nor an implied exclusion of the right of Commission officials to initiate a prosecution in their private capacity. (See also in this regard his judgment in the Indecom appeal at paras 188-192.) F Williams JA (at paras 229-232) agreed with Brooks JA on this issue. Phillips JA dissented on this point, considering (at para 55) that the 2010 Act had impliedly restricted the right of the Commissioner and his staff to bring private prosecutions. Secondly, the Court of Appeal by a majority (Brooks JA dissenting) allowed the appeal on the ground of the judge's failure to give sufficient attention to the respondent's defences of superior orders and mistake of fact or law, which the majority considered could have provided lawful justification or excuse.

53.

On 20 December 2018 the Court of Appeal granted conditional leave to appeal to the Judicial Committee of the Privy Council in respect of the following issues:

(1)

Whether Mr Dave Lewin, in his capacity as a Commission investigator, had the power to institute legal proceedings, and if so, what limitations are there, if any, to that power?

(2)

Whether there is an uncertainty caused by competing instruments of legislation, that is, the Act on one hand and the Commission's own protocols, the Constitution, the Police Services Regulations, 1961, the Constabulary Force Act and the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force, on the other hand? If so, whether in the circumstances, Mr Diah's defence of being lawfully excused from obeying the request of the Commission investigator ought to have been given more direct consideration by the Parish Court Judge?

(3)

Whether a claim of uncertainty about the lawfulness of a request made by a Commission investigator may amount to lawful justification or excuse for failure to comply with that request?

(4)

Whether the Court of Appeal erred in finding that the actions of Mr Diah in not handing over the police service firearms to the Commission investigators, citing that he was following the instruction of his superior officer to take the police service firearms to the laboratory, amounted to lawful

justification or excuse for failing to comply with the Commission investigator's request and ought to have been given more direct consideration by the Parish Court Judge?

54.

Issues 1 and 4 are no longer live issues. Issues 2 and 3 have been reformulated. Issue 2 as reformulated is essentially a plea of lawful justification or excuse. Issue 3 as reformulated is essentially a plea of mistake of fact.

Issue 1: Power to prosecute for offences contrary to section 33

55.

It is now conceded on behalf of Mr Diah that the Commission has the power to bring a prosecution for offences contrary to section 33. The Board considers that this concession was correctly made for the reasons set out at para 44 above. Equally, the Board can see no basis of objection to a private prosecution by a Commission official in his or her private capacity for an offence contrary to section 33 of the 2010 Act, which appears to be what occurred in the present case, although this may have been the subject of some misapprehension at the trial. (See Brooks JA in the Court of Appeal at para 178.) The practical problems identified at para 47 above do not arise here because section 28(1)(a) creates an express exception to the section 28 duty for disclosures made in proceedings for an offence under section 33 of the 2010 Act.

Issue 2: Lawful justification or excuse

56.

Section 4(2) of the 2010 Act provides that in the exercise of its functions under subsection 4(1) the Commission shall be entitled to have access to, inter alia, all evidence relating to all incidents including any weapons and to take charge of and preserve the scene of any incident (sections 4(2)(a) and (d)). Section 21 provides:

"21(1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.

(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.

(3) Subject to subsection (4), the Commission may summon before it and examine on oath -

(a) any complainant; or

(b) any member of the Security Forces, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigation.

(4) For the purposes of an investigation under this Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

(6) Section 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section.”

Section 22 provides:

“22(1) Notwithstanding anything to the contrary in any other law, the Commission shall have primary responsibility for the preservation of the scene of an incident or alleged incident and may issue directions to the Commissioner of Police or any other authority for the purposes of this section.

(2) The Commissioner of Police shall implement measures in accordance with directions issued under subsection (1) to ensure that members of the Jamaica Constabulary Force shall, as soon as practicable after being notified of an incident, attend at the scene of the incident in order to ensure the preservation of the scene until the arrival of an investigator assigned to that scene by the Commission and thereafter, each member shall be under a duty, until the investigator is satisfied that it is no longer necessary to do so, to continue to take steps for the purposes of preserving the scene.

