

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 4/2015

MOTION NO 6/2018

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE PUSEY JA (AG)**

BETWEEN	REGINA (ATS DAVE LEWIN)	APPLICANT
AND	ALBERT DIAH	RESPONDENT

**Terrence Williams, Mrs Yanique Taylor Wellington and Mrs Krystle Blackwood
for the applicant**

**Oswest Senior-Smith instructed Oswest Senior-Smith & Company for the
respondent**

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

**Joel Brown instructed by the Director of Public Prosecutions appearing
*amicus curiae***

11, 15 June 2018 and 20 December 2018

PHILLIPS JA

[1] I have read in draft the judgment of my brother Pusey JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

[2] I have also read in draft the judgment of my brother Pusey JA (Ag) and agree with his reasoning and conclusion. There is nothing that I wish to add.

PUSEY JA (AG)

[3] The applicant, Mr Dave Lewin, by way of an amended notice of motion, sought conditional leave to appeal to Her Majesty in Council, from the decision of the Court of Appeal delivered on 16 March 2018. This motion was made pursuant to section 110(1)(c) and 110(2) of the Jamaica (Constitution) Order in Council, 1962 ("the Constitution") as well as section 35 of the Judicature (Appellate Jurisdiction) Act.

[4] This case is only one of a number of cases involving the Independent Commission of Investigations ("INDECOM") and members of the police force. The Independent Commission of Investigations Act ("the Act") was passed by Parliament in an effort to undertake investigations concerning actions by members of the security forces and other agents of the state that resulted in death or injury to persons or the abuse of the rights of persons; and for connected matters. As a consequence, INDECOM has investigated incidents and acted with the authority, claimed by them, to bring actions against members of the security forces and other agents of the State, pursuant to the Act.

[5] The case in question is one such case. There had been a fatal shooting incident allegedly between police officers and gunmen. INDECOM was informed of the incident and thereafter, Mr Phillip Anderson, a forensic examiner of INDECOM, visited the

Central Village Police Station in the parish of Saint Catherine, on the same day. A Detective Sergeant Carl Morris, the initial investigating officer in the said fatal shooting, gave Mr Anderson seven firearms, which included six police service firearms as well as a firearm which had been recovered from the scene of the incident.

[6] Mr Albert Diah (a Deputy Superintendent of Police) later took possession of the abovementioned firearms. Excluding the firearm which had been recovered at the scene of the incident, which he gave to Mr Anderson, Mr Diah refused to return the six police service firearms to an INDECOM investigator in order that they might be photographed and packaged in the presence of the initial investigator. That same day, as a consequence of instructions received from his superior officer, Mr Diah took the six police service firearms to the Government Forensic Laboratory, where they were tested and returned to him. Based on a request made to Mr Diah by Mr Floyd McNabb, the Director of Complaints at INDECOM, the police service firearms were retested the following day by INDECOM.

[7] Mr Dave Lewin, an INDECOM investigator, proceeded to lay an information against Mr Diah for contravening section 33(b)(i) and (ii) of the Act. It was alleged that, in acting as he did, Mr Diah had, without lawful justification or excuse, (i) obstructed the Commission in the exercise of its functions; and (ii) failed to comply with a lawful requirement of the Commission. He was summoned to the Parish Court for the parish of Saint Catherine, tried, convicted and fined. The criminal action proceeded as a private prosecution and was prosecuted by counsel on behalf of Mr Lewin.

[8] Mr Diah appealed to the Court of Appeal against his convictions and sentences. Among the issues raised in the appeal were (i) whether the learned Parish Court Judge erred when she found that INDECOM's legal representative who prosecuted Mr Diah was empowered to do so, without the express written permission (or the fiat) of the Director of Public Prosecutions ("DPP"); (ii) whether the learned Parish Court Judge erred in using prejudicial information to aid in her deliberation; and (iii) whether the learned Parish Court Judge erred in her assessment of Mr Diah's defence, which was that he had had a lawful justification or excuse when he failed to comply with INDECOM's request.

The reasons for the decision of the Court of Appeal

[9] On 16 March 2018, by a majority decision, the Court of Appeal allowed the appeal, quashed the convictions and set aside the sentences. Judgments and verdicts of acquittal were entered and the court ordered that the fines that had been paid by Mr Diah should be returned to him.

[10] In giving the reasons for the decision, Phillips JA, with whom F Williams JA agreed, opined (at paragraph [87] of the judgment) that the learned Parish Court Judge had no or no proper regard to, and/or failed to properly analyse, Mr Diah's defence that a superior officer had instructed him as to how to proceed with respect to the six police service firearms and that he had complied with those instructions.

[11] The learned judge of appeal noted that this failure was of significance because, by virtue of the Constitution, the Police Service Regulations and the Constabulary Force

Act, police officers are bound to follow the instructions of their superior officers and the Commissioner of Police: they are thus constrained in their actions by the instructions given to them through the force orders. Phillips JA further reasoned, that the requirement for police officers to comply with the instructions of their superior officers, through force orders, created an inconsistency between the Constitution, the Police Service Regulations and the Constabulary Force Act, on the one hand, and the provisions of the Act, on the other hand. Phillips JA considered this to be so because the Act empowers INDECOM, through its Commissioner and his investigative staff, to, among other things, inspect records, weapons and buildings, have access to all reports, documents or other information regarding all incidents, and to take charge of and preserve the scene of any incident.

