

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 4/2015

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA**

ALBERT DIAH v R

Oswest Senior-Smith for the appellant

Richard Small and Miss Yanique Taylor for the respondent

**Miss Althea Jarrett instructed by the Director of State Proceedings appearing
*amicus curiae***

**Miss Kathy Pyke and Mrs Denise Samuels-Dingwall instructed by the Director
of Public Prosecutions appearing *amicus curiae***

2, 3, 6, 7, 8 June 2016 and 16 March 2018

PHILLIPS JA

[1] Mr Albert Diah (a Deputy Superintendent of Police) was charged and convicted of failing to comply with a lawful requirement of the Independent Commission of Investigations (INDECOM), and obstructing INDECOM in the exercise of its functions. He was sentenced on each count to a fine of \$400,000.00 or six months imprisonment at hard labour in default thereof. The information was laid by Mr Dave Lewin (an INDECOM investigator), and Mr Diah was prosecuted by INDECOM's legal

representative. He has now appealed his conviction and sentence on the basis that the Commissioner of INDECOM (the Commissioner) and his investigative staff, had no power to prosecute him without a fiat from the Director of Public Prosecutions (DPP). He further challenged his conviction and sentence on the basis that the learned Parish Court Judge utilised prejudicial material in her deliberations; failed to properly appreciate his defence having regard to section 13 of the Constabulary Force Act and section 22 of the Independent Commission of Investigations Act 2010 (the Act); and that the sentence imposed by the learned Parish Court Judge was manifestly excessive.

Background

[2] On 29 August 2013 at about 4:05 am, a shooting occurred in the Macca Tree area, Windsor Heights, in the parish of Saint Catherine, allegedly between police and gunmen. During that incident, a female was shot and killed and a firearm recovered from the scene of the shooting. INDECOM was informed of this incident and thereafter, Mr Phillip Anderson, a forensic examiner of INDECOM, visited the Central Village Police Station in the parish of Saint Catherine at about 7:20 am the same day. Detective Sergeant Carl Morris, the initial investigating officer in the said fatal shooting, gave Mr Anderson seven firearms, which included six police service firearms and the firearm recovered from the scene of the incident. Mr Diah later took possession of the said firearms, and it was alleged that when he was asked to return them to an INDECOM investigator so that they could be photographed and packaged by an INDECOM investigator, in the presence of the initial investigator, Mr Diah refused, save and except the firearm recovered at the scene of the shooting, which he gave to Mr Anderson.

Based on instructions given to Mr Diah by his superior, Senior Superintendent of Police Colin Pinnock, Mr Diah escorted the six police firearms to the Government Forensic Laboratory (the lab) in the parish of Kingston, that same day, where they were tested and returned to him. The firearms were retested the following day on 30 August 2013, by INDECOM, based on a request by Mr Floyd McNabb, Director of Complaints at INDECOM, to Mr Diah.

[3] On 20 November 2013, Mr Diah was summoned for the offences of: (i) obstructing INDECOM in the exercise of its functions contrary to section 33(b)(i) of the Act, in that he, “without lawful justification or excuse, obstructed [INDECOM] in the exercise of its functions in that, he terminated [INDECOM’s] access to weapons relevant to [INDECOM’s] investigations of an incident”; and (ii) failing to comply with a lawful requirement of INDECOM contrary to section 33(b)(ii) of the Act, in that he, “without lawful justification or excuse, failed to comply with a lawful requirement of [INDECOM], in that, he disobeyed a requirement to produce weapons relevant to [INDECOM’s] investigations that were in his possession or control”.

The trial

[4] His trial for those offences commenced in July 2014, in the Saint Catherine Parish Court, holden at Spanish Town, before Her Honour Miss Anne-Marie Nembhard. At the beginning of Mr Diah’s trial, a preliminary objection was made on his behalf that INDECOM’s legal representative, Mr Richard Small of counsel, ought to have obtained a fiat from the DPP in order to commence a prosecution against Mr Diah, since it was only the Clerk of the Courts and counsel from the office of the DPP that had such authority.

Counsel for INDECOM responded to this objection. The learned Parish Court Judge ruled, *inter alia*, that the issue as to whether INDECOM had the power to prosecute was settled in **The Police Federation and Others v The Commissioner of the Independent Commission of Investigations and Another** [2013] JMFC Full 3, and so rejected the preliminary objection.

[5] Mr Small called six witnesses for the prosecution. The first witness was Sergeant Alrick Morrison who testified that on 29 August 2013, he received information about the incident, and passed the said information to INDECOM as a part of the Jamaica Constabulary Force's (JCF) standard operating procedure. He was not cross-examined. The second witness was Mrs Peta-Gay Boyd-Davis, the secretary for the forensic department of INDECOM and the call operator for the Call User Group cellular phone. She testified that on 29 August 2013, she received a call from the police relating to the said incident, and she referred the matter to INDECOM's chief investigator, Mr Dave Lewin, and its chief forensic examiner, Mr Lauren Campbell. She too was not cross-examined.

[6] Mr Phillip Anderson, a forensic examiner from INDECOM and the third prosecution witness, testified that on 29 August 2013, he received information about the fatal shooting in Central Village. He arrived at the Central Village Police Station at about 7:20 am, and he spoke to Detective Sergeant Morris who identified himself as the initial investigator of the said incident, and who later handed over seven firearms to him. He further stated that Sergeant Morrison introduced him to the officers involved in the shooting, and the hands of those officers were swabbed for gunshot residue. He

then saw the firearms that were handed to him, being taken away by Mr Diah, and he "went to him and told him that it was my duty to package the firearms in the presence of the initial investigator". He also told Mr Diah that "[t]he sealed package containing the firearms should be handed back to the initial investigator". Mr Anderson indicated that Mr Diah responded saying that "he would not allow any civilians to handle police firearms and he would not hand them to me". Mr Anderson further testified that the following exchange took place:

79. ...I asked him since he was not handing the police firearms to me if it would be possible that I can package the alleged recovered firearm. That firearm was handed to be by Albert Diah. Kevon Stephenson, an investigator for [INDECOM] and Mr. Lauren Campbell, chief forensic examiner for [INDECOM], also spoke to Mr. Albert Diah.
80. I heard both Kevon Stephenson and Mr. Lauren Campbell saying that the firearms should be packaged by [INDECOM].
81. Mr. Diah was objecting to handing the firearms to us in a boisterous manner.
82. I saw him putting the firearms in the back of an SUV. I cannot recall if it was in the trunk or on the backseat.
83. I saw the firearms in his hand.
84. [INDECOM] requires the firearms to be packaged into a firearm box and sealed in the presence of the police initial investigator. The boxes should also be labeled before they are handed to the initial investigator.
85. The seal is signed by the person packaging the firearms. In this case it was me. The packaged, sealed and signed evidence box is photographed. When the firearm is placed inside of the box the firearm is fixed to the box using a tie strap. The

firearm inside of the box is photographed to show the serial number and the type of firearm. A glove should always be on anybody's hands who handle such firearms.

86. **Q:** What is the purpose of this procedure for the fixing of the gun, photographing etc? **A:** The purpose is to protect the integrity of the firearms. To ensure that parts of the firearms are not changed which can give a different ballistic output. The firearms were then handed to the initial police investigator for transmission to the Government Forensic Lab.
87. INDECOM's presence is required when the Government Forensic Lab analyst is opening the box containing the firearm."

[7] Under cross-examination, Mr Anderson said that when he arrived at the Central Village Police Station, all seven firearms were being tagged by a member of the JCF. He swabbed three hands, and while doing so, the seven firearms were on a table behind him. He stated that the firearms were exhibits, and that he had been given custody of those exhibits, but he agreed that he had not been exercising proper custody of the exhibits when they were placed behind him out of sight. Mr Anderson, in further cross-examination, agreed that in August 2013, he had no licence or permit to handle firearms.

[8] The fourth prosecution witness, INDECOM's chief forensic examiner and former member of the JCF, Mr Lauren Campbell, testified that on 29 August 2013, he received information about the incident from Mrs Boyd-Davis, and he contacted Mr Anderson and gave him certain instructions. He further indicated that while at the Central Village Police Station the following occurred:

- “110. Mr. Diah was leaving the station building carrying six (6) firearms. I spoke to him. I called out to him to get his attention first. I introduced myself to him as Lauren Campbell, Chief Forensic Examiner at INDECOM. I then asked him if the weapons that he was carrying were those that the officers involved in the shooting used in the operation. He answered. He said yes.
111. 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 firearms(s) that is/are involved in such shooting to INDECOM’s Forensic Examiner for processing.
112. This process entails checking for blood samples or verifying serial numbers or photographing and packaging of the weapons in firearm boxes. Then they are handed back to the police to be taken to the Forensic Lab for testing.
113. The initial investigator (the person from the Constabulary) is also required to inform the Chief Forensic Examiner at INDECOM of the date and time when these weapons would be taken to the Lab. This is to facilitate an INDECOM representative to be present to witness the breaking of the seal and the test firing, if desired.
114. Mr. Diah then said to me I am not giving these weapons to put in any box. I am taking them to the Lab right now. All I need to know is that they are tagged with the serial number. He also said I am investigating a crime and you are investigating an incident.
115. I asked him what crime are you investigating. He said Shooting with Intent on my men. I then asked him what would he call the shooting death in respect of the lady in the incident. He replied saying that is your responsibility.

116. Just about then his cellphone rang. He answered it. He walked away towards a car that was parked nearby.
117. I went into the station. Mr. Diah came back in the station. I approached him and tried to speak to him again. This time he shouted saying Mr. Campbell you can't instruct me because him a police.
118. He remained for a while and I think he left with the weapons."

[9] Mr Campbell, under cross-examination, denied suggestions that he failed to outline any procedures to Mr Diah. He nonetheless accepted that "Mr. Diah was speaking to someone on the telephone about the incident" and that he had "formed the view that Mr. Diah was clarifying his position to that person on the phone". He accepted that he had been a member of the JCF for 31 years before joining INDECOM, and that the "Commissioner of Police through Force Orders communicates with the entire membership of the [JCF]" and "[o]nce a Force Order is published all members of the [JCF] are put on notice of any change of Protocol or new protocol". He also accepted that before February 2013, "[t]here was no requirement for Police Firearms to be placed in any box but other firearms – recovered firearms" and "there was no requirement by INDECOM for Police firearms to be labelled and sealed by INDECOM personnel before being taken to the Government Forensic Lab". He agreed that firearms were added to the protocol after an incident in January 2013. He agreed that a force order governing firearms protocol between INDECOM and the Commissioner of Police was issued on 6 February 2014. When Mr Campbell was re-examined, he accepted that there was a procedure in place on 29 August 2013, governing investigations, and that it

was recorded in a document entitled "Preservation of Incident Scenes and Evidence", dated 22 February 2013 which was tendered and admitted as exhibit one.

[10] Kevon Stephenson, a senior investigator at INDECOM and the prosecution's fifth witness, testified that on the day in question, he saw Mr Diah remove the firearms from the table with his bare hands. He also stated that Mr Anderson told Mr Diah that he needed to box and seal the firearms, and that Mr Anderson had urged Mr Diah to desist from removing the firearms, but Mr Diah said that his investigation took precedence over that being done by INDECOM, and walked out of the room. He also stated that Mr Campbell did tell Mr Diah about INDECOM's policy with regard to the packaging of firearms. Mr Stephenson said that he, himself, spoke to Mr Diah, and "pleaded with him" and "told him it was wrong for him to take the weapons and that he should follow the guidelines that had been set out by [INDECOM]" and Mr Diah said that "he wanted to hear nothing from me" and "he was doing his job". Under cross-examination, Mr Stephenson rejected a suggestion that he had no conversation with Mr Diah about procedures governing firearms.

[11] The final prosecution witness was Mr Dave Lewin, former member of the JCF and chief investigator at INDECOM. He testified that on the morning of 29 August 2013, he received information that he passed to Mr Stephenson, Miss Tameisha Dawkins and Mr Campbell. On 20 November 2013, he served Mr Diah with two summonses for the offences stated herein. He said that he was familiar with exhibit one dated 22 February 2013. He also testified that INDECOM started boxing firearms in 2013 because of a shooting that occurred at the Jamaica Police Academy on 30 January 2013, where it

was suspected that parts of weapons used by police officers were switched between the time that the weapons were tagged, labelled and handed back to police officers for transmission to the lab, and the time they were taken to the lab.

[12] Under cross-examination, Mr Lewin indicated that he had been a member of the JCF for 13 years before joining INDECOM. He agreed with the suggestions that “the Commissioner of Police has the sole command and supervision of the [police] Force” and that he “conveys commands to members of the [JCF] through Force Orders”. He also testified that on 29 August 2013, “there existed absolutely NO Force Orders specifically addressing the subject of firearms for handling or testing in relation to any controversial shooting involving police and [INDECOM]”. The force order dated 13 October 2011, was tendered and admitted into evidence as exhibit two, and the force order dated 6 February 2014, was tendered and admitted into evidence as exhibit three. Mr Lewin also agreed that departmental actions which may result in dismissal could follow if a member of the JCF failed to follow a force order or instructions from a senior officer. Mr Lewin, under re-examination, stated that no departmental charges could flow from following the instructions of a senior officer, and that exhibit three does not deal with the packaging of firearms by INDECOM.

[13] After Mr Lewin’s testimony, the prosecution closed its case at which time a no case submission was made. Mr Peter Champagnie, on Mr Diah’s behalf, reiterated the point raised in the preliminary objection that INDECOM required a fiat to prosecute. He also argued that Mr Diah had not been pleaded to the informations, and that no jury properly directed could convict on the evidence adduced, since: (i) the prosecution had

failed to show that Mr Diah had the requisite *mens rea* to commit the offence, or that he had in fact committed the offence without lawful justification or excuse; and (ii) Mr Diah had been acting in accordance with the force orders. In response, Mr Small submitted that a *mens rea* defence has no relevance to the Act; a mistake of law cannot constitute a defence, even if it is honestly believed; and ignorance of the law is no excuse. Mr Small also indicated that the unchallenged evidence was that Mr Diah had been given instructions by INDECOM; he had not complied with them; and he had obstructed INDECOM in its investigations.

[14] The learned Parish Court Judge, in refusing the first argument in the no case submission on whether a fiat was required, adopted her reasoning given on the determination of the preliminary objection. On the issue as to whether Mr Diah was pleaded on the information, she ruled, relying on **R v Ashton and Others** [2007] 1 WLR 181 and **R v Clarke and another** [2008] 2 All ER 665, that a failure to follow the correct procedure with regard to arraignment is not necessarily fatal to proceedings thereafter, and as a consequence, the failure to have Mr Diah pleaded to the informations, although a regrettable irregularity, was not fatal to the validity of the proceedings. Moreover, the learned Parish Court Judge indicated that Mr Diah was aware of the allegations that were being made against him, and through his counsel, had made it clear that he would be challenging those allegations. Additionally, she found that he had suffered no prejudice as a result of not having been pleaded to the informations, since the defence had been furnished with all the evidence the prosecution intended to adduce, and counsel for Mr Diah had made a preliminary

objection with regard to the initiation of the proceedings, cross-examined the prosecution witnesses, and made legal submissions on his behalf.

[15] On the third point of whether a jury would convict based on the evidence led, the learned Parish Court Judge stated that the defence had sought to rely on the principle of mistake as to fact. Having regard to sections 33(b), 4, 13 and 14 of the Act and **R v Edwards** [1975] 1 QB 27, the Parish Court Judge found that there was a *prima facie* case that a lawful requirement had been made of Mr Diah; that the person making that request was authorized to do so by the Act; and that he had failed to comply with that requirement. She found that "Force Orders do not have the same effect as an Act of Parliament" and so a submission that Mr Diah was mistaken as to fact could not avail him. She found therefore that a *prima facie* case had been established and called upon Mr Diah to answer the charges.

[16] Mr Diah gave an unsworn statement in which he indicated that he was a Deputy Superintendent of Police and that he had been enlisted in the JCF since 1993. He indicated that on 29 August 2013 he was the Divisional Crime Officer for Saint Catherine South. He had been informed of an incident that had been unfolding at 4:00 am, and so he had visited Windsor Heights in the parish where three constables made a report to him. He stated that based on the authority given to him under sections 3 and 13 of the Constabulary Force Act, he gave instructions to Detective Sergeant Morris to commence investigations into a case of shooting with intent at the three constables, by persons known and unknown, and also, the death of Felicia Henry (the female). He thereafter gave instructions to another officer to escort the three constables and the

firearms to the Central Village Police Station so that they could be tagged, labelled and taken to the lab with haste. Upon his arrival at the Central Village Police Station, he saw police and INDECOM investigators on the compound. He stated that he caused the firearms to be retrieved from the Criminal Investigation Branch office of the police station and placed in a service vehicle. Mr Anderson told him "Mr. Diah the guns supposed to be placed in a box" and Mr Diah indicated to Mr Anderson, referring to his (Mr Anderson's) earlier instructions, that "this would have been the normal procedure so what's the new change". He called his commanding officer but was referred to Deputy Commissioner of Police Delroy Heath. He stated that:

"Whilst walking out of the station towards the car Mr. Anderson followed me and asked that the recovered firearm be returned to him and be photographed and placed in the box as we would normally do prior to that time."

[17] Mr Diah stated that the time when the INDECOM's forensic analysts and investigators were attempting to speak with him, he knew that section 4 of the Act gives INDECOM access, but it does not state "[w]hat was access? How was access defined? By Whom?... How long should access be granted? Who determines that?". He also indicated that section 4(3) of the Act stated that a warrant should be issued by a Justice of the Peace, but none had been presented to him by the INDECOM personnel. Moreover, handing over the firearms to INDECOM would have violated the Firearms Act. He stated, that as a trained scene of crime expert, the only reason the firearms would be taken to the lab was to get a reference sample, and since a firearms register was in existence, there could be no doubt as to which officer had the appropriate firearm. He

stated that since he was the manager of the operation that had been conducted, he took the decision to proceed.

[18] Mr Diah did admit that he told Mr Campbell that he was not entertaining him at that time, and that Mr Campbell could not give him instructions. He denied having been given any instruction, since he said, being told that the guns must be placed in a box, were not instructions, but merely providing information.

[19] Mr Diah said he spoke with Deputy Commissioner of Police Heath, who asked him to call Mr Floyd McNabb, which he did, and that neither person could provide him with clear directions as to how to proceed. He stated also that Senior Superintendent Pinnock told him to "proceed to the Lab and to make sure that I personally escort [the firearms]". He stated that he did escort the firearms to the lab and they were handed over at the lab at about 10:12 am the same day, test fired and returned to him sometime after 11:00 am. He also stated that Mr McNabb called him that same day and asked if the firearms could be retested the following day by INDECOM on 30 August 2013. That was done.

[20] He closed by stating that:

"255. In my mind on the morning in question I was fully in compliance with the procedures as they were established prior to the 29th of August [2013]. I would have consulted with my seniors as well as a senior personnel out of [INDECOM]. When no clear directions were given I had to take a decision in conjunction with a lawful order given to me by my Commanding Officer on the morning.

256. My decision that morning was not with the intention to obstruct [INDECOM], it could not have affected their investigations in any way or shape or form. This position I maintained from that morning until I was called to [INDECOM]...”

[21] Senior Superintendent of Police Pinnock was the defence’s sole witness. He testified that in August 2013, he was the commanding officer for Saint Catherine South, which included Central Village. He also indicated that on 29 August 2013, “Mr Diah gave me information about the shooting” and he “gave the instructions to him to ensure that all weapons were taken to the Forensic Laboratory, Ballistics Section”. He further testified that he was aware that those instructions were carried out the same day.