(3) It shall be:-

(a) the duty of any member of the Security Forces who is at the scene of an incident, or in any case where there is more than one such member, the member senior in rank and command;

(b) without prejudice to the provisions of paragraph (a), the duty of the police officer in charge of the police division in which the incident occurred.

to take such steps in accordance with directions issued under subsection (1) as are lawful and necessary for the purpose of obtaining or preserving the evidence and facilitating the making of reports to the Commission in relation to the incident.”

57.

On behalf of the respondent, Ms Kaufmann draws attention to the evidence of Mr Philip Anderson, Forensic Examiner at the Commission and Mr Lauren Campbell, the Commission’s Chief Forensic Examiner, as to the directions they gave to the respondent. Mr Campbell’s evidence was as follows:

“I then told him that there is a procedure that we follow as it relates to those weapons. I went on to tell him what the procedure was. I told him that when a police shooting occurs the police is required to hand over the firearm(s) that is/are involved in such shooting to Indecom’s forensic examiner for processing.

This process entails checking for blood samples or verifying serial numbers or photographing and packaging of the weapons in firearms boxes. Then they are handed back to the police to be taken to the forensic lab for testing.”

Mr Anderson’s evidence on this point was to similar effect.

58.

At the date of this incident, the Commission’s current Directions to the Jamaica Constabulary Force on the Preservation of Incident Scenes and Evidence, issued pursuant to section 22 of the 2010 Act, were those dated February 2013. Ms Kaufmann points to paragraph 13 of the Directions which is headed “Confiscation, Labelling and Storage of Weapons of Offence”. Paragraph 13 provides that any weapon of offence suspected to have been used during an incident shall be confiscated by the senior responding officer (ie a police officer) or the investigator (paragraph 13(2)(a)). Such confiscation shall be done immediately upon arrival at the incident scene or at the earliest opportunity thereafter, in a

manner that preserves the integrity of any material evidence and in accordance with procedures as may from time to time be published by the Commission (paragraph 13(2)(a)(i), (ii), (iv)). Where a weapon of offence is confiscated by a senior responding officer, he is required to cause it to be sealed in the presence of the Commission's investigator or forensic examiner (paragraph 13(2)(b)). The senior responding officer or investigator is required to exercise all due care and skill in handling and storing the weapon seized and shall ensure that each weapon is individually tagged, sealed and packaged in the manner prescribed by the Commission (paragraph 13(2)(e)). Ms Kaufmann submits that under the Directions there was no requirement for police firearms to be labelled and sealed by Commission personnel before being taken to the government forensic laboratory. All the steps set out in paragraph 13 of the Directions for the preservation of police firearms prior to transfer to the laboratory permitted the senior responding officer, who on 29 August was Mr Diah, to maintain the firearms in his possession. It was then the responsibility of the senior responding officer to transport the weapons to the laboratory (paragraph 13(3)).

59.

Accordingly, Ms Kaufmann submits that the process which, according to their evidence, Mr Anderson and Mr Campbell outlined to the respondent and with which they required him to comply was not that contained in the then current Directions. The terms of the instructions which formed the basis of the charges were inconsistent with the Directions in that the respondent was instructed to hand over the weapons to Commission investigators whereas he was entitled to retain possession of them. Ms Kaufmann submits that the instructions were, therefore, ultra vires and that the respondent had lawful excuse or justification for not complying with them. In the alternative, she submits that if Commission officials were entitled to issue their instructions by virtue of the provisions of the 2010 Act, the fact that the Directions entitled the respondent to retain possession of the weapons provided him with lawful justification or excuse for refusing to comply.

60.

In the further alternative, Ms Kaufmann submits that the then current force order, dated 13 October 2011, did not make any provision relating to the preservation of police firearms. In her submission, on the true construction of section 22(2) of the 2010 Act an officer such as the respondent was only required to comply with any instructions relating to the preservation of the scene as were contained in measures taken by the Commissioner of Police under section 22(2). In refusing to hand over the weapons, the respondent was acting in accordance with the force order which contained no provision requiring him to do so.