The learned Parish Court Judge’s summation and reasons for judgment

[22] The learned Parish Court Judge indicated that there were five issues to be determined. The first was whether a lawful requirement was made by INDECOM of Mr Diah. She had regard to sections 4, 13, 14(2), 20, 22(1), 22(3) and 33(b) of the Act, and found that both Mr Anderson and Mr Campbell had asked Mr Diah for the firearms so that they could be boxed, sealed, labelled and photographed by an INDECOM investigator, before being taken to the lab. She considered that this was corroborated by Mr Stephenson in his examination-in-chief and also in cross-examination, by way of a suggestion that Mr Campbell wanted the firearms to be placed in a box and taken to the lab. The learned Parish Court Judge indicated that Mr Diah had corroborated this aspect of the prosecution’s case in his unsworn statement, when he acknowledged that a request had been made of him to place the firearms in a box (which was later denied), and that he had followed that procedure in relation to the firearm recovered

from the scene, but refused to follow the same procedure with regard to the police firearms.

[23] She further noted that since section 20 of the Act gives the Commissioner and his investigative staff the like powers of a constable, these powers would include the power to be in possession of a firearm or ammunition. They therefore had the authority to request that the firearms be handed over to them, and so she found that the concern raised by Mr Diah as to the legality of handing over the firearms to INDECOM's investigative staff was misplaced. She indicated that it was interesting that Mr Diah's concern had not been extended to the firearm which had been recovered from the scene. The learned Parish Court Judge commented on the rationale for the request which had been made of Mr Diah (that is to place the firearms in a box, and then have them labelled, photographed and the box sealed by an INDECOM investigator), as stated by Mr Lewin, in relation to an incident that occurred at the Jamaica Police Academy in January 2013, which suggested potential tampering with the weapons. Ultimately, she accepted that the request made to Mr Diah by INDECOM's investigative staff had been lawful and reasonable in the circumstances, and that a lawful request had indeed been made.

[24] The second issue the learned Parish Court Judge examined was whether INDECOM's investigative staff had the authority to make requests of Mr Diah and found, in reliance on section 20 of the Act, that they indeed had such a power since the request was in furtherance of an investigation.

[25] On the third issue of whether there was compliance with INDECOM's instructions, and if not, whether there was a lawful justification or excuse for Mr Diah's non-compliance, the learned Parish Court Judge noted that the prosecution's case was that Mr Diah had failed to comply with a lawful request, and that had not been challenged or denied by the defence. Accordingly, the learned Parish Court Judge concluded that, where Mr Diah had failed to comply with the instructions of INDECOM's investigative staff, he was in breach of the Act, and it was not for Mr Diah to raise questions as to whether INDECOM's investigative staff should have access to the firearms. She stated that in the Jamaican reality, firearm registers and station diaries often go missing, and so, the Act, in seeking to ensure that evidence was collected by an independent body, required compliance with lawful and reasonable requests. In deciding whether Mr Diah had a lawful justification or excuse, the learned Parish Court Judge stated that Mr Diah's excuse was that he was mistaken as to fact, and that could not avail him because no restrictions had been placed on INDECOM as to the manner in which they were to conduct their investigations. Additionally, she found that the force order dated 13 October 2011, did cover firearms, and even if it had not done so, force orders could not override an Act of Parliament. Accordingly, she rejected Mr Diah's defence, and held that he had no lawful justification or excuse to refuse INDECOM's request.

[26] The fourth and fifth issues canvassed by the learned Parish Court Judge were whether Mr Diah, through his conduct, had obstructed or hindered INDECOM in its investigations, and if so, whether that obstruction or hindrance had been done with

lawful justification or excuse. She found that Mr Diah, by his conduct, had obstructed or hindered INDECOM in the exercise of its functions, since his actions had made it more difficult for INDECOM to carry out its functions. In rejecting any notion that Mr Diah was mistaken as to fact, she found on the fifth issue, that Mr Diah had no lawful justification or excuse for the obstruction or hindrance of INDECOM's investigators.

[27] She ultimately found the prosecution witnesses to be truthful, credible and reliable; accepted that they had proved their case beyond a reasonable doubt; and found Mr Diah guilty on each information. As indicated above, Mr Diah was later sentenced to a fine of \$400,000.00 or six months imprisonment at hard labour in default thereof on each information.

The appeal

[28] On 1 December 2013, Mr Diah filed notice and grounds of appeal which were later amended. The amended grounds of appeal were as follows:

"GROUND ONE

The Learned [Parish Court Judge], respectfully, erred in rejecting the preliminary objection raised by the Appellant and which was later reinforced in his submission of no case to answer."

"GROUND TWO

The deliberation of the Learned [Parish Court Judge] was fatally affected by prejudicial material."

"GROUND THREE

The fact of the Appellant being a Police Officer with a sworn and bounden duty to act within the parameters of Section 13 of the Jamaica Constabulary Force Act received no evaluation by the Learned [Parish Court Judge] in her 'Summation'."

“GROUND FOUR

There was a flagrant misdirection in relation to the Appellant’s defence which resulted in a non-direction and resultant conviction.”

“GROUND FIVE

The Court in its scrutiny of the material failed to consider whether or not there was lawful justification or excuse for the absence of a wholly positive reaction by the Appellant to the Investigator’s command.”

“GROUND SIX

In her entitled Findings of Fact, the Learned [Parish Court Judge] egregiously neglected to isolate much of the evidence that was favourable to the Defence. This oversight was fatal to the Appellant’s chances of an acquittal.”

“GROUND SEVEN

The Appellant did not benefit from the literal interpretation attributable to Section 22 of [the Act].”

“GROUND 8

The Sentence imposed on the Appellant was manifestly excessive and disproportionate to the alleged offence.”

[29] At the hearing of the appeal, the court heard submissions on behalf of the Attorney-General of Jamaica (AG) and the DPP as interested parties, along with those advanced by the appellant and the respondent. Mr Diah was interested in having his convictions quashed and his sentences set aside, while the respondent, the AG and the DPP argued that his convictions and sentences should be affirmed.

Issues

[30] Based on the grounds of appeal and submissions advanced, in my view, this appeal raises four main issues:

1. Whether the learned Parish Court Judge erred when she found that INDECOM's legal representative could prosecute Mr Diah without a fiat? (ground one)
2. Whether the learned Parish Court Judge erred in using prejudicial information to aid in her deliberation? (ground two)
3. Whether the learned Parish Court Judge erred in her assessment of Mr Diah's defence? (grounds three-seven)
4. Whether the sentences imposed on Mr Diah are manifestly excessive? (ground eight)

Issue 1: INDECOM's right to prosecute Mr Diah without a fiat (ground one)

Submissions

[31] As indicated, at the start of the trial, a preliminary objection was taken that INDECOM's legal representative ought to have obtained a fiat from the DPP before commencing the prosecution. This argument was again raised as a basis upon which the learned Parish Court Judge ought to have upheld a no case submission. On both occasions these arguments were rejected. On appeal, Mr Senior-Smith contended that the learned Parish Court Judge erred in rejecting those submissions, since she made no mention of sections 4(1)(a), 10(3)(c), 16(1), 17(10), 18(3) and 25 of the Act, which underscored that the legislature recognized the DPP's capacity and obligation to conduct prosecutions. He further submitted that the learned Parish Court Judge had not

taken section 289 of the Judicature (Parish Courts) Act into account, nor the DPP's role under section 94 of the Constitution of Jamaica (the Constitution). The learned Parish Court Judge, he submitted, by placing reliance on section 29 of the Justices of the Peace Jurisdiction Act, erred, since that section does not apply to summary offences. He further argued that the learned Parish Court Judge erred in her interpretation of the judgment of the Full Court in **The Police Federation** as that judgment, he submitted, "unwittingly elevated the common law right to bring prosecutions to a status not contemplated by the judgments". Counsel also contended, relying on **Jones v Whalley** [2006] UKHL 41, that the "common law right of an individual to commence a [private] prosecution arguably is a right of resort and/or recourse and is not to be actuated in the vanguard of criminal prosecution".

[32] Mr Small, in response to these submissions, argued that the Full Court in **The Police Federation** settled the argument as to whether INDECOM had the power to prosecute, when it found that INDECOM had the power to initiate and conduct private prosecutions in furtherance of its statutory objectives. He also argued that this court in **Rex v A E Chin** (1946) 5 JLR 31 and the Judicial Committee of the Privy Council in **Commissioner of Police and Another v Steadroy C O Benjamin** [2014] UKPC 8, accepted that there was indeed a right of citizens to initiate and conduct private prosecutions. Moreover, he submitted that section 94(3)(b) of the Constitution recognizes that persons other than the DPP may initiate prosecutions, since she is empowered to take over or discontinue a prosecution she had not commenced. Mr Small also contended that a consideration of sections 4(1)(a), 10(3)(c), 16(1), 17(10),

18(3) and 25 of the Act was unnecessary, as those sections do not “in any material respect, affect, impinge or qualify the common law, statutory or constitutional right of a person to prosecute”. Additionally, there is no provision in those sections which states that the DPP must assume the conduct of prosecutions. Mr Small urged this court to reject that submission as it would seek to “override the common law, statutory or constitutional right to prosecute” and a statute cannot be construed to abrogate a common law right.

[33] Miss Jarrett, in her submissions on the AG’s behalf, accepted at paragraph 18 of her written submissions that “[t]here is no statutory right to prosecute conferred on the Commissioner and his investigators by the Act”. However, in reliance on **Steadroy Benjamin; R (On the Application of Gujra) v Crown Prosecution Service** [2012] UKSC 52; **R (Virgin Media Ltd) v Zinga** [2014] EWCA Crim 52; **Broadmoor Special Hospital Authority and Another v Robinson** [2000] QB 775; **R v Rollins** [2010] UKSC 39; [2010] 4 All ER 880; and **R (on the application of Ewing) v Davis** [2007] EWHC 1730, she posited that the Commissioner and his investigative staff clearly have the power to bring private prosecutions in exercise of their common law right to do so. Miss Jarrett also submitted that section 11 of the Justices of the Peace Jurisdiction Act and section 289 of the Judicature (Parish Courts) Act provide a statutory basis for an informant to engage his own counsel to conduct a prosecution on his behalf in the parish court. She further asserted, in reliance on **Andrew Joseph O’Toole v Jack Scott and Another** [1965] AC 939, that with the common law right to prosecute, there is also the right of the prosecutor to instruct counsel to conduct the prosecution

on his behalf. In the light of those arguments, she urged this court to accept that Mr Lewin had the right as a private citizen to conduct a prosecution against Mr Diah, and he had the right, both at common law and by virtue of statute, to instruct counsel on his behalf.

[34] Miss Pyke, on the DPP's behalf, contended that, *inter alia*, the argument that the Commissioner and his investigative staff needed a fiat to conduct the prosecution was misconceived, and demonstrative of a grave misunderstanding of the right of private prosecutions, as stated in **The Police Federation** and **Steadroy Benjamin**, which both show that the Commissioner and his investigative staff have a common law right to prosecute without a fiat from the DPP. She also submitted that there was no specific power to prosecute stated in the Constabulary Force Act and so that power, which is given to constables is gleaned from the common law.

Discussion and analysis

[35] I accept that section 289 of the Judicature (Parish Courts) Act recognises that persons other than the Clerk of the Courts can appear on behalf of the prosecution, and also that section 94 of the Constitution recognises that persons other than the DPP can initiate prosecutions. However, the question before the court below and on appeal is whether Mr Lewin, as an investigator of INDECOM, has the right to bring a private prosecution generally and/or specifically for an offence created under section 33(b)(i) and (ii) of the Act.

[36] Section 33 of Act provides that:

“Every person who

- (a) wilfully makes any false statement to mislead or misleads or attempts to mislead [INDECOM], 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 [INDECOM] or any other person in the exercise of functions under this Act; or
 - (ii) fails to comply with any lawful requirement of [INDECOM] 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.”

This section creates an offence where any person, without lawful justification or excuse, interferes with the performance of INDECOM’s functions under the Act by, *inter alia* obstructing, hindering or resisting the Commissioner and his investigative staff in carrying out their functions under the Act, or failing to comply with any lawful requirement under the Act. ‘Functions’ is defined in the Act to include “powers and duties”. Accordingly, once there is interference by any person, in any form, with INDECOM’s capacity to carry out an investigation, or failure to comply with a lawful

requirement while conducting an investigation under the Act, that person is liable to prosecution. In order to ascertain whether the Commissioner and his investigative staff have the power to bring a private prosecution under the Act, and particularly under that section, certain common law principles must be distilled and an examination of the overall context of the Act must be conducted.

[37] As Mrs Jarrett correctly submitted, the Act does not confer the power to prosecute on the Commissioner and his investigative staff. However, the respondent, the AG and the DPP all contend that right of the Commissioner and his investigative staff to prosecute is exercisable by them pursuant to the common law. In respect of the AG, Miss Jarrett's position was that INDECOM, as indicated, would not have the right to prosecute as it was not a juristic person, but that the Commissioner and his investigative staff had the right to do so as private citizens. While it is indeed true that private citizens and public bodies do have a right to initiate and conduct private prosecutions (as was held by the Privy Council in **Steadroy Benjamin** and by this court in **Rex v Chin**), there are cases including **Rex v Chin**, which recognise that this right can be abridged either expressly or impliedly by statute. In the instant case therefore, one has to examine the provisions in the Act in order to ascertain whether Parliament truly intended that the prosecution of offences created under the Act, were meant to be brought as private prosecutions by private citizens, namely, the Commissioner and his investigative staff, or whether the Act had impliedly abrogated the right of the Commissioner and his investigative staff to bring private prosecutions. It is necessary to assess therefore, whether the Commissioner and his investigative staff

have the right to initiate and conduct prosecutions pursuant to the Act, statute or common law.

[38] In **R (on the application of Ewing) v Davis**, the court had to decide the issue as to whether a third party who was not aggrieved had *locus standi* to initiate the prosecution, and whether that third party was required to establish that the offences concerned a matter of public interest and benefit, and were not being prosecuted as a purely private interest with an individual grievance. Mitting J of the Queen's Bench Division, referred by way of a case stated, found that a third party could initiate the prosecution, and that that third party did not have to show that it was in the public interest to bring the prosecution, in respect of an offence against the provision of a public general act, the public interest being established by the nature of the offence created by the statute. At paragraph [23] of the judgment, he stated that:

"If the right of private prosecution is to be taken away or subjected to limitation, it is for Parliament to enact and not for the courts by decision to achieve. There is in existence a statutory scheme which permits the state to interfere in private prosecutions which in the view of the Director of Public Prosecutions or the CPS are unmeritorious. Under s 6(2) of the Prosecution of Offences Act 1985, the Director and the CPS have the power to take over a private prosecution and under s 23 to discontinue it. If, in relation to criminal proceedings, Mr Ewing is thought to be vexatious, then the Attorney General can apply under s 42 of the Supreme Court Act 1981 for a criminal proceedings order. Subject to either of those steps being taken, it seems to me that these informations were properly laid and, subject to any further arguments which were not before me about abuse of process, properly resulted in the issue of summonses and should proceed to a hearing."

[39] Ultimately, this case reiterated and in those circumstances applied the general principle, that any person may conduct a private prosecution (not having to show that it concerned a public interest or benefit). The case also recognised that nonetheless there may be limitations contained within the said general public act itself. Various authorities stipulate that such limitations may be expressly stated or implied. I intend to canvass some of these cases.

[40] **Rex v Chin** is a case in which a sanitary inspector employed to the Kingston and Saint Andrew Corporation, laid an information charging Mr Chin for breaching section 80 of the Public Health Law, which required that such proceedings were to be undertaken by “the Clerk or other duly authorised officer or servant of the Central Board or a Local Board as the case may be”. The evidence led established that the sanitary inspector was not a duly authorised officer or servant of the Board of Health for this purpose. However, it was argued that as a private citizen, the sanitary inspector is entitled to lay an information and conduct proceedings. This court held that the sanitary inspector was entitled as a private individual to lay an information. Hearne CJ, on behalf of the court, at page 35 said:

“The right of a private individual to lay an information ‘in person or by his Counsel or Solicitor’ section 9 of Chapter 433 is not excluded either expressly or impliedly. If it had been intended to abrogate the right of a private individual to lay an information under the Public Health Law this would have been expressly stated...”

[41] In this case, the court recognised that the Public Health Law acknowledged that prosecutions could be undertaken in respect of offences against the Public Health Law,

although they would have been brought by persons not specifically authorised under that law. This court also recognised, however, that the right of a private individual to prosecute can be “excluded either expressly or impliedly”. In the instant case, the Act does not authorise prosecutions at all, and as I intend to set out *infra*, in my view, the right of the Commissioner and his investigative staff to bring private prosecutions as private citizens has been impliedly abrogated by the specific words of the Act.

[42] In **Broadmoor**, while Lord Woolf MR accepted that there was indeed a right of public and private citizens to prosecute at common law, he considered that such a right could be impliedly restricted if the right to prosecute did not seek to protect that body’s specific public interests. In that case, a hospital sought an injunction seeking to restrain one of its patients from publishing a book documenting how he had killed a therapist employed to the hospital and his justification for doing so. This injunction was sought to prevent distress to the victim’s family and to protect the medical history of other patients. The injunction was refused by a judge at first instance, and the Court of Appeal upheld his decision on the basis that the hospital had no authority to bring proceedings to protect distress to the victim’s family and the right to privacy of other patients, since the conduct complained of did not advance the hospital’s interests, and did not interfere with its performance. Lord Woolf MR at paragraph 25 of the judgment held that:

“...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.'

[43] In the instant case, the Act has not given INDECOM, the Commissioner or his investigative staff the power to prosecute, but has granted a comprehensive power to investigate without the interference of anyone. The power to prosecute is not a responsibility required for the performance of the public functions ascribed to INDECOM under the Act. It cannot be implied as a role of INDECOM. Prosecutions would not therefore advance INDECOM's public functions which as stated were to conduct investigations, nor were they related to its protection of the public interest. INDECOM's protection of the public interest was related to investigation and the submission of recommendations and reports, and thereafter, if recommendations were not followed, to lay a report in Parliament. The institution of prosecutions was not a necessary incidence of the statutory power given to INDECOM to protect the public interest. Thus the right of the Commissioner and his investigative staff to prosecute as private citizens was clearly circumscribed and impliedly limited by the Act which set out in detail all the functions, objects and purposes of INDECOM.

[44] In **R v Rollins**, the United Kingdom Supreme Court recognised that prosecutions for any offence could be conducted by the United Kingdom Financial Services Authority (FSA), provided that the prosecution fell within the scope of its objects and powers and provided that the statute which created the offence had not imposed any expressed or implied restriction or condition to the power to prosecute. In fact, in that case, a question arose as to whether the FSA had the power to prosecute particular money laundering offences since the legislation that created the offences had not specifically reserved that power. The UK Supreme Court held that since the right to conduct prosecutions was a power that the FSA had previously enjoyed, and since the right to prosecute had been contained in its objects and powers, the fact that the right to do so was not specifically retained in the later legislation, did not limit the FSA's right to conduct the prosecution.

[45] In the instant case, there was no express provision under the Police Public Complaints Act (now repealed by the Act), that authorised INDECOM's predecessor the Police Public Complaints Authority to prosecute. It is noteworthy however, that that body had separate legal personality as it had been defined as a body corporate to which section 28 of the Interpretation Act applies. The instant case can therefore be distinguished from **R v Rollins**, as the FSA had previously been provided with the right to prosecute though this right was not retained in later legislation, and additionally, the issue as to prosecution of these offences was contained in the FSA's objects and powers. However, the right to prosecute was not specifically given to INDECOM's predecessor, the Police Public Complaints Authority, by its enabling legislation, the

Police Public Complaints Act, and pursuant to the provisions of that Act, the authority's powers would have been impliedly abrogated. Additionally, the right to prosecute is not contained in INDECOM's objects and purposes. Accordingly, the issue with regard to taking away any rights previously held by INDECOM, the Commissioner or his investigative staff, by the Act or otherwise, would not arise.

[46] In **R v Zinga**, the court also recognized that in assessing whether the right to conduct such prosecutions existed, regard must be had to the nature of the function being undertaken by the private prosecutor. In that case, Virgin Media Ltd (Virgin) brought confiscation proceedings under the UK Proceeds of Crime Act (POCA) to recover £26,600,000.00 that Munaf Ahment Zinga had failed to pay to Virgin after providing cable, telephone and broadband services to customers in the UK without subscribing to Virgin. The Court of Appeal held that Virgin was indeed empowered to bring such a prosecution since it directly affected Virgin's interests and since section 40(9) of POCA recognised that a "prosecutor" encompassed persons that the court believed ought to have conduct of any proceedings of the offence, which in its ordinary meaning, would include all prosecutors conducting proceedings for the offence including private prosecutors such as Virgin. As indicated this was not the position in the instant case.

[47] The questions that arise from these cases are: (i) what are INDECOM's objects and purposes; (ii) does the Act impliedly restrict the right of INDECOM, the Commissioner or his investigative staff to prosecute as private citizens under the Act or particularly, as in the instant case, an offence under section 33 of the Act; and (iii) does

the right to prosecute as private citizens, an offence under section 33 of the Act, advance INDECOM's objects and purposes and protect INDECOM's specific public interest.

[48] Section 3(1) of the Act provides that INDECOM is a Commission of Parliament and as such, it is a body of persons acting under the authority of the legislature to perform certain public functions. INDECOM has not been given any separate legal personality under the Act, nor is it an entity incorporated under the Companies Act. If Parliament had intended to give INDECOM separate legal personality that would have been expressly stated as it was so stated under the Police Public Complaints Act. It is therefore not a juridical person, and is constrained to operate through the persons as defined (in sections 3, 8 and 26 of the Act), pursuant to the functions as stated in the Act, and within the confines of the Act.

[49] INDECOM's objects and purposes are found in its obvious name which incorporates the word "investigations" and in its preamble which states that it should undertake investigations in relation to "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 substantively, in section 4 of the Act which specifically sets out its functions.

[50] Several provisions in the Act set out the vast expansive investigative powers of INDECOM. It is empowered to conduct investigations based on reports made to it. In pursuit of these investigations and to give effect to sections 4, 13 and 14 of the Act,

section 20 provides that the Commissioner and his investigative staff have the like powers of a constable. Section 4 empowers INDECOM investigators to, *inter alia*, inspect records, weapons and buildings; conduct reviews of disciplinary procedures; have access to reports, documents and other information regarding all incidents; and they can even take charge of, and preserve the scene of any incident. Section 13 states that INDECOM may undertake investigations on its own initiative; and section 14 empowers INDECOM to, *inter alia*, manage, supervise, direct and control an investigation carried out by the security forces or other relevant public body in relation to an incident. It is clear, therefore, that the powers of a constable conferred on the Commissioner and his investigative staff are those relating to an investigation only. Those powers and duties do not include, for instance, to keep watch by day and night; to preserve the peace; to detect crime; search persons; stop and search vehicles; to prevent congestion in the thoroughfare; and/or to regulate traffic (as state in the Constabulary Force Act).

[51] It is indeed evident therefore that INDECOM's vast powers under the Act do not extend beyond the scope of the investigative process. My opinion is strengthened when one has regard for instance to section 21(3) of the Act which provides that INDECOM may summon before it and examine on oath any complainant, member of the security forces, specified officials or any other person who in its opinion can assist in the investigation. Accordingly, the power to summon is given only in relation to the investigative process.

[52] Additionally, and perhaps even more importantly, there is a requirement in a number of instances for consultations with and referrals to the DPP of all relevant matters to the conduct of the investigation being undertaken by the Commissioner and his investigative staff. Section 10(3) of the Act provides that on receipt of a complaint under section 10(1), the Director of Complaints shall, *inter alia*, forward a copy of the complaint to the DPP forthwith, if INDECOM, upon an investigation having been conducted, is of the view that the conduct complained of constitutes an offence. Section 16 of the Act stipulates that INDECOM may, after consultation with the DPP and with the consent of relevant parties to the complaint, determine, having regard to all the circumstances, whether the matter can be dealt with by mediation or any other alternative methods of dispute resolution. A copy of the report created by INDECOM pursuant to section 17 of the Act, which deals with, *inter alia*, the process of handling complaints and preparation and production of reports, ought to be sent to the DPP pursuant to section 17(10)(d) of the Act. Though section 18(1) and (2) of the Act empowers INDECOM to conduct either public or private hearings during the course of an investigation, section 18(3) of the Act stipulates that where INDECOM proposes to hold such a hearing, it shall not proceed to do so except after prior consultation with the DPP, and such other persons or authority as INDECOM may in its discretion consider appropriate. Section 25 of the Act places an obligation on an INDECOM investigator to attend court and grant assistance and such other support as is required by the DPP. It states that:

“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.”

[53] When one examines these provisions, it is indeed evident that the DPP plays an important role in INDECOM’s exercise of its obligations under the statute. In fact, the presence of these provisions also gives credence to a position taken by Sykes J (as he then was) in **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigations and Others** [2012] JMFC Full 1, at paragraph [153], where in construing INDECOM’s primary purpose and in particular section 17 of the Act, he said:

“...Why would [INDECOM] be under a duty to provide a report to all these persons and institutions? The answer must be for those persons and institutions to take such action as they see fit. It may be used for internal disciplinary measures if necessary. It can form the basis of changes in policy, procedures or even changes in the law. The persons complained about may be exonerated. Undoubtedly, it may lead to criminal charges being preferred. If that is the case, so be it but that is not its primary focus. It is to unearth the facts and report...”

[54] He continued at paragraph [266] to state that:

“[INDECOM] is not a criminal investigative agency in the way that a police force is. It is an independent agency designed to conduct a thorough, impartial and independent investigation into allegations of misconduct alleged against state agents named in section 2 of the Act. [INDECOM] is not a prosecutorial agency and does not function as an evidence gathering entity for the purpose of prosecuting persons.”

[55] I would adopt Sykes J's comments as a correct statement of INDECOM's objects and purposes. Accordingly, since INDECOM's objects and purposes are to investigate, in my view, the right to prosecute is not required to effect INDECOM's ability to "conduct a thorough, impartial and independent investigation into allegations of misconduct alleged against state agents named in section 2 of the Act" and is not necessary to advance its objects and purposes or protect its specific public interest. Moreover, since the DPP plays an integral role in INDECOM's investigative process, in my view, the Act has impliedly restricted the right of the private citizen at common law to prosecute, and has also recognised that the DPP would conduct the prosecutions based on reports submitted to that office by INDECOM. This right is also impliedly restricted, by section 17 of the Act which imposes a duty on INDECOM to make recommendations and submit reports to various persons and institutions and by section 23(3) of the Act, which provides that where a recommendation is made in a report by INDECOM to a relevant force or public body and that force or public body fails to comply with that recommendation, INDECOM's only recourse is to cause a report to be laid on the Table of each House of Parliament. Accordingly, the Act by not recognising and/or extending INDECOM's powers beyond the scope of an investigation, without consultation from the DPP, has in that way, impliedly restricted the right of the Commissioner and his investigative staff, and all persons authorised pursuant to section 26 of the Act to perform the functions of INDECOM, to conduct private prosecutions.

[56] When the overall context of the Act is examined it is clear that the Commissioner and his investigative staff are not empowered to bring a private prosecution under the

Act. As indicated, the object and purpose of INDECOM under the Act is to investigate and report. I am unable to fathom an instance where the right to prosecute may be utilised to advance an investigation, as a prosecution may not advance but may even stall the investigative process, since during that process, an accused has the right to remain silent. The fact that at every stage of its investigative process consultation with the DPP is required, and the fact that the right to conduct private prosecutions could not operate to advance INDECOM's objects and purposes, illustrates that the right to conduct private prosecutions has been impliedly restricted.

[57] In this matter, Mr Diah was prosecuted under section 33 of the Act. As indicated previously (at paragraph [36] herein) that section creates offences under the Act. It states, *inter alia*, that every person who without lawful justification or excuse obstructs, hinders or resists INDECOM or any other person in the exercise of its functions under the Act, or fails to comply with any lawful requirement of INDECOM or any person under the Act commits an offence and shall be liable on summary conviction in the parish court to a fine not exceeding \$3,000,000.00 or to imprisonment for a term not exceeding three years or to both such fine and imprisonment. In my opinion, in keeping with the regime of the Act, and in particular within the scope, objects and purposes of INDECOM under the Act, if any offence occurs while INDECOM and its investigative staff are pursuing their functions under the Act, or making legal requirements pursuant to the provisions under the Act, then a recommendation must be made to the DPP, to initiate a prosecution against such a person, and a decision is taken by the DPP to prosecute that person by the DPP, and that prosecution is carried out.

[58] As indicated, the common law right to prosecute has been impliedly limited and/or restricted by the various provisions in the Act, and so on that basis, in my view, the Commissioner and his investigative staff have no right to prosecute any offence arising from an investigation into any incident under the Act. In keeping within the objects and purposes under the Act, INDECOM, the Commissioner and his investigative staff and persons authorised pursuant to section 26 of the Act, would have no right either, under the Act or at common law, to prosecute these particular offences. I have read the judgment of my learned brother Brooks JA and his interpretation of section 33 of the Act. In my view, I do not discern any difference between the obligations and responsibilities of the Commissioner and his investigative staff pursuant to the provisions generally set out in the Act and to those imposed under section 33 which creates certain offences as set out in paragraph [36] herein. In fact, section 33 specifically refers to, *inter alia*, persons misleading or attempting to mislead or hindering INDECOM, the Commissioner and his investigative staff in the exercise of their functions under the Act, which must include their investigations of any incident as described by section 2 of the Act.

[59] Under section 4(3) of the Act, as indicated previously, for the purpose of the discharge of its functions, on a warrant having been issued by a Justice of the Peace, INDECOM is entitled to access, *inter alia*, records, documents and premises, and pursuant to section 4(4) of the Act, INDECOM has the power to require any person to furnish information which is relevant to any matter being investigated by it under the Act. Section 27 of the Act protects INDECOM or any person acting in the administration

of the Act in respect of anything he may do or say in the performance of his functions under the Act, and anything said or information or document produced for the purpose of and in the course of any investigation carried out under the Act, to be absolutely privileged in the same manner as if the investigation were proceedings in a court of law. Additionally, section 27(3) of the Act stipulates that any fair and accurate report made by INDECOM shall be deemed to be privileged with regard to the purposes of the Defamation Act.

[60] Section 28(1)(a) of the Act provides, *inter alia*, that all documents and information and matters disclosed to the Commissioner or any person acting in the administration of the Act, in the execution of any of the provisions under the Act, shall be kept secret and confidential, and shall not if disclosed be considered inconsistent with the provisions in proceedings for an offence under section 33 of the Act. Additionally, section 28(1)(b) of the Act states that will be equally applicable if made by the Commissioner, as thought necessary, in the discharge of his functions if it would not prejudice the security, defence or international relations of Jamaica. Of even more importance, section 28(2) of the Act makes it clear that neither the Commissioner nor any person acting in the administration of the Act shall be called upon to give evidence in respect of or to produce any document, information or thing in any proceedings other than proceedings mentioned in section 25(1) of the Act, where they are attending those proceedings at the request of the DPP in relation to a prosecution arising out of an incident, to provide such other support as the DPP may require in relation to the relevant proceedings under the Act.

[61] One must recall that section 9 of the Act requires the Commissioner and all appointed members of staff of INDECOM, before they perform any functions under the Act, to subscribe to the oath set out in the Third Schedule to the Act; in the case of the Commissioner, the oath is administered by the Governor-General and in the case of all other employees by the Commissioner.

[62] It is therefore, in my view, abundantly clear that there are no duties or functions in respect of which any lawful requirement for the production of documents or information or access to premises can be made by INDECOM or its investigative staff or persons acting in the administration of the Act, which would not relate to the functions of INDECOM prescribed under the Act, namely the pursuit of investigation into an incident as described under the Act.

[63] In my opinion, although section 33 creates certain offences under the Act, nothing in section 33 illuminates the issue with which this ground of appeal is concerned, which is who has been given the power to prosecute. One is therefore driven back to the considerations already expressed with regard to the several provisions in the Act, dealing with INDECOM's wide investigatory functions. INDECOM has no power or duty to obtain information, or to make a lawful requirement in respect of which the failure to provide such information would result in an offence under section 33, which does not relate to an investigation of an incident under the Act. Documents, information or other material would only have been obtained by INDECOM in performance of its functions under the Act. It is that same document, information or material that can be obtained by INDECOM and/or its investigative staff that is

absolutely privileged from disclosure (section 27 of the Act) and subject to secrecy (section 28 of the Act). In other words, the information must relate and be relevant to an investigation being carried out concerning any incident under the Act. Additionally, as already stated, the Commissioner and any person concerned with the administration of the Act cannot be called upon to give evidence in any proceedings save as set out in section 28(1) and (2) of the Act.

[64] Accordingly, there are no words in section 33 of the Act which give or could be ascribed a different interpretation to that section, as opposed to any of the other provisions in the Act dealing with the performance of the functions and duties of INDECOM under the Act, where, as has already been shown, there are limitations and restrictions in the common law right to prosecute. Section 33 of the Act must therefore be read in the context of those circumstances, and in my view it would be quite odd for Parliament to have intended that two different regimes would operate under the same Act.

[65] The issue may arise as to whether the prosecution, having been brought by a person not so entitled to do so pursuant to the Act or at common law, is a nullity. In **Regina (Hunt) v Criminal Cases Review Commission** [2001] QB 1108, Lord Woolf CJ acknowledged that there is authority in which it has been held that where a prosecution has been conducted by an individual who had no such authority then the conviction based on that prosecution would be a nullity, but said that he would not conclude either way whether he agreed with that view. I, too, would decline to make any pronouncements on that issue.

[66] It is, of course, perfectly understandable why the learned Parish Court Judge allowed the prosecution to commence the proceedings without a fiat. In so doing, she was acting pursuant to the decision of the Full Court of **The Police Federation** that, *inter alia*, INDECOM investigators had the right at common law to conduct a private prosecution. However, as I have already indicated, in my view, that right had clearly been limited, restricted and impliedly curtailed by the provisions of the Act. I accept, as indicated in paragraph [35] herein, that by virtue of section 289 of the Judicature (Parish Courts) Act persons other than the Clerk of the Courts can appear for and on behalf of the prosecution, and that pursuant to section 94 of the Constitution persons other than the DPP can initiate prosecutions. However, based on my said findings contained herein, and those stated in **The Police Federation** case on appeal, in my opinion, as the Commissioner and his investigative staff have no statutory right to prosecute, and the right to prosecute not falling within INDECOM's objects and purposes, and the common law right, having been impliedly curtailed under the Act, INDECOM's Commissioner and its investigative staff have no common law right to prosecute as private citizens, and the prosecution ought not to have been conducted without a fiat. It seems to me therefore that the Commissioner and his investigative staff can only conduct prosecutions pursuant to a fiat from the DPP. This ground of appeal therefore succeeds.

Issue 2: The learned Parish Court Judge's use of prejudicial information (ground two)

[67] At paragraphs 295-298 of the learned Parish Court Judge's summation, she had noted the following:

- “295. The Prosecution’s witnesses went so far as to make clear the rationale behind the request. The evidence was clear that the ultimate intention was to return the said firearms to the police officers in any event as was done with the single firearm that was allegedly recovered at the scene of the alleged shooting incident.
296. The evidence of Mr. Dave Lewin adequately captured this rationale in the following words:-
- ‘Q: What was the nature that gave rise to this change in policy?**
- A: Coming out of that investigation it was suspected that parts of the weapons used by the police officers were switched between the time that the weapons were tagged and labelled and handed back to the police officers for transmission to the Lab and the time that they were taken to the Lab.’**
297. This evidence came in reference to an incident that had allegedly taken place at the Jamaica Police Academy in January 2013.
298. The Court finds that a lawful requirement was made of Mr. Diah.” (Emphasis as in original)

Submissions

[68] Mr Senior-Smith, relying on **Harry Daley v R** [2013] JMCA Crim 14, submitted that the evidence of Mr Lewin, which was incorporated by the learned Parish Court Judge at paragraph 296 of her judgment, was inadmissible and prejudicial, since it was “incendiary and that it could affect her mind but also had no heed to the fact that that information was not conveyed to [Mr Diah] as a reason for INDECOM requiring the six (6) firearms on the 29th August, 2013”.

[69] Mr Small argued that no objection was raised by Mr Diah at the time as to the admissibility of the evidence adduced, and it was Mr Diah himself (through his counsel) who introduced evidence of the incident that occurred in January 2013 during the cross-examination of Mr Campbell. It was as a result of that line of questions that the prosecution sought to re-examine Mr Campbell, and tender and admit into evidence exhibit one. Mr Small argued that Mr Lewin was giving evidence in relation to material that was already in evidence. That evidence, he posited, was relevant, admissible and not prejudicial and at most, the evidence sought to illustrate the rationale behind a change in policy regarding the packaging of police firearms. **Harry Daley v R** therefore had no relevance to the instant case since no prejudicial evidence was elicited that coloured the judgment of the learned Parish Court Judge.

[70] Miss Pyke argued that the Parish Court Judge referred to this bit of evidence in her summation, but stated that this was done "to make clear the rationale behind the request and that the information was in relation to another incident" and she had considered it in relation to whether a lawful requirement had been made by INDECOM of Mr Diah and so the evidence was not prejudicial.

Discussion and analysis

[71] An analysis of this ground requires an assessment of whether the information elicited about the suspicions surrounding the January 2013 incident at the Jamaica Police Academy in relation to whether parts of the weapons used by police officers were switched between the time that the weapons were tagged, labelled and handed back to the police officers for transmission to the lab, and the time that they were taken to the

lab, was indeed relevant, admissible and/or prejudicial, and whether it was fatal to Mr Diah's conviction.

[72] Panton P in **Harry Daley v R** has given guidance on how to assess whether certain evidence is prejudicial and whether it impacts on the fairness of the trial. At paragraph [52] of the judgment he said the following:

"Fairness involves the exclusion of inadmissible evidence especially when such evidence is prejudicial. In the instant case, the prosecution's chief witness, Tafari Clarke, was allowed to give unsubstantiated prejudicial evidence which must have coloured the judgment of the learned Senior Resident Magistrate. She was told that the appellant was 'a dangerous man' who had 'all the gunmen on both sides and the police'. There was no stated basis for this statement. This witness also referred to his deceased uncle as 'a hitman and murderer'. Here again, there was no proven basis for that statement. Paul Wilson, a tenant of the deceased, had a different picture as he regarded the deceased as an honest person. We are of the view that the unsubstantiated prejudicial statements of the witness Tafari Clarke in relation to the appellant and the deceased (with whom he had the transaction in issue) were grossly unfair and must have had a negative impact on the proceedings."