61.

The difficulty with these submissions is that they focus exclusively on paragraph 13(2) of the Directions and disregard its more general provisions and those of the 2010 Act. In particular, paragraph 4 of the Directions provides that an investigator shall have primary control of and primary responsibility for preserving an incident scene (paragraph 4(1)). Upon arrival at the incident scene an investigator is required to assume control of the scene, all evidence and witnesses, and is authorised to issue instructions to any member of the JCF attending the scene (paragraph 4(3)). Paragraph 4(6) provides in material part:

"The senior responding officer ... shall take such steps as are necessary to ensure the fulfilment of these directions, and shall:

...

(vi) fulfil or ensure the fulfilment of the instructions of the investigator having control of the incident scene;

(vii) confiscate and label the firearms and ammunition of all members of the JCF present at the incident scene in accordance with the directions set out in section 11 herein; ...”

Section 11 provides in material part:

“Where, in relation to an incident, a parallel or secondary investigation is being conducted by the JCF, the following procedures shall apply:

...

(g) Where a member of the JCF has recovered any item from an incident scene, before, during or after the completion of Indecom’s examination of that scene, that member shall immediately advise Indecom of the existence of the item. The said member shall take all necessary steps to surrender the item to Indecom, while preserving the chain of custody and the integrity of the evidence.”

62.

When the Directions are read as a whole, it is clear that the Commission investigators were entitled to issue their instructions in relation to the delivery and packaging of the firearms and that the respondent was required to comply with them. Furthermore, he and other members of the security forces were bound to comply with the provisions of the 2010 Act. Under section 4(2) the Commission and its officials were entitled to have access to the weapons and to take charge of and preserve the scene of the incident. Under section 21(1) the Commission and its officials were entitled to require the respondent and any other member of the security forces to produce the weapons which were in their possession or control. Contrary to the submission on behalf of the respondent, the Board does not consider that the duty under section 22(2) to take steps for the purposes of preserving the scene is limited to compliance with instructions contained in measures taken by the Commissioner of Police, but, in any event, there is no such limitation under section 4(2)(a) or (d), section 21 or section 22(3). Moreover, section 26 makes clear that the functions of the Commission may be performed by any member of its staff or by any other person authorised for that purpose by the Commission.

63.

The Board therefore considers that the instructions given by Mr Anderson were not ultra vires so as to give rise to a lawful justification or excuse for refusing to comply with them.

Issue 3: Mistake of fact

64.

The Court of Appeal concluded by a majority (Brooks JA dissenting) that the trial judge failed to give sufficient attention to the matters raised by the respondent’s defence. Relying on a range of factors, the majority concluded that the respondent acted with lawful justification or excuse in that he was mistaken. The appellant challenges this conclusion and submits that any mistake on the part of the respondent was a mistake of law which cannot avail him.

65.

In her judgment Phillips JA drew attention to various factors including the following:

(1)

Under the Commission Directions the respondent himself had the power to tag, seal and package the firearms in the manner prescribed by the Commission. The respondent was a “senior responding officer” within the Commission Directions who was therefore entitled to handle the firearms.

(2)

The force order was ambiguous in failing to distinguish between civilian firearms and police firearms, if firearms were even included under the rubric “other relevant material”. Before February 2013 there was no requirement for police firearms to be placed in a box, only other recovered firearms. There was no requirement by the Commission for police firearms to be labelled and sealed by Commission personnel before being taken to the laboratory.

(3)

The Commissioner of Police conveyed commands through Force Orders. At the time of the incident on 29 August 2013 there was no Force Order in existence that addressed the testing or handling of police firearms involved in police shootings.

(4)

There was uncertainty as to the proper interpretation of the provisions of the Act. During the incident at the police station the respondent had been trying to clarify the position by contacting senior officers by telephone. Deputy Commissioner of Police Heath and Mr McNabb had failed to give him clear directions as to how to proceed. Finally, he complied with direction of his commanding officer Senior Superintendent Pinnock.