[73] The evidence elicited referred to in paragraph [67] herein, was indeed entirely irrelevant, unsubstantiated, inadmissible and were statements made unrelated to the instant case. They were clearly prejudicial. It is no excuse that the defence invited the evidence in its cross-examination. The learned Parish Court Judge ought to have dismissed it and divorced it from her mind in her deliberations. Instead, she used it to substantiate her finding that INDECOM's request of Mr Diah was lawful and that Mr Diah's refusal to follow INDECOM's requests was without lawful justification or excuse. In my view, it cannot be said that the information may not have "coloured her mind" or

“had a negative impact on the proceedings” resulting in her finding of guilt. This is so particularly in the light of her findings, at paragraphs 317 and 318 of her reasons for judgment (*infra* at paragraph [78]), that in spite of the prosecution’s witnesses (Mr Campbell and Mr Lewin who were former police officers) indicating that at the time of the incident in August 2013, there was no recognised procedure for firearms allegedly used by members of the security forces in a shooting incident to be boxed, sealed, labelled and photographed by INDECOM, she nonetheless found that it could be considered as being covered by the force order dated 13 October 2011, under the rubric “access to documents and other relevant material”, without reviewing this aspect of the evidence when considering Mr Diah’s defence.

[74] The only saving grace in this aspect of the discussion in the learned Parish Court Judge’s reasons for judgment is that it cannot be said that it was ever suggested that Mr Diah was complicit in the alleged suspected tampering of the police weapons in January 2013. Additionally, there was other evidence upon which the learned Parish Court Judge could ground her finding and did ground her finding that a lawful request was made of Mr Diah. Accordingly, while the information elicited was indeed prejudicial, it would not be fatal to the conviction and therefore, in my view, this ground of appeal fails.

Issue 3: The learned Parish Court Judge’s assessment of Mr Diah’s defence (grounds three to seven)

[75] At the close of the case for the prosecution Mr Champagne made a no case submission in which he, *inter alia*, submitted that:

"this is a case where one has to be possessed of the requisite mens rea. It is the duty of the Prosecution to establish that he had no lawful justification or excuse to refuse to comply. There is no deeming provision in the legislation... [Mr Diah] acted believing that he was being guided by the Force Orders."

[76] Mr Small in response said that:

"...this was an assertion by [Mr Diah] as to a mistake of Law and not as to a mistake of Fact. The provisions of [the Act] are quite clear. A Mens Rea Defence has no relevance. A mistake of law cannot constitute a Defence even if it is honestly believed. Ignorance of the law is no excuse."

[77] The learned Parish Court Judge, in dismissing the no case submission of Mr Champagne, ruled that the force orders do not have the same effect as an Act of Parliament and "[t]he submission that [Mr Diah] was mistaken as to fact does not assist him in the circumstances of the evidence that has been adduced by the Prosecution", and the fact that Mr Diah may have been mistaken as to law is not a defence that can avail him.

[78] At the conclusion of the trial, the Parish Court Judge made the following statement with regard to whether Mr Diah had a lawful justification or excuse:

"310. Mr. Diah also contends that he acted with lawful justification or excuse in that he was mistaken as to fact.

311. The Court understands the Defence's contention to be that because this particular procedure had never before been employed during the investigation of any incident in which Mr. Diah had been involved and because he did what had previously been required of him he did not have the requisite mens rea and as a consequence was mistaken as to fact.

312. The difficulty with that argument is that it presupposes that because this procedure had never been employed in prior investigations in which Mr. Diah was involved, [INDECOM] would be precluded from seeking to employ and enforce a new or different procedure.
313. A reading of [the Act] however does not reveal that any such restrictions are placed on [INDECOM's] investigative staff. There is no requirement for the request to be made in writing, or for the Security Forces to be notified beforehand of the particular request and when one considers the purpose behind the legislation the rationale behind that becomes clear.
314. It is illogical to expect that, in the fluidity of circumstances surrounding the investigation of an alleged fatal shooting of a member of the public by members of the Security Forces, for example, [INDECOM's] investigative staff is going to pause to ask whether there is a Force Order in place or whether the particular police officer is aware of the requirement of [INDECOM] or whether he had ever been so required to act before.
315. That is not in keeping with the purpose of the legislation and is precisely the mischief that it intended to remedy.
316. Again the learned authors of **Cross, Statutory Interpretation, 3rd edition**, state that the office of the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico. ***[See – Chapter 1, pages 11-12].***
317. Great emphasis had been placed on whether there was a Force Order in place that spoke to the requirement by [INDECOM] that firearms be boxed, sealed, labelled and photographed. The Prosecution's witnesses indicated that there was such a

requirement prior to August 2013 only in relation to those firearms that were allegedly recovered at the scene of a shooting incident. The requirement for the same procedure to be observed in relation to firearms allegedly used by members of the Security Forces during these types of incidents was a new one.

318. The Court notes however that as far back as the 13th October 2011 there was a Force Order indicating that members of the [JCF] were required to ensure that [INDECOM's] personnel ***had access to documents and other relevant material pertaining to the particular investigation.*** ***[See Sub. No. 2 Force Order dated the 13th October 2011 – Exhibit two (2)].***
319. In any event the Court has already stated that a Force Order does not have the same effect as and does not override an Act of Parliament and does not affect the issues here to be determined." (Emphasis and underline as in original)

Submissions

[79] At the hearing of the appeal, Mr Senior-Smith submitted that the learned Parish Court Judge erred in her assessment of the appellant's defence as she failed to: (i) consider section 13 of the Constabulary Force Act which would include the appraisal of weaponry needed for police officers under Mr Diah's command; (ii) consider the evidence of Mr Diah's superior, Senior Superintendent Pinnock, that he gave Mr Diah instructions to take the firearms to the lab, and whether this could amount to a lawful justification or excuse; (iii) properly identify Mr Diah's defence and any evidence that could be used to support it; and (iv) consider whether the absence of a protocol specifically governing police firearms at the time of the incident could constitute a lawful justification or excuse.

[80] Mr Small argued that the learned Parish Court Judge was never asked to consider section 13 of the Constabulary Force Act as a justification for Mr Diah failing to hand over the police firearms to INDECOM's investigators. He further contended that while Mr Diah did say that he was experiencing a shortage of weapons at his division, and he therefore required them to be tested and returned to his division with haste, he never indicated that this was indeed a justification for his failure to hand over the firearms. Additionally, this explanation could not amount to a lawful justification or excuse, as in fact, no delay would have been caused by Mr Diah complying with the requirement of INDECOM investigators that the firearms be processed by Mr Anderson and then returned to him (Mr Diah).

[81] Mr Small also contended that Mr Senior-Smith had failed to demonstrate that the learned Parish Court Judge had misdirected herself with regard to Mr Diah's defence, as the issue raised by Mr Diah was a question of law, and an error in law cannot avail Mr Diah or anyone advising him. He further asserted that the learned Parish Court Judge did address the issue as to whether Mr Diah had acted without lawful justification or excuse (as stated above in paragraph [78]), and she found that Mr Diah had so acted. The learned Parish Court Judge, counsel submitted, also rejected the defence as to mistake of fact and law (as stated in paragraph [78] above). Mr Small's final argument on this point was that Mr Senior-Smith had not identified any issue of fact that was favourable to Mr Diah that the learned Parish Court Judge had failed to consider. He contended that the learned Parish Court Judge had conducted a thorough summation of the evidence and had utilised aspects of the evidence that were relevant to the offence.

He submitted further that even if the learned Parish Court Judge had specifically addressed Senior Superintendent Pinnock's evidence, it would not have changed the verdict, as the prosecution had mounted a formidable case against Mr Diah. Whether or not the protocol was in place, he contended, does not change the fact that Mr Diah refused to comply with a lawful request. Learned counsel submitted further that exhibit two (dated 13 October 2011) clearly illustrates that a force order was in place governing "other relevant material" which could include firearms, and so the grounds of appeal advanced on these issues must fail.

[82] Miss Pyke argued, in response to this issue, that section 13 of the Constabulary Force Act cannot be used to give Mr Diah a lawful justification or excuse since INDECOM's request would not have undermined or affected his duties as a police officer. She further stated that the learned Parish Court Judge gave adequate and appropriate regard to Mr Diah's defence at paragraphs 281, 282, 294, 304, 310, 311 and 324 of her summation, and her conclusion on his defence, that he, Mr Diah, was operating under a mistake as to fact was correct. She also posited that the learned Parish Court Judge had made a comprehensive analysis of the evidence before arriving at her findings of fact, and there was no indication that she had excluded any evidence that could have changed her verdict. Moreover, counsel argued that there was nothing to suggest that the learned Parish Court Judge had not applied the literal interpretation of section 22 of the Act, as there was a force order in place governing "other relevant material" which would indeed include firearms.

Discussion and analysis

[83] Mr Diah, as a police officer, plays a role that is recognized by the Constitution, and the Jamaica (Constitution) Order in Council, 1962 (of which the Constitution of Jamaica is the Second Schedule thereof). A "police officer" is defined in Chapter I, section 1(1) of the Constitution as "a member of the [JCF] or any force, by whatever name called, for the time being succeeding to the functions of the [JCF]". Section 20(1) of the Charter of Fundamental Rights and Freedoms found in Chapter III of the Constitution defines "service law" as "the law regulating the discipline of a defence force or police officers".

[84] The law regulating the discipline of police officers is found in legislation subsidiary to the Jamaica (Constitution) Order in Council, 1962, in the Police Service Regulations, 1961 which is specifically preserved in section 2(2)(c) of the Jamaica (Constitution) Order in Council, 1962. Part I of the Second Schedule to the Police Service Regulations lists minor offences which may be dealt with summarily. Number 11 of those offences makes it an offence for "[f]ailing to comply immediately with an order". If it is that the offence of "failing to comply immediately with an order" is not summarily dealt with and disciplinary proceedings are held, Part III of the Second Schedule in the Regulations lists the penalties which may be imposed on officers above the rank of Inspector, which would be applicable to Mr Diah. The Regulations stipulate that he may be dismissed; reduced in rank; his seniority may be forfeited; he may receive a reprimand; or severe reprimand. As a consequence, it is evident that serious

consequences follow in circumstances where an officer fails to comply with an order from his senior officer or fails to comply with a force order.

[85] Provisions within the Constabulary Force Act also reinforce the fact that there exists in the police force a hierarchical structure. Section 3(2)(a) of the Constabulary Force Act provides that the force consists of a Commissioner of Police who “shall have the sole operational command and superintendence of the Force”; and other members below him in order of rank and command to include (listed in order of rank): deputy commissioners, assistant commissioners, senior superintendents, superintendents, deputy superintendents, assistant superintendents, inspectors, sergeants, corporals, acting corporals, and police constables. This structure is also underpinned by section 14 of the Constabulary Force Act, which provides that officers of the force shall have such command and duties as the Commissioner of Police may direct, and that the officers and sub-officers shall be subject to the command and control of any other officer or sub-officer as the case may be.

[86] It was Mr Diah’s contention (at paragraph 238 of the transcript) that at the time when he took possession of the firearms, and Mr Anderson told him that the “guns supposed to be placed in a box”, he told Mr Anderson that what he was doing “would have been the normal procedure” and asked for an explanation as to why there was a change in procedure. He said he spoke with Deputy Commissioner of Police Heath and Mr Floyd McNabb, director of complaints at INDECOM, who failed to give him clear directions on how to proceed. He indicated that Senior Superintendent Pinnock told him to proceed to the lab, personally escort the firearms, and he had complied with that

order. Senior Superintendent Pinnock testified that he had given instructions to Mr Diah to ensure “that all weapons were taken to Forensic Laboratory, Ballistic section” and that he was aware that his instructions had been carried out on the same date. The learned Parish Court Judge in her summation gave absolutely no consideration to Senior Superintendent Pinnock’s evidence, and so did not address her mind as to whether Mr Diah’s compliance with the order of his senior officer, in keeping with the Police Service Regulations under the Jamaica (Constitution) Order in Council, 1962, the provisions in the Constabulary Force Act, and in the absence of clear guidance as to whether INDECOM ought to be allowed the kind of access to police firearms as the INDECOM investigators required, was indeed a lawful justification or excuse.

[87] As indicated, the Constitution recognises that there is “service law” which governs discipline in the Constabulary Force. The learned Parish Court Judge, although she acknowledged that the witnesses for the prosecution Mr Campbell and Mr Lewin, who were both former police officers, had recognised and accepted that the Commissioner of Police communicates commands and hence “service law”, through force orders, in my view, she had no or no proper regard to and/or failed to properly analyse Mr Diah’s defence in relation thereto. Mr Campbell went even further in his evidence to state that members of the JCF are notified of any protocol or a change in protocol once it is published in the force orders, and as indicated at paragraph [9] herein, Mr Campbell also gave evidence that in August 2013, there was no force order in place indicating that police firearms at a shooting incident should be labelled and sealed by INDECOM investigators. While it is indeed true that force orders do not have

the weight of an Act of Parliament, police officers by virtue of the Jamaica (Constitution) Order in Council, 1962; the Constitution; the Police Service Regulations; and the Constabulary Force Act, are bound to follow the instructions of their superior officers and the Commissioner of Police, and are thus constrained in their actions by the instructions given to them through the force orders.

[88] This requirement (for police officers being obliged to follow instructions of their superior officers through force orders) creates an inconsistency between the Constitution, the Police Service Regulations, the Constabulary Force Act, on the one hand, and the provisions of the Act, on the other hand, which empowers INDECOM through its Commissioner and his investigative staff to inspect records, weapons and buildings (section 4(1)(b)(i)); have access to all reports, documents or other information regarding all incidents (section 4(2)(a)); and to take charge of and preserve the scene of any incident (section 4(2)(d)). The apparent inconsistency between the hierarchical structure of the JCF and its rules and regulations, endorsed and protected by the Jamaica (Constitution) Order in Council, 1962, and the requirements of INDECOM, made lawful through the Act, makes it necessary in dealing with the scene of an incident that section 22(2) of the Act be implemented and complied with. Section 22 of the Act states that:

“(1) Notwithstanding anything to the contrary in any other law, [INDECOM] 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 [INDECOM] 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 [INDECOM] in relation to the incident.”

[89] In order to overcome these patent inconsistencies, and in endeavouring to create clear lines of demarcation of authority and direction between the security forces and the Commissioner and his investigative staff, at the scene or alleged scene of an incident, it was therefore prudent pursuant to section 22 of the Act, that protocols be developed between the Commissioner of INDECOM and the Commissioner of Police. The first of one such protocol, relevant to the instant case, is exhibit two which is in the Jamaica Constabulary Force Order dated 13 October 2011 (exhibit two), Sub. No. 2, entitled “TEN POINT PROTOCOL TO GUIDE FUTURE INVESTIGATIONS BY INDECOM” which states that:

“The Commissioner of Police, Owen Ellington and the Commissioner of [INDECOM], Terrence Williams have agreed on a 10-point protocol to guide future investigations by INDECOM.

All members must be directed by the new protocol to ensure the transparent and efficient conduct of investigations by INDECOM and the protection of members’ rights.

The JCF accepted that INDECOM will:

...

- have access to documents and other relevant material pertaining to the particular investigation.
- ...” (Emphasis as in original)

[90] The question must arise as to whether the words “access to documents and other relevant material”, contained in the force order dated 13 October 2011 (exhibit two), did indeed cover police firearms. I acknowledge that section 4(2)(a) of the Act requires that INDECOM have access to reports, documents and other information and indicates that that access includes weapons. However, in the promulgation of exhibit two, there was no specific reference to firearms and no distinction was made between firearms owned and utilised by members of the public, as against firearms owned by the government in the possession of a person authorised by the government. Section 52 of the Firearms Act draws such a distinction, as the Firearms Act does not apply to firearms and ammunition the property of the Government unless at the material time they are in the possession of an unauthorised person.

[91] What is of importance in the circumstances of this case was that a new protocol was devised by INDECOM, in a document entitled “Preservation of Incident Scenes and

Evidence”, dated 22 February 2013 (exhibit one) and signed by INDECOM’s Commissioner. In that document (exhibit one), a “weapon of offence” is defined as “any instrument designed or used to inflict harm upon the person including, but not limited to, a firearm, bullet, baton, boot, or knife”. Paragraph 13 of that document states that:

“CONFISCATION, LABELLING AND STORAGE OF WEAPONS OF OFFENCE

(1) Where an **incident** allegedly involves injury to any person by a **weapon of offence** used by any member of the JCF, it shall be the primary responsibility of the said member who used such a weapon of offence to surrender it to the **senior responding officer** or the **Investigator** as soon as is practicable.

(2) Subject to subsection (1):

(a) Any **weapon of offence** suspected to have been used during an **incident** shall be confiscated by the said **senior responding officer** or the **Investigator**. Such confiscation shall be done:

- (i)** immediately upon arrival at the **incident scene** or at the earliest opportunity thereafter;
- (ii)** in a manner that preserves the integrity of any material evidence;
- (iii)** in a manner that clearly facilitates the identification of the individual from whom each weapon was seized; and
- (iv)** in accordance with procedures as may from time to time be published by **INDECOM**;

(b) Where a **weapon of offence** is confiscated by a **senior responding officer**, said **senior responding officer** shall cause it to be sealed in the presence of the **INDECOM’s Investigator** or **Forensic Examiner**.

(c) The said **senior responding officer** or **Investigator** shall, upon seizure of a **weapon of offence**, issue a receipt to the officer formerly in possession of the said weapon.

(d) The receipt shall contain information sufficient to facilitate the identification of the individual weapon, as well as the date of seizure and the person from whom it was seized. Each weapon shall be individually packaged and sealed and a signed duplicate of the receipt affixed to it.

(e) The said **senior responding officer** or **Investigator** shall 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 **INDECOM**.

(f) The said **senior responding officer** or **Investigator** may also seize any ancillary equipment used with a firearm, including but not limited to ammunition, ammunition clips, holsters or gun-belts, as well as any clothing worn by the person who used the **weapon of offence**. He/she shall ensure that these items are individually packaged and marked to facilitate the identification of the individual from whom each item has been confiscated.

(g) The **senior responding officer** shall cause all confiscated weapons, ammunition or equipment to be safely stored and submitted for forensic testing.

(3) Upon the confiscation of any weapon or live ammunition, as provided above, the weapon or live ammunition shall be transported by the **senior responding officer** or Technical Services Division to the JCF Forensic **Laboratory** for processing, or to the Headquarters or Arms Store of the JCF Division in which the **incident** occurred, for storage and safekeeping.

(4) Where pursuant to subsection (3) any weapon or live ammunition is to be transported by the **senior responding officer** or Technical Services Division to the JCF Forensic **Laboratory**, the seal on any such package in which the

weapon or live ammunition was transported shall be broken in presence of an **Investigator**.

(5) The **Commissioner of Police** shall ensure that standard procedures are established, implemented and enforced regarding the issue, return, storage and seizure of firearms, to allow an accurate determination to be made as to the identity of the person having custody or control of the firearm at all times." (Emphasis as in original)

[92] An "investigator" is defined as "any person employed by **INDECOM** to perform investigative functions pursuant to **the Act** and includes a **Forensic Examiner**". A "senior responding officer" is "the highest ranking member of the Jamaica Constabulary Force and Department of Corrections responding to an **incident scene**, not being a person directly or indirectly involved in the **incident**" (emphasis as in original). Mr Diah himself would be considered a "senior responding officer" within INDECOM's own protocol. Mr Diah himself had the power to tag, seal and package the firearms in the manner prescribed by INDECOM. So, even by virtue of INDECOM's own protocol, the "weapon of offence" may be surrendered to a senior member of the police force (which in the instance case would be Mr Diah) **or** to an INDECOM investigator.

[93] The procedures go on to state at paragraph 13(2)(a)(iv) that any weapon of offence used during an incident shall be confiscated by the said senior responding officer **or** the INDECOM investigator in accordance with procedures laid down by INDECOM. Section 13(2)(b) stipulates that where a weapon of offence has been confiscated by a senior responding officer, the said senior responding officer shall cause it to be sealed in the presence of INDECOM's investigator or forensic examiner.

[94] Subsequent to the issuance of that protocol by INDECOM's Commissioner, a new force order was issued by the Commissioner of Police dated 6 February 2014 (exhibit three). In that force order (exhibit three), under the heading "Protocol for Cooperation with [INDECOM]", at Sub. No. 2, it provides that:

"In furtherance of the instructions previously promulgated in Force Orders No. 3464, Sub No. 1 dated 2013-10-24 in regarding the ten point protocol to guide investigations by INDECOM, specific **protocols are hereby published with additional instructions for the guidance of all members**. These protocols will guide:-

- ***the arrest/prosecution of members***
- ***the testing of firearm and ammunition exhibits, and***
- ***the call out of INDECOM to incident scenes.***

...

II. Procedures to be followed pursuant to the Forensic Testing of Firearm and Ammunition Exhibits

The following procedures have been agreed on by the Commissioner of Police, the Commissioner of INDECOM and the Director of the Government Forensic Science Laboratory (GFSL) **where firearms and ammunitions involved in police shooting incidents are to undergo forensic testing:**

- a) The BSI will advise INDECOM of the date and time firearm/ammunition exhibits will be taken to the GFSL for test firing and invite the INDECOM Forensic Agent to attend and observe the process.
- b) As far as practicable, BSI will hand over the packaged exhibit(s) to the GFSL in the presence of the INDECOM Ballistic Agent on the date and time of the test.

- c) The INDECOM Ballistic Agent will be allowed to observe the testing process.
- d) The GFSL will retain all its test fired ammunition.
- e) After the GFSL's test firing is completed, INDECOM will be allowed to conduct its own test firing using the Laboratory's facility or, where necessary, the facility of the Firearm Licensing Authority (FLA).
- f) Where INDECOM test firing is carried out at the GFSL, it will be done in the presence of a member of the Ballistic Section of the GFSL. It is the responsibility of this member, to ensure that the testing is done in accordance with the safety guidelines of the Laboratory. The GFSL's representative will neither certify nor endorse, in any way, the test firing procedure and results of the test carried out by INDECOM's Ballistic Agent.
- g) Where INDECOM test firing is done at the FLA, the firearm and ammunition exhibits will be conveyed by a member of the GFSL under police escort and retrieved immediately after the exercise. A member of the GFSL will observe the test firing but will neither certify nor endorse, in any way, the test firing procedure and results of the test carried out by the INDECOM Ballistic Agent.
- h) INDECOM will retain all its test fired ammunition.
- i) The INDECOM Ballistic Agent will be supplied, upon the production of a written application, with the quantity and calibre ammunition required to conduct the test firing.
- j) INDECOM will be billed, at the replacement cost price, for the ammunition used in the test firing exercise." (Emphasis as in original and supplied)

[95] This force order does not affect the instant case because it was promulgated after the incident and also because it speaks to the procedure with respect to forensic testing of firearms and ammunition involved in police shooting incidents, and not to the process to be utilised before forensic testing of firearms and ammunition. However, it is important to note that that force order (exhibit three), recognises that the police would inform INDECOM of the date that the firearms and ammunition involved in a police shooting incident would be taken to the lab to be tested, and invite INDECOM's forensic agent to attend. Additionally, the police would "hand over" the packaged exhibits to the lab in the presence of the INDECOM agent. There was no requirement under that force order for police service firearms to be handed over to INDECOM to be tagged, sealed and packaged before dispatch to the laboratory.

[96] It is accepted that the force order that would have been applicable at the time of the alleged offence was the 13 October 2011 force order (exhibit two). The learned Parish Court Judge failed to recognise that that force order (exhibit two) was ambiguous in failing to distinguish between civilian firearms and police firearms, **if** firearms were even included under the rubric "other relevant material". Additionally, the learned Parish Court Judge erred in not giving adequate consideration to the fact that under INDECOM's own protocol, Mr Diah himself had the power to tag, seal and package the firearms in the manner prescribed by INDECOM. As indicated, the force order dated 6 February 2014 (exhibit three) was not applicable to the instant case as it was enacted subsequent to the incident and only related to the procedure with respect to forensic testing of firearms and ammunition in police shooting incidents. However, it

is important to note that that force order does not speak to tagging, sealing and packaging police service firearms. The learned Parish Court Judge found that the fact that Mr Diah was not aware that INDECOM's protocols existed, was a mistake of fact or law that could not avail him. She made this finding without examining whether indeed Mr Diah may have had a lawful justification or excuse, based on the absence in INDECOM's own protocol, and that of a force order (governed by the Constitution, Regulations and statute), at the time of the offence, specifically addressing police firearms, and so erred in that regard.

[97] There has indeed been some uncertainty as to the proper interpretation to be accorded various provisions of the Act. This is evidenced by the number of matters before the court seeking clarification as to whether INDECOM was empowered to do certain things. This fact was not lost on Mr Diah as he indicated that he had spoken with Deputy Commissioner of Police Heath and Mr McNabb but they had failed to give him clear directions on how to proceed. Ultimately, as indicated, he complied with the directions of his commanding officer Senior Superintendent Pinnock.

[98] Mr Senior-Smith was also correct to state that the learned Parish Court Judge erred when she failed to assess the aspects of the evidence that were favourable to Mr Diah's defence. He had submitted, and I agree, that the learned Parish Court Judge had failed to consider that Mr Campbell under cross-examination had:

- (i) agreed that Mr Diah was on his telephone at the material time and that he (Mr Campbell) had formed

the view that he (Mr Diah) had been trying to clarify his position with the person on the phone;

- (ii) that he had been a member of the JCF for 31 years and that the Commissioner of Police communicates to the JCF through force orders and it is through that means that the members of the JCF are put on notice of any change in protocol or any new protocols;
- (iii) that before February 2013 there was no requirement for police firearms to be placed in a box, only other recovered firearms;
- (iv) that there was no requirement by INDECOM for police firearms to be labelled and sealed by INDECOM personnel before being taken to the lab; and
- (v) that police firearms were added to the protocol after the incident in January 2013 (which incident had nothing to do with this case).

[99] There was evidence also that:

- (i) Mr Diah was a "senior responding officer" pursuant to INDECOM's own protocol that could handle the firearms; and
- (ii) under cross-examination Mr Lewin had said that the Commissioner of Police conveys commands through

force orders and at the time of the incident on 29 August 2013, there were no force orders in existence that addressed the testing or handling of police firearms involved in police shootings.

[100] This level of uncertainty as to whether INDECOM's investigative staff ought to have been given the police firearms to be tagged, sealed and packaged by the INDECOM's investigative staff, and the fact that Mr Diah followed the instructions of Senior Superintendent of Police Pinnock, and took the police firearms to the lab, is a factor that must, in my view, give rise to a lawful justification or excuse of his failure to comply with INDECOM's request, and also demonstrate a lawful justification of any obstruction or hindrance of INDECOM in the exercise of its functions under the Act. The grounds of appeal contained under this issue, therefore succeed (grounds three to seven).

Issue 4: The sentences imposed on Mr Diah are manifestly excessive (ground eight)

[101] For my own part, I wish to state that the sentences given to Mr Diah do not appear to be manifestly excessive. However, given my own view as to the disposition of this appeal, I find it unnecessary to comment any further in respect of this ground.

Conclusion

[102] INDECOM, as a Commission of Parliament, is not a public body with any separate legal identity and so cannot prosecute any person on its own behalf. Additionally, there is no statutory right to prosecute conferred on INDECOM's Commissioner or its

investigative staff by the Act. The right to prosecute is not contained within INDECOM's object and purposes, nor does INDECOM require that right to advance its specific public functions, which are to investigate and report. As a result, the right of the Commissioner and his investigative staff to effect private prosecutions is impliedly restricted by the Act in the performance of their public functions to investigate and its specific public interest. This position is equally applicable to prosecution of offences under section 33 of the Act which must be undertaken by the DPP. As a consequence, there is a requirement for INDECOM to obtain a fiat from the DPP before embarking upon such a course.

[103] The evidence led as to the suspicion that firearms involved in the January 2013 incident at the Jamaica Police Academy could have been tampered with before being taken to the lab, was indeed prejudicial, was entirely unsubstantiated, and had therefore likely coloured the learned Parish Court Judge's mind and her finding of guilt. Since this information was utilised by the learned Parish Court Judge allegedly to support a change in policy informing the direction to Mr Diah, and the conclusion that a lawful requirement had been issued to him, and also used to justify the finding that he had not acted with any lawful justification or excuse, this could have potentially affected the fairness of the trial. However, as there was other evidence from which the learned Parish Court Judge could have concluded that a lawful requirement had been made, and as there was no allegation made against Mr Diah specifically, and as there was no adverse comment made by the learned Parish Court Judge in her judgment that he was

complicit in any way in the alleged suspected tampering of the police weapons, the use of the prejudicial material by the court was not fatal to the conviction.

[104] Of significance in this case however, the learned Parish Court Judge failed to give adequate consideration to Mr Diah's defence to ascertain whether he indeed had a lawful justification or excuse not to comply with the requirement of INDECOM. She did not identify or highlight any evidence that was favourable from which she could accept or reject that he had a lawful justification or excuse. She examined his defence as one that contained a mistake of fact or law when he was in fact saying that he, being uncertain as to how to proceed, had been following the orders of his superior. As indicated, police force orders are supported by the Constitution, the Police Service Regulations and the Constabulary Force Act. The fact that the prosecution's evidence was that there were no force orders in existence at the time of the incident governing police firearms, in my view, clearly cumulatively amounted to a lawful justification or excuse, for failing to comply with a lawful requirement of INDECOM and therefore by his actions not obstructing INDECOM in the performance of its functions.

[105] I have noticed that my learned brother Brooks JA in paragraph [104] of his judgment referred to Mr Diah as being "absolutely wrong in his approach" and that had he been less arrogant in his approach he may not have been charged. However, although perhaps regrettably in too forceful a manner, I viewed Mr Diah's behaviour as resisting the requirement made of him by Mr Campbell. He was faced with a genuine dilemma which had been brought about by the dichotomy of competing instruments of legislation, and one wonders if Parliament had given comprehensive and thorough

analysis of the situation as was required and is expected. Although section 22 of the Act speaks to INDECOM's Commissioner having primary responsibility for the preservation for the scene of an incident or alleged incident and states that he may issue directions to the Commissioner of Police or any other authority for the purpose of the section and the exercise of that responsibility is stated to be "[n]otwithstanding anything to the contrary in any other law", the binding authority of the force orders on police officers pursuant to the Police Service Regulations embraced by the Constitution is destined to result in difficulties in compliance between competing directions from an INDECOM investigator and a high ranking police officer and his subordinate within the police hierarchy at the scene of an incident.

[106] It is therefore crucial and of the greatest importance that INDECOM's Commissioner and the Commissioner of Police establish protocols as to the preservation of the scene of an incident or alleged incident and to that extent it is advisable that the directions referred to in section 22 of the Act must be issued timeously and regularly to avoid uncertainty and confusion as occurred in this case.

[107] In my opinion, given the entire scheme of the Act that the Commissioner and his investigative staff are to report matters and offences to the DPP, I find it difficult to accept and on a proper construction of the words stated in section 22 of the Act that section 22 could have meant that any INDECOM personnel could give directions, to say, the Commissioner of Police which if not obeyed could be subject to an offence under section 33 of the Act. In any event, if that was the true and proper interpretation to be accorded to what Parliament meant by the words used in section 22 of the Act, then it

fortifies my position that the offences under section 33 of Act could not have been expected to be prosecuted by the Commissioner of INDECOM and his investigative staff as private citizens. In my opinion, that would be an absolutely absurd result and could not be what Parliament intended by the use of the words in those sections.

[108] It would be remiss of me not to place on record our gratitude for the industry from all counsel demonstrated in the detailed and comprehensive submissions provided in this matter. I must also place on record our sincere regret for the delay in the delivery of the judgment. Much effort was made to deliver the same timeously but regrettably circumstances militated against that laudable goal.

[109] Accordingly, in my opinion, Mr Diah's appeal against his convictions and sentences ought to be allowed; his convictions quashed, his sentences set aside, and judgments and verdicts of acquittal entered.

BROOKS JA (DISSENTING)

[110] As it seeks to find its proper place in the legal landscape of this country, the Independent Commission of Investigations (INDECOM) has taken various steps, some of which have been challenged in court by various entities and individuals. Some of these challenges have been in the civil courts, while others, such as the present case, have been in the arena of the criminal law. In this appeal, Mr Albert Diah, who was a Deputy Superintendent of Police, has challenged an INDECOM investigator's action of having instituted a private prosecution against him. Mr Diah has also questioned the

investigator's right to retain counsel to appear for him in court and to prosecute the case without the assent of the Director of Public Prosecutions (DPP). Mr Diah's ultimate aim is for this court to quash his convictions and set aside his sentences arising from those convictions.

[111] In this case, the INDECOM investigator, Mr Dave Lewin, laid two informations against Mr Diah charging him with offences contrary to section 33 of the Independent Commission of Investigations Act (the INDECOM Act), by which INDECOM was established. The first charge was for obstructing "[INDECOM] in the exercise of its functions" and the second was for failing "to comply with a lawful requirement of [INDECOM]". The informations were laid in the Parish Court (then Resident Magistrates' Court) for the parish of Saint Catherine.

[112] Mr Diah was summoned to attend before the Parish Court to answer both charges. The cases were both intitled "Regina vs Diah Albert – Information of Lewin Dave". Privately retained counsel appeared for the prosecution, but without the benefit of a written authorisation, known as a "*fiat*", from the DPP. Mr Diah was also represented by counsel.

[113] He was convicted, after a summary trial, on 31 October 2014. Having found him guilty of the offences, the learned Parish Court Judge (as she then was), Miss Nembhard, imposed, in respect of each count, a fine of \$400,000.00 or a term of six months' imprisonment in default of payment. Mr Diah has appealed against the convictions and sentences. Among the grounds on which he has appealed is his

contention that Mr Lewin had no authority to lay informations grounding the charges or to prosecute them, through his counsel, without the assent of the DPP.

The factual background

[114] My learned sister, Phillips JA, has, in her judgment, set out the relevant background to the charges being laid against Mr Diah. It is unnecessary, for the purposes of this opinion, for them to be restated in detail. It will be sufficient to say that Mr Diah, in his capacity of Deputy Superintendent of Police, removed, from the custody of INDECOM officials, some firearms which were used by police officers during an incident, in which a woman was shot and killed. The incident was said to be a shoot-out between the police and criminal gunmen.

[115] INDECOM officials had taken control of the firearms and the firearms were on a table awaiting processing by those officials. When Mr Diah took up the firearms, the INDECOM officials told him that the process was not complete and he should return them to the table. He refused and put them in his vehicle. He said, in court, that before taking the firearms away, he had checked with his commanding officer, who told him that the firearms should be taken to the Forensic Laboratory without delay. Mr Diah then drove away with the firearms and took them to the Forensic Laboratory. After the firearms had been examined at the Forensic Laboratory, Mr Diah made them available for re-testing by INDECOM officials.

[116] Some months later he was summoned to the Parish Court to answer the charges mentioned above.

The decision in the court below

[117] The issue of Mr Lewin's right to prosecute the case by way of counsel appearing for him, was raised, as a preliminary point at the trial. The learned Parish Court Judge gave a careful ruling dismissing the preliminary point. She relied on that ruling in dealing with the issue when it was again raised, at the close of the prosecution's case, as part of a submission that Mr Diah had no case to answer.

[118] At the completion of the evidence and submissions, the learned Parish Court Judge found that:

- a) the INDECOM official had made a lawful requirement of Mr Diah;
- b) Mr Diah wilfully refused to carry out the requirement;
- c) Mr Diah had no lawful justification or excuse for his refusal; and
- d) his conduct obstructed the INDECOM official in the exercise of his function.

The grounds of appeal

[119] In this appeal, Mr Senior-Smith, appearing on behalf of Mr Diah, sought and secured permission to argue eight supplemental grounds of appeal in place of Mr Diah's originally filed grounds. The supplemental grounds are as follows:

1. "The Learned Resident Magistrate, respectfully, erred in rejecting the preliminary objection raised by the

Appellant and which was later reinforced in his submission of no case to answer.”

2. “The deliberation of the Learned Resident Magistrate was fatally affected by prejudicial material.”
3. “The fact of the Appellant being a Police Officer with a sworn and bounden duty to act within the parameters of Section 13 of the Jamaica Constabulary Force Act received no evaluation by the Learned Resident Magistrate in her ‘Summation’.”
4. “There was a flagrant misdirection in relation to the Appellant’s defence which resulted in a non-direction and resultant conviction.”
5. “The Court in its scrutiny of the material failed to consider whether or not there was lawful justification or excuse for the absence of a wholly positive reaction by the Appellant to the Investigator’s command.”
6. “In her entitled Findings of Fact, the Learned Resident Magistrate egregiously neglected to isolate much of the evidence that was favourable to the Defence. This oversight was fatal to the Appellant’s chances of an acquittal.”
7. “The Appellant did not benefit from the literal interpretation attributable to Section 22 of the INDECOM Act.”
8. “The Sentence imposed on the Appellant was manifestly excessive and disproportionate to the alleged offence.”

Except for grounds four and five, which will be considered together, the grounds will be considered separately, and in turn.

Ground One: The investigator's instituting the prosecution and appearing by counsel

[120] In the preliminary point that was taken by the defence at the trial, it was argued that Mr Small, who is identified in the record of appeal as counsel for the prosecution, could only properly appear for the prosecution if he had received a *fiat* from the DPP. Mr Small did not have such a *fiat*. The submission on behalf of Mr Diah, at the trial, was that in the absence of a *fiat*, the prosecution could only properly be conducted by a clerk of court or a representative of the DPP. Mr Small was recorded as appearing for INDECOM, but in fact, INDECOM was not the prosecutor in the case, it was Mr Lewin.

[121] In this appeal, Mr Senior-Smith, who was not the counsel who represented Mr Diah at the trial, adopted a modified stance to that which was taken at the trial, in respect of this point. The essence of Mr Senior-Smith's submission, on this aspect, was that Mr Lewin did not have a right to institute private prosecution against Mr Diah, or any member of the Jamaica Constabulary Force (JCF), at the time that these informations were laid. Accordingly, Mr Senior-Smith submitted, this prosecution required the permission of the DPP. He concluded that the learned Parish Court Judge was, therefore, wrong in dismissing the preliminary point.

[122] Mr Senior-Smith accepted that Mr Lewin did have a right at common law, albeit a restricted one, to institute a private prosecution in a case of a breach of the INDECOM Act. He argued that the context of the INDECOM Act made that right inoperable, unless the DPP, to whom the Act had given the competence to prosecute offences under the Act, had failed or refused so to do. There was nothing in this case, Mr Senior-Smith

submitted, that triggered Mr Lewin's right to institute a private prosecution. Learned counsel submitted that Mr Lewin, therefore, had no right to even invoke the jurisdiction of the court, much more to be represented by counsel.

[123] He relied on a number of cases in support of his submissions. These included **Gouriet v Union of Post Office Workers and Others** [1977] 3 All ER 70, **Jones v Whalley**, [2006] UKHL 41, **R (on the application of da Silva v Director of Public Prosecutions and Another** [2006] EWHC 3204 (Admin); [2006] All ER (D) 215, **R (on the application of Gujra) v Crown Prosecution Service** [2012] UKSC 52; [2013] 1 AC 484; [2013] 1 All ER 612 and **R (Virgin Media Ltd) v Zinga** [2014] EWCA Crim 52; [2014] 3 All ER 90.