66.

Phillips JA concluded that this level of uncertainty as to whether the Commission’s staff ought to have been given the police firearms to be tagged, sealed and packaged by the Commission’s staff and the fact that the respondent followed the instructions of Senior Superintendent Pinnock and took the police firearms to the laboratory gave rise to a lawful justification or excuse for his failure to comply with the Commission’s request and any obstruction.

67.

Similarly, F Williams JA identified the following considerations as of “tremendous importance”.

(1)

The relative novelty of the legislation at the time.

(2)

The recent change in the procedures relating to the handling of police firearms of which the respondent was unaware but on which he was seeking clarification.

(3)

The fact that a new protocol was promulgated through force orders relatively shortly thereafter on 6 February 2014 which clarified what the new requirements were.

(4)

The respondent’s concern about the shortage of police firearms at the police station.

(5)

The fact that the respondent complied with the order of his superior officer in taking the weapons to the laboratory.

F Williams JA considered that had these factors, taken together, been directly considered they could have created in the mind of the judge a reasonable doubt as to whether the respondent had a lawful justification or excuse.

68.

On this issue the Board finds itself in agreement with the dissenting judgment of Brooks JA. He explained that the judge did address the issue of whether the respondent had any lawful excuse for disobeying the requirement of Mr Anderson. She referred to his uncertainty as to what course he should follow. She held, however, that the provisions of law were entirely clear and that police officers were required to obey the instructions of the Commission's investigators. Although the judge did not refer to Senior Superintendent Pinnock's instructions to the respondent, this could not be fatal to the conviction as he could not have issued a lawful instruction to disobey the instruction of the Commission's investigators.

69.

The lack of a force order relating specifically to the custody of police firearms following an incident did not absolve the respondent from complying with the instructions of Commission officials. As Brooks JA pointed out in his judgment (at para 202), the suggestion that in the absence of a force order dealing with any specific situation a police officer is free to take any step he considers appropriate in relation to evidence conflicts with both sections 21 and 22 of the Act. An order under section 21(1) requiring a member of the security forces to produce a thing in connection with an investigation may be made notwithstanding the fact that there is no force order authorising the making of the requirement. Similarly, under section 22(1) the Commission has primary responsibility for the preservation of the scene of an incident "notwithstanding anything to the contrary in any other law". Although the firearms were at the police station in the present case and therefore not at the scene of the incident, their preservation is clearly within the scope of section 22. Failure to comply with an order of a Commission official to produce a thing in connection with an investigation pursuant to section 21(1) or to preserve the scene of an incident pursuant to section 22(1) will constitute an offence under section 33(b)(ii). The respondent's claim of acting on the direction of a senior police officer cannot justify such a failure. The respondent was under a duty under section 21(1) to produce the firearms when required by Mr Anderson to do so. Any misunderstanding on the part of the respondent as to his responsibilities is essentially a matter of law not of fact and is therefore incapable of giving rise to any lawful justification or excuse.

Issue 4: Superior orders

70.

On this appeal it is submitted on behalf of the appellant that it is not a defence known to law merely to claim that an act was done in obedience of superior orders and that accordingly it cannot be relied on by the respondent. On behalf of the respondent Ms Kaufmann does not argue otherwise.

Conclusion on the Diah appeal

71.

For these reasons, the Board considers that this appeal should be allowed.

72.

Following conviction, the respondent was sentenced to pay a fine of \$400,000.00. The respondent appealed against sentence to the Court of Appeal on the ground that it was manifestly excessive. The Court of Appeal quashed the convictions and sentences. Only Brooks JA expressed a view on the

appeal against sentence. In these circumstances, the Board considers that the matter should be remitted to the Court of Appeal for further consideration of the appeal against sentence.

73.

For these reasons the Board will humbly advise Her Majesty that this appeal should be allowed, the convictions restored and the matter remitted to the Court of Appeal for further consideration of the appeal against sentence.