[124] In opposing Mr Diah's appeal, Mr Small, on behalf of Mr Lewin, strongly asserted that the right of the citizen to institute a private prosecution was alive and well. He submitted that that right was grounded in the common law, was recognised by the Constitution and was buttressed by statute, including the INDECOM Act. Learned counsel argued that the right was not conditional, as Mr Senior-Smith had contended, on a failure or refusal by the formal prosecuting authorities to act. Mr Small submitted that not only did Mr Lewin, and each of INDECOM's investigators, have the right to institute a private prosecution in their individual names, but they were also entitled to institute it in the name of INDECOM, as it was a recognised authority, being a Commission of Parliament.

[125] On the issue of Mr Lewin being represented at the trial by counsel, Mr Small submitted that, at common law, a private prosecutor was entitled to be represented by counsel. He argued that that right has also been supported by various provisions of the Justices of the Peace Jurisdiction Act (the JPJA) and the Judicature (Parish Courts) Act (the JPCA). He submitted that, based on those principles, Mr Lewin was entitled to be represented by counsel at the trial, and that the learned Parish Court Judge was correct in so ruling.

[126] Mr Small relied on a number of cases in support of his submissions. In addition to **Gouriet** and **Gujra**, he cited, among others, **Hobby v Hobby** [1954] 2 All ER 395, **Chokolingo v Attorney General of Trinidad and Tobago** [1981] 1 All ER 244, **R v Rollins** [2010] UKSC 39; [2010] 4 All ER 880, **Broadmoor Special Health Authority and Another v Robinson** [2000] QB 775 and **Commissioner of Police and another v Steadroy C O Benjamin** [2014] UKPC 8; (2014) 84 WIR 307.

[127] Both of the interested parties, the Attorney General of Jamaica and the DPP, opposed Mr Diah's stance on this ground of appeal. Although the submissions of their respective counsel were broadly along the lines of Mr Small's submissions, there were some departures that are worthy of specific mention.

[128] Ms Jarrett, on behalf of the Attorney General, agreed with Mr Small's submissions that the common law right to institute private prosecution could not be impliedly excluded by any statute. She contended in her oral submissions that section 20 of the INDECOM Act conferred on the Commissioner of INDECOM and his

investigators all the powers, authorities and privileges as are given by law to a constable. Learned counsel submitted that those powers included the common law right to initiate a private prosecution. Ms Jarrett pointed out that section 36 of the Constabulary Force Act (the CFA) was one provision which specifically recognised the common law right of a constable to initiate such prosecutions.

[129] Where Ms Jarrett departed from Mr Small was with regard to INDECOM's ability to initiate prosecutions in its name. She submitted that a prosecution had to be initiated by a legal person. INDECOM, she pointed out, although created by the INDECOM Act, does not have a separate legal personality and therefore had no right to initiate a prosecution in its name. In this regard, learned counsel submitted that the learned Parish Court Judge had made a slight error in her ruling, when she said that section 20 had conferred that right on INDECOM. The error, Ms Jarrett argued, was, however, not fatal to the conviction as the information had been laid in Mr Lewin's name.

[130] Ms Jarrett relied on many of the authorities cited by Mr Small. She also relied on other cases, including **R (on the application of Hunt) v Criminal Cases Review Commission** All England Official Transcripts (1997-2008) (judgment delivered 8 November 2000).

[131] Miss Pyke, on behalf of the DPP, submitted that the right to prosecute, which the Commissioner of INDECOM and its investigators have, was the common law right to initiate a private prosecution. That is the right, she submitted, that a constable has and

that is the right which section 20 of the INDECOM Act confers on the Commissioner of INDECOM and its investigators.

[132] Miss Pyke, like Ms Jarrett, contended that a prosecution may only be instituted by a legal person. She however went a step further. Learned counsel submitted that the prosecution could only be initiated by an individual. She supported that stance on the basis that an information could only be laid by an individual. She relied for this point on **Rex v A E Chin** (1946) 5 JLR 31 and **Rubin v Director of Public Prosecutions** [1990] 2 QB 80.

[133] Other cases, on which Miss Pyke relied, included **R v Director of Public Prosecutions, ex parte Duckenfield and another** [1999] 2 All ER 873.

[134] This case was undoubtedly initiated as a private prosecution by Mr Lewin. He did identify himself in the informations as "Dave Lewin of [INDECOM]", but that does not convert the complaint to be one made by INDECOM. The words appearing after his name merely assist in identifying him. As was pointed out in **Rex v Chin**, citing an extract from the judgment in **Giebler v Manning** (1906) 1 KB 709, the additional words may be considered "mere surplusage and did not invalidate the proceedings" (see page 32 of **Rex v Chin**).

[135] Although all parties have accepted the existence of the right of a person in Jamaica to institute a private prosecution, it would be helpful to outline the nature of the right and its origin in order to determine the extent of the right and how it is currently viewed. The United Kingdom Supreme Court noted, at paragraph [11] of its

judgment in **Gujra**, that until "late in the nineteenth century prosecutions were brought almost entirely by the victims of the alleged crimes or, if they were dead, by their kinsmen". The right to prosecute was, however, not restricted to victims or their relatives. In **Regina v Chairman, County of London Quarter Sessions. Ex parte Downes** [1954] 1 QB 1, a page 4, Lord Goddard CJ noted that anyone could initiate the prosecution. He said:

"...At common law any person could prefer an indictment to the grand jury and seek a presentment on the information he could give by himself or by witnesses. It was unnecessary to have any depositions at all."

[136] The right of initiating a prosecution was also recognised by this court in **Grant v DPP** (1980) 30 WIR 246. Although speaking in the context of an offence triable on indictment, Carberry JA, in his judgment on behalf of this court under the rubric "***Preferring of indictments: the history, in England and Jamaica***" said, at pages 290-291:

"The learning on this matter was extensively canvassed in the judgments of the Constitutional Court, with which we agree, but in deference to the arguments urged upon us, we propose to deal, briefly, with this aspect of the matter.

...

'At common law any person may prefer a bill of indictment before a grand jury against anyone whom he accuses of committing an indictable crime, and that without any previous inquiry before justices or any leave of any judge or any notice to the person against whom the indictment was presented. This right still exists, except where it has been taken away or restricted by statute, but the

usual practice is only to prefer a bill of indictment after laying an information before justices of the peace sitting in petty sessions.' [9 *Halsbury's Laws of England* (1st Edn) (1909) P 33 1, para 651; 9 *ibid* (2nd Edn) (1933) p 127, para 164].'

...

These passages usefully set out the original common law position: anyone could prefer a bill of indictment to the grand jury and, if it were accepted, it became a written accusation of crime upon which the accused person had to stand his trial before the petty jury or, as we would say in Jamaica, before the circuit court. No preliminary judicial hearing in the shape of a preliminary examination before justices was required, although it was optional and as time passed became more and more customary...."

[137] Their Lordships in **Gujra** accepted that the motivation for such prosecutions was the public benefit. They also stated at paragraph [11]:

"...But, as late as 1816, Chitty, in *A Practical Treatise on The Criminal Law* (1st edn, 1816), vol 1, p 1 wrote:

'Criminal Prosecutions are carried on in the name of the King, and have for their principal object the security and happiness of the people in general, and not mere private redress. But as offences, for the most part, more immediately affect a particular individual, it is not usual for any other person to interfere.'

..."

[138] The Crown, therefore, retained an interest in the prosecution. In their sixth edition of *An Introduction to Criminal Law*, Cross and Jones noted, at page 14, that that interest "is reflected in the method whereby indictments are headed". The learned authors note that the practice for indictments was to name the Sovereign as the complainant and the accused as the defendant. Thus the format would be, for example,

where the Sovereign is female, "The Queen (or R) v John Brown". The learned authors state that the practice for summary proceedings was different. They state at page 14:

"...The name of the prosecutor appears in summary proceedings, e.g. *Smith v. Jones*. Smith might be a private individual, a police officer or, in appropriate cases, the representative of a government department or local authority...Notwithstanding the use of the name of the individual prosecutor in summary cases, he is, in theory, the representative of the Crown...."

In **Rex v Ivanhoe Faulkner** (1943) 4 JLR 101, Furness CJ identified the prosecutor as the person who had laid the information on which the charges were brought.

[139] Their Lordships in **Gujra** noted that where the prosecution was initiated by the police "the prosecuting police officer was just another private prosecutor" (paragraph [12]). The court in **Rubin v DPP** recognised that when the police initiated a prosecution, the proper practice was for it "to be commenced by an information which has been laid by a member of the force; that is to say, by that member who reported the offence and the person accused of committing it or by the chief constable himself or some other member of the force authorised by him to lay an information" (page 89G).

[140] With the introduction of organised constabularies, private prosecutions became less common. The reason for that was that the private citizen did not have the resources for investigation or the other powers that the organised constabulary possessed. In addition, the prosecution would have been conducted at the cost of the private citizen. Moreover, the organised constabulary was under a duty to investigate

and detect crimes and prosecute the offenders (see pages 54-55 of Commonwealth Caribbean Criminal Practice and Procedure, third edition, by Dana S Seetahal).

[141] Despite the reduction in the incidence of private prosecutions, Lord Diplock, in **Gouriet**, noted that every citizen still has the right to initiate private prosecutions. He went on to put that statement in the context of prosecutions in the realm of offences against the criminal law. He said at page 97:

“The ordinary way [of] enforcing criminal law is by punishing the offender after he has acted in breach of it. Commission of the crime precedes the invocation of the aid of a court of criminal jurisdiction by a prosecutor. The functions of the court whose aid is then invoked are restricted to (1) determining (by verdict of a jury in indictable cases) whether the accused is guilty of the offence that he is charged with having committed and (2), if he is found guilty, decreeing what punishment may be inflicted on him by the executive authority. **In English public law every citizen still has the right, as he once had a duty (though of imperfect obligation), to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law by this procedure.** It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and to bring criminals to justice and the creation in 1879 [by the Prosecution of Offences Act 1879] of the office of Director of Public Prosecutions, the need for prosecutions to be undertaken (and paid for) by private individuals has largely disappeared; **but it still exists** and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.

...

So much for the ordinary way of enforcing the criminal law....” (Emphasis supplied)

[142] Mr Senior-Smith relied, in part, in respect of the latter part of the extract from Lord Diplock's speech in **Gouriet**. Learned counsel utilised that quote, and other aspects of that speech, to argue that the right to institute a private prosecution is now conditional on the "failure or refusal of those authorities" to prosecute. The submission is, however, ill-founded. Firstly, it is in the civil arena that their Lordships ruled in **Gouriet**, that a private citizen was restricted in initiating action in matters of public concern. The headnote in **Gouriet** states correctly their Lordships' finding in cases where a breach is threatened but has not yet occurred. It states, in part:

"It was a fundamental principle of English law that public rights could only be asserted in a civil action by the Attorney General as an officer of the Crown representing the public. Except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him...."

Mr Gouriet had filed a writ by which he applied to the court for an injunction to prevent a postal workers' union located in England and Wales from soliciting its members to refuse to handle mail going between that country and South Africa. South Africa was, at that time, pursuing a political policy of apartheid. Mr Gouriet contended that the postal workers' union's solicitation would have constituted a criminal offence. The House of Lords ruled that a private person could not institute an action in his own name in order to prevent a public wrong.

[143] The second reason that Mr Senior-Smith's submission is unfounded is that it is apparent from the highlighted portion of the above quote from Lord Diplock's judgment,

that their Lordships underscored the unconditional nature of the right to initiate private prosecutions for a breach of the criminal law. That recognition is also apparent from the reliance placed on **Gouriet** by their Lordships in **Rollins**. Sir John Dyson SCJ, who delivered the judgment of the United Kingdom Supreme Court in **Rollins**, confirmed the right of an individual to initiate a private prosecution. He said at paragraph [8]:

“Every person has the right to bring a private prosecution:
see, for example [**Gouriet**]....”

His Lordship went on to explain that the right of a private individual to prosecute breaches of the criminal law is usually implied in statutory instruments which create offences; “[the statutes typically] simply state that a person who is guilty of the offence in question shall be liable to a specified maximum penalty, it being assumed that anybody may bring the prosecution” (paragraph [11]). He indicated that it is only restrictions to that right, which would be imposed by statute. Such statutes would either expressly state who was entitled to initiate the prosecution or would expressly state that the prosecution could only be initiated with the prior permission of the authorised prosecuting authorities.

[144] The third reason that Mr Senior-Smith’s submission is flawed is that the existence of a right to institute a private prosecution is impliedly recognised by section 94(3) of the Constitution of Jamaica. The subsection states:

“The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—

- (a) to institute and undertake criminal proceedings against any person before any

court other than a court-martial in respect of any offence against the law of Jamaica;

(b) **to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;** and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself **or any other person or authority.**" (Emphasis supplied)

[145] That extract, as counsel for Mr Lewin and the interested parties all submitted, implicitly recognises the existence of the right of individuals, in this country, to institute private prosecutions. The reference to "any other person", learned counsel submitted, can only be a reference to an individual who has instituted a private prosecution. The argument is, with respect, sound. In fact, Mr Senior-Smith did not demur from that interpretation. Learned counsel, nonetheless, insisted that the right is a qualified right.

[146] Mr Senior-Smith also sought to find support in **Gujra** for his position that the right to initiate private prosecution was now a qualified right. His reliance is, however, misplaced. To the extent that their Lordships in **Gujra** sought to state that the right was recognised, but with some reservation, is as a direct result of legislation enacted in England and Wales. The legislation, although partially similar to the effect of section 94(3) of the Constitution, has been interpreted to have a different stress than that for which Mr Senior-Smith advocates.

[147] In **Gujra**, their Lordships all recognised the citizen's right to initiate a private prosecution. The majority were more inclined to a more liberal standard to be used by the prosecuting authorities in that country to take over, and if needs be, discontinue a privately initiated prosecution. One of the majority, Lord Neuberger of Abbotsbury P, said at paragraph [68]:

"There is no doubt that the right to bring private prosecutions is still firmly part of English law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities, as Lord Wilson [JSC] acknowledges at paras 28 and 29 [of **Gujra**], and Lord Mance JSC says at para 115 [of **Gujra**]. However, that does not really impinge on the lawfulness of the Director applying a 'better than evens' test to private prosecutions. Once one accepts that the Director is entitled to apply that test to his own prosecutions, it is hard, as a matter of logic, to see how applying the same test to private prosecutions inhibits the valuable protection afforded by the right to bring such prosecutions." (Emphasis supplied)

[148] The decision in **Gujra** turned specifically on the effect of the Prosecution of Offences Act 1985, passed in that country. The statute installed the Crown Prosecution Service as the authority which was to conduct prosecutions in that country. Their Lordships noted that despite the creation of that service, the right of the individual to initiate private prosecutions remained intact. Lord Wilson SCJ, one of the judges in the majority in **Gujra**, said at paragraph [21] of the judgment:

"...section 6 of the 1985 Act...provides as follows:

(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which

the Director's duty to take over the conduct of proceedings does not apply.

(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.'

...In July 1998 the Law Commission, under the chairmanship of Dame Mary Arden, published a paper entitled '*Consents to Prosecution*' (Law Com No 255), in which, at para 5.8, **it analysed section 6 as giving the private prosecutor in effect an unlimited right to *institute* a prosecution but as limiting his right to *continue* it** by reference both to the Director's duty to take it over in the circumstances identified in s 3(2) and to his power to do so in all other circumstances, conferred by sub-s (2) of section 6 itself. **I agree with the analysis.**" (Emphasis supplied, italics as in original)

The reservation imposed by Prosecution of Offences Act 1985 in England and Wales is the limitation on an individual to continue a prosecution that he has initiated. It is only obliquely, that the right to initiate a private prosecution is affected. Mr Senior-Smith is, however, correct that the situation resulting, in this regard, from the promulgation of that legislation is indistinguishable from the effect of section 94 of the Constitution of Jamaica.

[149] The common law right to initiate private prosecutions in this country, and the method by which it is given effect, is also recognised by George Belnavis in his work, *Criminal Practice and Procedure in the Magistrates' Courts in the Commonwealth Caribbean*. The learned author states that the laying of an information, as was done in this case, is open to private citizens. He said, at pages 1-2:

“The first method [of commencing a prosecution] is open to the public – private citizens – and prosecuting authorities alike, and consists of the laying of an information before a Magistrate or Justice of the Peace. An information...names the informant who is technically the prosecutor and is signed by him. Most Commonwealth Caribbean police forces, when commencing a prosecution by way of information, invariably name the Commissioner of Police as the informant; others prefer the name of the officer who has investigated the offence to appear on the information. Either way, since the information would have been prepared by a police officer in the course of his duties, the proceedings are best recorded as a police prosecution....”

[150] Laws, including the common law, which were in effect before the promulgation of the Jamaica (Constitution) Order in Council, 1962, were expressly stated to have continued in force upon the taking effect of that statute. Those laws were only subject to amendment or repeal by the appropriate authority. Section 4(1) of the Order in Council states, in part:

“All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day...but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.”

[151] In 1968, the Interpretation Act reinforced the continuity of common law principles of ancient vintage, such as the right to private prosecution. It states, in part, that all, “laws and Statutes of England as were, prior to [June 1727], esteemed, introduced, used, accepted, or received as laws in the Island [of Jamaica] shall continue

to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island” (section 41).

[152] The right to initiate a private prosecution in Jamaica is also recognised and supplemented by statute. Sections 9 and 31 of the JPJA respectively recognise the right of a private individual to lay an information in respect of summary and indictable offences. In either case, the complaint may be laid by any person authorised by the complainant, including his legally qualified representative. For summary offences, unless it is intended that a warrant of arrest be issued in the first place, there is no requirement for the information to be taken on oath (section 9). Section 31 refers to the form of information that should be used to initiate prosecutions for indictable offences. Form 15, appearing in the First Schedule to that Act, to which the section applies contemplates a layperson as the informant. It states in part:

“The information and complaint of C.D., of [address]
(**labourer**, etc.)....” (Emphasis supplied)

[153] Section 11 of the JPJA addresses the private prosecutor’s right in summary cases to be represented by a legally qualified representative. It states, in part:

“Every such complaint and information [laid by a complainant or informant] shall be heard, tried, determined, and adjudged by one or two or more Justice or Justices...and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively, **and to have the witnesses examined and cross-examined by counsel or solicitor on his behalf.**” (Emphasis supplied)

[154] The prosecutor's right to legal representation also exists for indictable offences. Section 289 of the Judicature (Parish Courts) Act allows for the legal representative of the private prosecutor to have priority over the clerk of courts in presenting the case for the prosecution. It states:

"In trials for indictable offences and in summary prosecutions for such classes of offences as the Minister may from time to time direct, the Clerk of the Courts shall, **excepting in cases where a barrister, advocate, or solicitor appears on behalf of the prosecution** and cases in which the Director of Public Prosecutions or some one [sic] deputed by him conducts the prosecution, be the officer to conduct the prosecution." (Emphasis supplied)

[155] In addition to the statutory provision, there is case law that stipulates that parties should be allowed to have their respective counsel conduct the case on their behalf. In **Hobby v Hobby**, it was said that the intervention by the justices' clerk, where both parties were represented by counsel before the court, was improper.

[156] A private prosecutor is also entitled to defend an appeal brought to this court. Rule 3.10(1) of the Court of Appeal Rules requires a private prosecutor to be notified of such an appeal and to be asked whether he or she intends to defend it.

[157] Based on the common law, constitutional and statutory authority stated above, it must be concluded, as counsel for Mr Lewin and the interested parties have submitted, that an individual has the right to initiate a private prosecution for perceived criminal offences. The private prosecutor may appear by counsel and need not secure a *fiat* from the DPP in order to conduct the prosecution before the court and to defend a conviction at the appellate level. This right may be restricted by statute, but only so by

an express provision or by necessary implication. In **Ewing v Davis** [2007] 1 WLR 3223, Mitting J stated, at paragraph 23 of his judgment:

“...If the right of private prosecution is to be taken away or subjected to limitation, it is for Parliament to enact and not for the courts by decision to achieve. There is in existence a statutory scheme which permits the state to interfere in private prosecutions which in the view of the Director of Public Prosecutions or the Crown Prosecution Service are unmeritorious...” (Emphasis supplied)

In **Broadmoor Special Hospital Authority and Another v Robinson**, the English Court of Appeal held that a statute could impliedly restrict the standing of a public body to seek an injunction (paragraph 25 of the judgment).

[158] It would seem that any restriction on an established common law right, such as the right to initiate a private prosecution, could only be by way of an express provision contained in a statute or by way of inescapable implication from the construction of that statute.

[159] The next issue to be decided in this ground is whether the INDECOM Act imposes any restrictions on the right to initiate a private prosecution under section 33 of the INDECOM Act. Mr Senior-Smith submitted that the tenor of the INDECOM Act impliedly subjects all the operations of INDECOM to the jurisdiction of the DPP. He pointed to sections in which INDECOM is obliged to turn over material or make reports to the DPP or otherwise co-operate with the DPP. These provisions, namely, sections 4(1)(a), 10(3)(c), 16(1), 17(10), 18(3) and 25 of the INDECOM Act, learned counsel

submitted, required a conclusion that neither INDECOM nor its agents had the right to initiate or continue prosecutions.

[160] Counsel on both sides of the divide spent some significant time addressing the issue of whether INDECOM could, in its own name, initiate a prosecution, or whether, since it was not a corporate body, it was obliged to act through the Commissioner or through an investigator. There was no agreement on the point.

[161] It is not intended to resolve that issue in this judgment, especially as the information for each of the charges against Mr Diah, was laid in Mr Lewin's name. Ms Jarrett is most likely to be correct in the position that a prosecution had to be initiated by a legal person, which INDECOM is not. It will be sufficient to observe, however, as was contended for by Miss Pyke, that the best practice is for the information to be laid in the name of the investigator or in the name of the Commissioner. This practice was, as was mentioned above, recognised in **Rubin v Director of Public Prosecutions**, where it was held that:

“...an information, either oral or in writing, could in general be laid by any member of the public, should identify the person who had laid it and the defendant, and should give particulars of the offence and any relevant statute or regulation; that, **in the case of a prosecution brought by a police force, the information had to be laid by the constable who reported the commission of the offence, or by the chief constable or some other member of the force authorised by him to lay an information;**...” (Emphasis supplied)

In **Rubin**, the complaint was that the information was laid in the name of “Thames Valley Police”, which was an unincorporated body. The court found that the procedure

did not invalidate the information since the identity of the investigating officer “could easily have been established, and since the defendant had not been misled as to the status of the prosecutor or his authority to prosecute” (page 80F). The situation was not, however, ideal.

[162] Subject to that reservation, Mr Senior-Smith is not correct in his submissions, insofar as section 33 of the INDECOM Act is concerned. As has been stated above, the individual’s right to initiate private prosecution may only be excluded or qualified by statute, either expressly or by necessary implication. Conversely, that right is implied into statutes which create offences. The right to prosecute is especially implied in respect of the person or authority that is given responsibilities under that statute. This was stated in **Rollins** which cited **Broadmoor Special Hospital Authority and Another v Robinson** as authority for that proposition. Sir John Dyson SCJ, in delivering the judgment of the United Kingdom Supreme Court in **Rollins**, said in part at paragraph [9] of his judgment:

“...In *Broadmoor Hospital Authority v R* [2000] 2 All ER 727 at [25], sub nom *Broadmoor Hospital Authority v Robinson* [2000] QB 775 at [25], Lord Woolf MR said:

'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.**' (Emphasis supplied)

[163] Contrary to Mr Senior-Smith's submissions, the INDECOM Act does not, at any point, even impliedly, deny or restrict the right of any person to initiate a private prosecution for any offence created by section 33 of the INDECOM Act. None of the provisions, to which Mr Senior-Smith pointed, impinged on section 33 of the INDECOM Act which created the offences, with which Mr Diah was charged.

[164] Section 4(1)(a) of the INDECOM Act stipulates that one of the functions of INDECOM is to conduct investigations for the purposes of the INDECOM Act. The scope of those purposes of the INDECOM Act is to receive reports of incidents and complaints about alleged improper conduct of members of the security forces and specified officials, to attempt to resolve those complaints if possible, and to pass on the results of its investigation to certain specified authorities including the DPP and Parliament. The section does not address offences created by section 33.

[165] Section 10(3)(c) directs that where a Director of Complaints of INDECOM finds that the conduct of a member of the security forces, or any specified official, complained of, constitutes an offence, a copy of the complaint must be forwarded to the DPP. The offences, if any, identified by INDECOM or its investigators, in their investigation of the conduct complained of, are not the breaches encompassed by section 33 of the INDECOM Act.

[166] Section 16(1) requires that there be consultation with the DPP before INDECOM undertakes to resolve, by mediation or alternative dispute resolution, matters arising from a complaint. Again, there is no mention of offences created by section 33.

[167] Section 17(10) and (11) requires INDECOM, upon the completion of an investigation of a complaint, to prepare and furnish a report (containing its recommendations) to the DPP and other relevant persons or authorities.

[168] Section 18(3) states that where, during an investigation, INDECOM seeks to hold a public or partly public hearing, it must consult with the DPP and any other relevant person or authority.

[169] Section 25 provides that an INDECOM investigator, upon the request of the DPP, must attend court and provide support needed in the prosecution of an offence that would have arisen from its investigation into an incident. The word "incident" is defined in section 2, and the definition does not include an occurrence contemplated in the commission of an offence under section 33 of the INDECOM Act. Similarly, the term "complaint", as contemplated by sections 2, 10 and 11, speaks about the conduct of a member of the security forces or a specified official, which results in a reference to INDECOM. The term does not contemplate an occurrence after INDECOM or its investigators have been asked to carry out their functions under the Act. Occurrences, in terms of offences, after the intervention of INDECOM, are the province of section 33 of the INDECOM Act.

[170] It may be argued that all the sections referred to by Mr Senior-Smith seem to implicitly preclude INDECOM or its investigators from prosecuting anyone in respect of an incident or complaint, which INDECOM was asked, pursuant to the Act, to investigate. The scheme of the INDECOM Act suggests that INDECOM is limited to reporting on the results of such investigations or, after consulting with the DPP, initiating a mediation process or public or partly public hearings.

[171] Section 33, however, speaks to an entirely different scenario, namely offences committed against INDECOM's Commissioner, its investigators or any other person in the execution of functions established by the INDECOM Act. This is the only section in the INDECOM Act that creates offences. There is no requirement to report any such offence to the DPP. There is no restriction on who is entitled to prosecute such offences. There is, therefore, neither express nor implied exclusion of the right to initiate private prosecutions for offences committed contrary to section 33 of the INDECOM Act.

[172] Accordingly, the dictum of Sir John Dyson, at paragraph [11] of **Rollins**, is apposite. He said:

"...Most statutes which create offences do not specify who may prosecute or on what conditions. Typically, they simply state that a person who is guilty of the offence in question shall be liable to a specified maximum penalty, it being assumed that anybody may bring the prosecution...." (Emphasis supplied)

[173] Section 33 of the INDECOM Act is set out below to demonstrate the relevance of the learned Justice's point:

"Every person who—

- (a) willfully 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."

In applying the principle, stated by Sir John Dyson, to section 33 of the INDECOM Act, it may be said that any person may bring a private prosecution in respect of a breach of section 33, particularly a person upon whom obligations are placed by the INDECOM Act. The DPP, although having the authority to take over and to discontinue, if she

wishes, any prosecution before the court, has no authority to prevent a prosecution from being initiated, either by the police or by a private citizen (see **Benjamin**).

[174] **Rex v Chin** is an example of the existence of the right to institute a private prosecution despite a statutory provision stipulating the method by which the entity charged with regulating certain conduct should proceed. The headnote accurately states the facts of the case and the decision on the point in issue:

“B., a Sanitary Inspector in the employ of the Kingston and Saint Andrew Corporation as the Local Board of Health of the Corporate Area of Kingston and Saint Andrew, laid an Information charging the appellant with the infringement of a regulation made under the Public Health Law, Chapter 71, but B. was not a duly authorised officer or servant of the Board of Health for this purpose.

Held: Section 80 of Chapter 71 provides that where proceedings are taken on behalf of a Board of Health it should be taken by the Clerk or other duly authorised officer or servant of the Board **but the right of a private person to lay an information given by section 9 of the Justices of the Peace Jurisdiction Law, Chapter 433, is not taken away either expressly or impliedly by section 80 of the Public Health Law and that B. was entitled as a private individual to lay the information in this case.**” (Emphasis supplied)

[175] Based on that reasoning, the INDECOM Commissioner, any of INDECOM’s investigators or any other person contemplated by section 33, may institute a private prosecution concerning any action by any person, including police officers, who act in breach of the provisions of that section. There is no need for any prior approval by the DPP for the information to be laid to enable that prosecution to take place. There is also

no need for any prior approval by the DPP for the private prosecutor to be represented by counsel.

[176] There is a procedural point which could have been taken concerning the initiation of a private prosecution in this case. It is that sections 60 and 65 of the JPJA require the payment of stamp duty on a summons, which is to be issued pursuant to an information. There was no issue raised in this appeal by any of the parties concerning this point. It may also be noted that section 303 of the JPCA states that no appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information, unless the point had been taken at the trial, or the Court of Appeal is of the view that the error or defect caused injustice. Nothing else need be said in this appeal about this point.

[177] Based on the above analysis, there was (except for the stamping point) nothing incorrect about the procedure by which the informations against Mr Diah were laid or in the legal representation of the prosecutor, Mr Lewin. The learned Parish Court Judge was therefore correct in her analysis and conclusion in which she found that the information had been laid by Mr Lewin. She was also correct in rejecting the complaint against counsel, Mr Small, prosecuting the case against Mr Diah without the benefit of a *fiat* from the DPP.

[178] There was, however, a general misapprehension at the trial that the prosecutor in that private prosecution was INDECOM. The fact is that the prosecutor, as noted above, was Mr Lewin. Mr Small, it would appear, sought to clarify his status at the trial.

The learned Parish Court Judge, at page 8 of the record of appeal, made the following record:

- “9. Learned Counsel Mr. Small submitted that in the instant case the Informations are laid in the name of ***Dave Lewin of the Independent Commission of Investigations***. This is a private prosecution he submitted.” (Emphasis as in original)

[179] Mr Senior-Smith’s expansion on that narrow complaint, that INDECOM’s investigators had no authority to institute a private prosecution, is without merit. The analysis, set out above, demonstrates, in my view, that ground one should fail.

Ground two: The complaint against prejudicial material

[180] The complaint under this ground has been fully assessed by my learned sister, Phillips JA. I accept that the evidence, concerning an incident at the Police Academy, was inadmissible as being entirely speculative. It should not have been used by the learned Parish Court Judge in her analysis of the charges against Mr Diah. The error, by itself, should not, however, be fatal to the conviction. The evidence was used by the learned Parish Court Judge only to determine whether the INDECOM investigator had made a lawful requirement. There was no allegation made against Mr Diah specifically, and as Phillips JA has noted, the learned Parish Court Judge made no adverse comment that he was complicit in any way in any suspected tampering with the police weapons in the incident at the Police Academy. **Harry Daley v R** [2013] JMCA Crim 14, relied on by Mr Senior-Smith, is entirely distinguishable from this case, on its facts. This ground also fails.

Ground three: The significance of Mr Diah's status as a police officer and the impact, if any, of his statutory duty as such

[181] The essence of this ground is that the learned Parish Court Judge did not accord any or any sufficient weight to the fact that, as the Divisional Crime Officer for Saint Catherine South, Mr Diah had duties which required him to take control of the weapons.

Mr Senior-Smith submitted that the evidence showed that Mr Diah was concerned about a shortage of weapons in his division and was eager to have the weapons tested and returned to service. The learned Parish Court Judge's failure to take those matters into consideration, learned counsel submitted, led her to improperly convict Mr Diah.

[182] Mr Senior-Smith submitted that the control of the weapons was a part of Mr Diah's duties, which were imposed by section 13 of the CFA. Learned counsel submitted that in the face of those statutory obligations and the lack of any Force Orders or other material to guide him, Mr Diah was obliged to do his duty as he understood the statute and as his commanding officer's order required.

[183] Mr Small submitted that the record did not indicate that Mr Diah proffered a shortage of firearms as the reason for disobeying the investigator's order. In any event, he submitted, that excuse would not amount to a lawful justification for failing to comply with the directive. Learned counsel submitted that the learned Parish Court Judge considered the issue and properly decided that there was no basis for refusing to hand over the firearms. She correctly held, he submitted, that the intention had been communicated to Mr Diah that the police firearms would have been processed and returned to him, as was done that very morning with the recovered firearm.

[184] The evidence led by the prosecution concerning the instructions given to Mr Diah to return the police firearms, came from three sources. INDECOM personnel, Phillip Anderson, Lauren Campbell and Kevon Stephenson all said that they spoke to Mr Diah about his removal of the police firearms and told him that the protocol required INDECOM investigators to process the firearms before returning them to the police. Mr Kevan Stephenson testified that he pleaded with Mr Diah. He said, "I told him it was wrong for him to take the weapons and that he should follow the guidelines that are set out by [INDECOM]". Mr Diah was, however, unmoved. Mr Stephenson said that Mr Diah was aggressive in his response. He wanted to hear nothing from the investigators. Mr Anderson testified that Mr Diah stated that he would take no instructions from any civilian and that he would not allow any civilian to handle police firearms.

[185] Mr Small is correct in stating that it did not arise during the prosecution's case, either in examination in chief or in cross-examination, that Mr Diah's reason for refusing the investigator's instruction was that he was concerned about the quantity of weapons in his division. Contrary to Mr Small's further submissions, however, Mr Diah did place that issue squarely as a part of his defence. He said, in his unsworn statement, that he gave instructions for the weapons to be tagged and labelled so that they could be taken to the Forensic Laboratory "with haste". His reason then, he said, was that the weapons involved amounted to a significant part of the police station's armoury and that until the side arms were returned the officers involved, who were the subjects of threats, would be without force-issued weapons.

[186] The defect in Mr Senior-Smith's submissions on this point is that the learned Parish Court Judge did consider the issue in arriving at her decision. She found, from the evidence, that it was lawful and reasonable for INDECOM's investigators to want to package the firearms and place them in boxes. She found that they were entitled to request that Mr Diah permit them to do so and, importantly, she found that it was made clear to Mr Diah that the process would not have defeated his expressed motivation to have the weapons returned to his division quickly. She said at paragraph 295 of the record:

"The Prosecution's witnesses went so far as to make clear the rationale behind the request. **The evidence was clear that the ultimate intention was to return the said firearms to the police officers** in any event as was done with the single firearm that was allegedly recovered at the scene of the alleged shooting incident." (Emphasis supplied)

That finding recognised the evidence of Mr Lauren Campbell, who testified that he told Mr Diah that the "process entails checking for blood samples or verifying serial numbers or photographing and packaging of the weapons in firearm boxes. Then they are handed back to the police to be taken to the Forensic Lab for testing" (paragraph 112 of the record).

[187] As noted by Mr Senior-Smith, the learned Parish Court Judge did not specifically mention Mr Diah's obligations under the CFA. The oath, which a member of the force is obliged to take, includes an obligation to see the peace kept and to prevent, as far as he can, all offences against the peace. Sections 13 through 25 of that Act speak to the various duties and powers of members of the force, including higher ranked members,

such as Mr Diah. None of those sections, however, impose on Mr Diah any obligation which conflicted with the statutory requirement to produce any document or thing to INDECOM as is required by section 21 of the INDECOM Act. The context in the section is wide enough to allow reference to any “thing”, including a firearm. Mr Diah did not suffer any prejudice by the learned Parish Court Judge’s omission to mention his statutory obligations.

[188] She did, however, consider the practical elements of those obligations and found that he had no lawful excuse to disobey the instructions of the INDECOM investigator. It is also correct to say, as submitted by Miss Pyke, that there is no provision in section 13 of the CFA that justified Mr Diah’s disobedience of the direction of the investigator. His expressions of uncertainty, in his unsworn statement from the dock, did not assist him with regard to the matter of whether he had an intention to breach the statutory requirements stipulated by section 21 of the INDECOM Act.

[189] Among the areas of uncertainty raised by Mr Diah were:

- (A) the nature of the access to which the INDECOM investigators were entitled in those circumstances;
- (B) the authority that INDECOM investigators had to handle firearms so as not to breach the provisions of the Firearms Act; and
- (C) the issue concerning the chain of custody in respect of the firearms.

[190] The learned Parish Court Judge found that these issues had all been provided for in the INDECOM Act and therefore Mr Diah had no justification to refuse to obey the investigators' requests, which she had found to be lawful. She said at paragraph 305 of the record:

"The Court finds that Mr. Diah fell into breach of the [INDECOM Act] when he failed to comply with the request made of him. The powers, authorities and privileges of [INDECOM's] investigative staff in the exercise of [INDECOM's] statutory functions and the scope of those powers, authorities and privileges have been expressly stated in the legislation. It is not for Mr. Diah to raise the questions he did as to access to the said firearms in the manner in which he sought to [sic]. I have already stated that the Court finds that [INDECOM's] investigative staff would have had the authority to handle the said firearms as is expressly stated in the legislation."

[191] The learned Parish Court Judge properly considered the issue of Mr Diah's intention, based on his duties as a police officer, for the purposes of the offence. This ground, in my view, fails.

Grounds four and five: The treatment with and effect of Mr Diah's statement concerning the directives of his commanding officer

[192] Mr Senior-Smith argued grounds four and five together. He submitted that the learned Parish Court Judge did not give any or any sufficient weight to Mr Diah's statement that his commanding officer had instructed him to take the firearms to the Forensic Laboratory. He submitted that she did not consider whether this would be a lawful excuse for disobeying the instructions of the INDECOM investigator.

[193] Learned counsel pointed to the evidence of Senior Superintendent of Police Colin Pinnock, who testified that he “gave instructions to [Mr Diah] to ensure that all weapons were taken to the Forensic Laboratory, Ballistics section” (paragraph 260 of the record). That evidence, Mr Senior-Smith submitted, was unchallenged and yet it was not given any weight by the learned Parish Court Judge.

[194] Mr Senior-Smith is correct that the learned Parish Court Judge did not specifically mention Senior Superintendent Pinnock’s evidence concerning this element of Mr Diah’s defence. She did, however, identify the larger issue of whether Mr Diah had any lawful excuse for disobeying the requirement of INDECOM’s investigator. She considered Mr Diah’s stated uncertainty as to what provisions should prevail in determining the course that he should follow. She also considered, as shown in the above quote of paragraph 305 of the record, his stated uncertainty as to whether he could properly allow the investigators to handle the firearms. She found that the provisions of the law were quite clear that not only did the investigators have the same entitlement as constables, to handle firearms, but that it was also clear that police officers should obey the instructions of the INDECOM investigators who were carrying out their duties under the INDECOM Act. It was for those reasons that she found that Mr Diah’s claim of a mistake of fact did not assist him.

[195] It may also be said that although the learned Parish Court Judge did not mention Senior Superintendent Pinnock’s instructions to Mr Diah, she found that the procedure that the INDECOM investigators required Mr Diah to follow would not have prevented

him from, or unduly delayed him in, taking the firearms to the Forensic Laboratory. That finding has already been referred to above. Her failure, in this regard, could not be fatal to the conviction. Mr Diah's commanding officer could not have issued a lawful instruction to disobey the instruction of INDECOM's investigator. Senior Superintendent Pinnock's instructions to Mr Diah cannot avail him a reason for failing to obey a lawful requirement of an INDECOM investigator. Those instructions were insufficient to constitute a defence to the charges. These grounds fail.

Ground six: The failure of the learned Parish Court Judge to make findings of fact that were favourable to Mr Diah

[196] Mr Senior-Smith submitted that the learned Parish Court Judge failed to take into account the fact that there was no established protocol in place on 29 August 2013 concerning the preparation of police firearms by INDECOM investigators. He argued that there were negotiations that were ongoing between INDECOM and the JCF regarding the protocol to be used in incidents involving police firearms. The position was, however, not settled.

[197] The record does not support Mr Senior-Smith on this point. The learned Parish Court Judge did, at paragraph 304 of the record, quote extensively from Mr Diah's unsworn statement as to what he said were unsettled issues concerning the protocol regarding firearms. She found at paragraph 305 that the powers, authority and privileges of INDECOM's investigators had been clearly set out in the legislation and that it was "not for Mr. Diah to raise the questions he did as to access to the said firearms in the manner which he sought". She found that it was "not for Mr. Diah to

determine that there would have been no issue as to who was in possession of the respective firearms as a result of the entries that would have been made in the Firearms Register and the Station Diary” (paragraph 306). The learned Parish Court Judge carefully considered these points and rejected this aspect of Mr Diah’s defence. She also considered the question of whether the existence, or not, of a Force Order would have assisted Mr Diah in his defence of lawful justification. That reasoning will be considered in ground seven. For these reasons, ground six should also fail.

Ground seven: The effect of section 22 of the INDECOM Act

[198] This ground gave me the most concern. A broad overview could lead to the conclusion that Mr Diah was genuinely uncertain as to the correct action to take in the circumstances. For that reason, I was, at one stage, inclined to agree with my learned sister, Phillips JA, that the conviction was unsafe, especially in the light of the novelty of the INDECOM Act. A closer examination of the reasoning of my learned sister makes it apparent, however, that Mr Diah, if acting genuinely, was operating on a mistake as to law, and not as to fact. Whereas the latter would have afforded him a defence, the former would not.

[199] For this ground, Mr Senior-Smith argued that the learned Parish Court Judge did not give attention to the intent of section 22 of the INDECOM Act. He submitted that the section contemplated the establishing of a structure or regime that should be in place before any police officer could be charged for failing to comply with the requirements of an INDECOM functionary. The section, learned counsel argued, required INDECOM to issue directions to the Commissioner of Police who in turn would

establish a protocol, in accordance with those directions, for the members of the JCF to follow. Such protocols would be communicated by Force Orders issued by the Commissioner of Police. Learned counsel submitted that the Force Order that was in place in August 2013, concerning the preservation of evidence spoke to “documents and other relevant material”. He argued that the term “relevant material”, as used in the Force Order, could not include a reference to firearms which are of a totally different nature from documents. The Force Orders to which learned counsel referred were contained in a document dated 13 October 2011.

[200] Mr Senior-Smith submitted that whereas those Force Orders which were in place since 2011, established the protocol to guide the police in respect of investigations by INDECOM, there was no Force Order in place which specifically spoke to the weapons of the members of the force involved in those controversial police shootings. There was no further relevant Force Order, concerning firearms and INDECOM, until February 2014. Learned counsel submitted that in the absence of a Force Order, made as a result of the provisions of section 22 of the INDECOM Act, dealing with the preservation of evidence, there was no obligation on Mr Diah to hand over the firearms to the INDECOM investigators.

[201] Mr Small submitted that the learned Parish Court Judge, not only gave the correct interpretation of section 22, but also correctly held that any insufficiency of a Force Order could not override a requirement issued in pursuance of a statutory provision. Learned counsel submitted that the correct approach to the question is to apply the provisions of section 21 of the INDECOM Act which unequivocally authorises

INDECOM to “require any member of the Security Forces...to...produce any document or thing in connection with the investigation” that is under that member’s control.

[202] The flaw in Mr Senior-Smith’s submissions is that, taken to their logical conclusion, it means that in the absence of a Force Order dealing with any specific situation, the police officer involved in that situation is free to take any step in respect to dealing with evidence that he deems appropriate. That conclusion conflicts with both sections 21 and 22 of the INDECOM Act.

[203] The INDECOM Act, still being fairly new, and INDECOM still seeking to establish its proper role in the arena in which the INDECOM Act places it, there are likely to be many situations where there is no applicable specific Force Order. This could result from the novelty of the circumstances of a particular case, administrative sloth, or any reason in between. In those circumstances, the guidance of the provisions of the INDECOM Act would apply.

[204] Section 21 provides that INDECOM’s Commissioner or any of its investigators, or other employee so tasked, may require a police officer to produce any document or thing in connection with an investigation. If it is in the possession of a police officer, of whatever rank, he or she is obliged to comply with the requirement. The relevant part of section 21 states:

“(1) Subject to subsection (5), **[INDECOM] may at any time require any member of the Security Forces**, a special 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." (Emphasis supplied)

Subsection (5) provides the basis on which a lawful request made pursuant to subsection (1) may be properly refused. The only lawful excuse that exists for refusing to comply with a requirement made under subsection (1) is that the person required was not compellable in law to provide that information. Subsection (5) states:

"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."

[205] A fair application of those provisions would be that there need be no Force Order in place, to authorise the making of the requirement. Neither would the absence of a Force Order, protocol, or direction or approval from any senior officer, provide lawful justification or excuse to any member of the JCF to refuse to comply with a requirement made pursuant to subsection (1).

[206] In similar vein, section 22 makes it very clear who is in charge of evidence at the scene of any incident. The section states:

"(1) Notwithstanding anything to the contrary in any other law, [INDECOM] 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 [JCF] 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 [INDECOM]** 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 [INDECOM] in relation to the incident." (Emphasis supplied)

[207] As set out in section 22(1) above, it is INDECOM, which has the "primary responsibility for the preservation of the scene of an incident or alleged incident". The provision is unconditional. It operates "[n]otwithstanding anything to the contrary in any other law". The provision would supersede any order made by any superior police officer, any Force Order, and any situation where there is an absence of an established protocol. If the Commissioner of INDECOM or an INDECOM investigator gives a direction pursuant to section 22(1) for the preservation of a scene, it must be obeyed. To disobey may constitute failure "to comply with [a] lawful requirement" under section

33(b)(ii), and as a result, a breach of the provision. A claim of acting on the instructions of a senior officer cannot justify the refusal or failure to obey the direction of the Commissioner of INDECOM and an INDECOM investigator.

[208] Section 22(2) and (3) directs who is in charge at the scene of an incident or alleged incident. Before INDECOM's Commissioner or its investigator arrives on the scene, it is the senior member of the security forces at that scene, who has the responsibility of preserving the scene. After INDECOM's Commissioner or its investigator arrives at the scene, the security forces are subject to the authority of INDECOM's Commissioner or its investigator for the purposes of the preservation of the scene and the evidence. Each member of the JCF "shall be under a duty, until the [INDECOM] investigator is satisfied that it is no longer necessary to do so, to continue to take steps for the purposes of preserving the scene".

[209] It should be noted, for completeness, that although sections 21 and 22 of the INDECOM Act speak to the powers and responsibilities of INDECOM, section 26 of the Act stipulates that the "functions of [INDECOM] may be performed by any member of its staff or by any other person...authorized for that purpose by [INDECOM]". There should, therefore, be no doubt as to the authority of INDECOM's investigator when he or she gives a direction for the purpose of the preservation of evidence or of any other aspect of the requirements of the Act.

[210] Section 22 is designed to establish a protocol for the members of the security forces to preserve evidence at the scene of any incident. It does not itself address the delivery to INDECOM's functionaries of any evidence or material of interest to them. It is section 21 of the INDECOM Act, on a fair interpretation, which requires the members of the security forces to deliver up evidence to INDECOM's investigators, provided that they did not have the excuse that they were, for any reason, not compellable.

[211] Although the learned Parish Court Judge did spend some time examining section 22 of the INDECOM Act, Mr Diah was required, by an application of section 21, to have produced the firearms when Mr Anderson and the other INDECOM investigators, required him to do so. Section 21(5) deals with circumstances in which a person could not be compelled to produce items as required by subsection (1). It does not apply in these circumstances. An application of section 21(1) confirms that Mr Diah was legally obliged to produce the weapons when he was required, by the investigator, so to do.

[212] Instead, the evidence reveals that Mr Diah was aggressive and boisterous in his response to the entreaties of the INDECOM investigators. The witness, Mr Kevon Stephenson, testified that Mr Diah said that he wanted to hear nothing from Mr Stephenson. It was Mr Lauren Campbell's evidence that Mr Diah stated that he would take no instructions from Mr Campbell. Mr Anderson, in his evidence, stated that Mr Diah told him he (Mr Diah) would not allow any civilian to handle police firearms. This is evidence that the learned Parish Court Judge could properly take into account in determining whether Mr Diah's defence was a genuine one.

[213] It is my view that Mr Diah was absolutely wrong in his approach. Had he been less arrogant, the matter would, most likely, not have resulted in his being charged. The novelty of the terms and implication of the INDECOM Act may have resulted in his genuine uncertainty in that situation. But, as said before, this would have been an uncertainty as to the law, not the facts.

[214] Police officers and others are also to be generally aware of the authority of INDECOM investigators at the scene of any incident or alleged incident. This is so, even if there is no protocol established or agreed between the Commissioner of INDECOM and the Commissioner of Police, to deal with the specific situation at that particular scene. The relevant part of section 22(1) bears repeating, “[n]otwithstanding anything to the contrary in any other law, [INDECOM] shall have primary responsibility for the preservation of the scene of an incident or alleged incident”.

[215] The provisions of section 22(1) would apply in the circumstances of this case. Although the firearms were not at the “scene” of the incident, the preservation of their integrity, despite their location at the police station, would be within the intention of section 22. Section 22(3) speaks generally to “preserving the evidence”.

[216] In my view, ground seven fails.

Ground eight: The sentence

[217] In arguing that the sentence on each count of \$400,000.00, or in default of payment imprisonment for six months at hard labour, was manifestly excessive, Mr

Senior-Smith submitted that the learned Parish Court Judge failed to provide herself with relevant material. She ought to have requested, he submitted, a social enquiry report so that she could be better informed as to the appropriate sentence.

[218] The learned Parish Court Judge's judgment on sentence cannot properly be criticised. Although this was a new bit of legislation with few, if any, previous decisions on the issue of sentence, the learned Parish Court Judge considered the rationale for the creation of the offence, Mr Diah's behaviour in the circumstances and the fact that he had previously had no difficulties with INDECOM's functionaries. Her decision to impose a fine is appropriate in the light of the fact that he had no previous convictions. In the light of the fact that the maximum fine prescribed by section 33 of the INDECOM Act is \$3,000,000.00, it cannot properly be said that the sentence was manifestly excessive.

[219] It must be noted that the learned Parish Court Judge refused an application that the conviction against Mr Diah not be recorded. It may be that another Parish Court Judge, in light of the fact that it is yet early days for the litigation in this area, could have acceded to the request. This, however, was a matter of discretion for the learned Parish Court Judge. It cannot be said that she exercised her discretion improperly. It should not, therefore, be disturbed. This ground should also fail.

Summary and conclusion

[220] It is my opinion that Mr Lewin was entitled to lay the informations against Mr Diah by virtue of his common law right to initiate a private prosecution. He was also

entitled to be represented by counsel. Further, there was no need for Mr Lewin or his counsel to seek or obtain permission from the DPP in order to represent him.

[221] The learned Parish Court Judge was also correct in finding that the INDECOM investigator had made a lawful request and given a lawful direction to Mr Diah, who without lawful justification, failed to comply with it. Mr Diah also improperly and unlawfully removed the firearms, and thereby obstructed the INDECOM investigator in his function.

[222] When closely perused, Mr Diah's defence was one of mistake of law. His expressed view that the INDECOM investigator was not entitled to handle police firearms was wrong in law. The investigator in carrying out his functions, at the time that he gave the instruction to Mr Diah, had the powers of a constable, for the purposes of conducting an investigation (section 20 of the INDECOM Act), and could therefore properly handle the firearms (see section 52(e) of the Firearms Act). Mr Diah's defence that he was entitled to disobey the instruction of the INDECOM investigator because he was carrying out the instruction of a senior officer was wrong in law. Section 22(1) of the INDECOM Act bestows the power of preservation of the scene on an INDECOM investigator, "[n]otwithstanding anything to the contrary in any other law".

[223] Finally, Mr Diah's defence that he was entitled to disobey the INDECOM investigator's direction, because of the absence of any Force Order or protocol which addressed the issue, was wrong in law. Section 22(1) applied completely in those circumstances. Mr Diah is not entitled to rely on mistakes of law and the learned Parish

Court Judge was correct in rejecting his defence. She properly found him guilty of the offences.

[224] This opinion would not be complete without a word of appreciation and gratitude to all counsel for the thorough, painstaking work that was put into assisting the court with the relevant material and the careful effort made in the presentation, both orally and in writing. The care and clarity with which the learned Parish Court Judge approached the task of presenting her reasoning was commendable. The court was greatly assisted by all those efforts.

[225] It also ought to be noted that although all counsel referred to the Full Court decision in **The Police Federation and Others v The Commissioner of the Independent Commission of Investigations and Another** [2013] JMFC Full 3, with counsel for INDECOM and the interested parties relying on the decision for support in respect of ground one, no analysis of it has been made in this opinion. This is because an appeal from that decision was heard during the same week that the appeal in this case was heard. Although some of the issues in that case overlap with aspects of ground one, some are in fact different. In my view, it is best that the decision in that appeal be left without any foreshadowing by this appeal.

[226] For the reasons stated above, it is my view that the appeal should be dismissed, and the convictions and sentences affirmed.

F WILLIAMS JA

[227] I have read the two largely differing judgments by Phillips JA and Brooks JA in this matter, each persuasively putting forward the views to which they hold.

[228] Having done so, I agree with my learned brother on most aspects of his judgment, and with my learned sister on at least one aspect of hers. It will be more convenient for me to comment on the issues of the case, as done by Phillips JA, rather than to discuss the individual grounds.

[229] The main issue in the case appears to be whether the Commissioner and his investigative staff have the power to prosecute breaches of the Act; and, more particularly, whether it was legally permissible for the prosecutor in this case to have brought the prosecution without a fiat from the Director of Public Prosecutions. In relation to that main issue, I am in full agreement with Brooks JA in respect of his analysis and conclusions. I am persuaded by the dicta in the cases of **Rex v A E Chin** (1946) 5 JLR 31, and more so the case of **Broadmoor Special Hospital Authority and Another v Robinson** [2000] QB 775 in which Lord Woolf MR is noted as having said at paragraph 25 that:

“... 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...”

[230] That being so, I regret that I am unable to agree with my learned sister's conclusion at paragraph [43] of her judgment to the effect that “[t]he power to prosecute is not a responsibility required for the performance of the public functions ascribed to INDECOM”.

[231] To my mind the said power is required and has not been, either expressly or by necessary implication, restricted in any way.

[232] Additionally, I am not of the view that the Commissioner of INDECOM and his investigative staff can only conduct prosecutions pursuant to a fiat, for the reasons outlined by Brooks JA.

[233] In relation to the issue of whether prejudicial evidence relating to an incident on 30 January 2013 was considered by the learned Parish Court Judge, I find that the evidence was inadmissible and ought not to have been considered. I am of the view, however, that, as it conveys no hint of wrongdoing on the part of Mr Diah himself, the evidence cannot properly be regarded as being prejudicial to him. Another consideration is that the court below used the information on the incident on 30 January of 2013, only as background to consider the rationale for the policy change in respect of the processing of police firearms. Nothing in the evidence adduced could have coloured the judgment of the court below against Mr Diah. However, even if I am wrong in this view

and the evidence is in fact prejudicial, I join with both my learned colleagues in the view that that would not be fatal to the conviction.

[234] The third issue concerns the treatment by the court below of certain aspects of Mr Diah's defence. It is on this issue that I must respectfully part company with Brooks JA and agree with Phillips JA. To my mind, the following considerations are of tremendous importance in this regard: (i) the relative novelty of the legislation at the time; (ii) the recency of the change in the procedures relating to the handling of police firearms, that Mr Diah clearly did not know about but was equally clearly seeking clarification on; (iii) the fact that a new protocol was promulgated through force orders relatively shortly thereafter (on 6 February 2014 - exhibit three) stating for clarity and the avoidance of doubt what the new requirements were. (These force orders do not address the issue of the placement of police firearms in boxes to be photographed, sealed and labeled. The force orders, as they relate to firearms involved in police shootings, speak only to the process to be adopted in the forensic testing of such firearms and ammunition, and seem to permit the police to retain the firearm and to present it for testing in the presence of an INDECOM agent); (iv) the fact that there is an unchallenged statement made by Mr Diah about the shortage of police firearms at the police station at which the police personnel involved in the incident were stationed and that he was concerned about that shortage; (v) the fact that Mr Diah's superior officer ordered him to take the weapons to the government forensic laboratory; and (vi) the fact that, from all indications, Mr Diah complied directly with that order.

[235] In my finding, these factors, taken together, and if they had been directly considered and analyzed, could possibly have created in the mind of the learned Parish Court Judge reasonable doubt in evaluating whether the appellant had had a "lawful justification or excuse". The factor listed at (v) above, which was not specifically considered by the learned Parish Court Judge at all, is given added weight. That is so especially considering (in addition to the legislation referred to by Phillips JA at paragraphs [83] to [84] of this judgment) rule 3.4 of the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force. The Rules are dated 7 September 1988, and were made by the Minister pursuant to section 26 of the Constabulary Force Act. Rule 3.4 reads as follows:

“3.4 LAWFUL COMMANDS

Every member shall receive the lawful commands of his Senior with deference and respect; and execute them with alacrity...”

[236] It is likely that Mr Diah, in the uncertainty that existed, would unfortunately have found himself placed squarely on the horns of a dilemma, trying to decide between complying with the requests of the INDECOM staff, on the one hand, in respect of requirements that were new and not previously communicated to him and, on the other hand, with the instruction that he was given by Senior Superintendent of Police Colin Pinnock.

[237] Regrettably, although perhaps touched on by the learned Parish Court Judge in a general way, these said factors were not given the sort of direct consideration that they required in the particular circumstances of this case. On this issue, therefore, I concur

with my learned sister, Phillips JA, in finding that the learned Parish Court Judge fell into error, necessitating the allowing of the appeal in what I find to be the unusual circumstances of this case.

[238] It is therefore my view that the appeal should be allowed and the convictions quashed and the sentences set aside.

PHILLIPS JA

ORDER (By a majority, Brooks JA dissenting)

1. The appeal against Mr Diah's convictions and sentences are allowed, his convictions are quashed and his sentences are set aside.
2. Judgments and verdicts of acquittal entered.
3. The amount of \$400,000.00 paid by Mr Diah on each count be refunded to him forthwith.