[12] In assessing this inconsistency, Phillips JA concluded that the following factors supported Mr Diah's defence that he had lawful excuse or justification for his failure to comply with INDECOM's request or to obstruct or hinder them and merited consideration by the learned Parish Court Judge: (i) the level of uncertainty that existed as to whether INDECOM's investigative staff should have been given the police service firearms to be tagged, sealed and packaged, even through their own published protocols; and (ii) the fact that Mr Diah was unable to obtain assistance from Mr McNabb and had followed instructions from his superior officer by taking the police service firearms to the Government Forensic Laboratory. Phillips JA was of the view that the learned Parish Court Judge failed to give adequate consideration to these factors in arriving at her decision.

[13] F Williams JA, in agreeing with the views expressed by Phillips JA, noted that he too was of the opinion that it was likely that Mr Diah, in the uncertainty that existed, would have found himself having to determine whether to comply 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 instructions given to him by his superior officer. He reasoned that this was of significance, as rule 3.4 of the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force directed that police officers were to receive the lawful commands of their senior with deference and respect, and execute them with alacrity. These factors, F Williams JA concluded, ought to have been given more direct consideration by the learned Parish Court Judge.

[14] Brooks JA disagreed with the decision of the majority of the court on this issue. He reasoned that the learned Parish Court Judge was 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". He further reasoned that Mr Diah had improperly and unlawfully removed the police service firearms, and thereby obstructed the INDECOM investigator in his functions.

[15] Brooks JA concluded that the learned Parish Court Judge was correct in rejecting Mr Diah's defence, as his contentions that he was entitled to disobey the instructions of the INDECOM investigator, on the basis that: (i) he was carrying out the instruction of a senior officer; (ii) the INDECOM investigator was not entitled to handle police service

firearms; and (iii) there was an absence of any force order or protocol which addressed the issue, were all "wrong in law".

[16] Although not determinative of the appeal, a further issue which arose for consideration by the Court of Appeal was whether the legal representative for Mr Lewin ought to have obtained a fiat from the DPP in order to undertake the prosecution against Mr Diah.

[17] Brooks JA, with whom F Williams JA agreed with respect to this issue, opined that, whilst an INDECOM investigator or the Commissioner were not empowered by the Act to prosecute for an offence under section 33 of the Act in their public capacity or pursuant to their public responsibility, based on the common law, constitutional and statutory authority, an individual had the right to initiate a private prosecution for perceived criminal offences. As such, a private prosecutor may appear by counsel without having obtained a fiat from the DPP. He therefore reasoned that, whilst this right may be restricted by statute, this may only be done, "by an express provision or by necessary implication".

[18] In the circumstances, Brooks JA concluded that the Commissioner, and any of INDECOM's investigators or any other person contemplated by section 33 of the Act, may institute a private prosecution, in relation to any action by any individual, inclusive of police officers, which would be in contravention of the provisions of that section.

[19] Phillips JA, on the other hand, reasoned that INDECOM neither had a statutory power to prosecute nor the common law right to bring a private prosecution as it was

not a "person" in law. Having examined the Act in detail, she concluded that this is so as the power to prosecute was not expressly granted. Brooks JA and F Williams JA agreed with Phillips JA on this point.

[20] Phillips JA further reasoned that the Commissioner and the investigators of INDECOM could not exercise the common law right to prosecute, because it was impliedly restricted by the Act. She concluded that INDECOM's object and purpose, under the Act, was to investigate and report and, therefore, instituting a private prosecution was impliedly restricted. The consequence of this reasoning was that Phillips JA was of the view that Mr Lewin would not have had the authority to bring the prosecution against Mr Diah and that a fiat from the DPP would have been necessary to enable counsel to proceed with the prosecution on his behalf.

The application for leave to appeal to Her Majesty in Council

[21] The applicant, by its motion, sought to challenge this decision of the Court of Appeal. The applicant contended that the appeal lies to Her Majesty in Council as of right, pursuant to section 110(1)(c) of the Constitution, as the decision is "a final, decision" in a criminal proceeding, on questions as to the interpretation of the Constitution, in particular, section 94(3), (4), (5) and (6). Section 110(1)(c) of the Constitution reads as follows:

"110.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -

(a) ...;

(b) ...;

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution;..."

[22] The applicant further contended that, in the alternative, the appeal lies to Her Majesty in Council where it is prescribed by Parliament, as provided by section 110(2)(b) of the Constitution. The applicant asserted that this is so, where, in criminal appeals, the matter involved a point of exceptional public importance and it was desirable in the public interest that a further appeal be brought. Section 110(2) states that:

"(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament."

Whether an appeal lies as of right pursuant to section 110(1)(c) of the Constitution

[23] Section 110(1)(c) stipulates that an appeal lies as of right to Her Majesty in Council where the matter (a) is a final decision in a criminal, civil or other proceedings; and (b) involves a question as to the interpretation of the Constitution.

[24] Mr Diah was found guilty by the learned Parish Court Judge and sentenced. Therefore, the matter is a final decision in criminal proceedings and the applicant would have satisfactorily met the first requirement.

[25] The second requirement, is for the applicant to establish that this case involves a question as to the interpretation of the Constitution. Mr Terrence Williams, counsel on behalf of the applicant, contended that questions as to the interpretation of the Constitution were before this court in the appeal in three respects. These were:

- (a) The Court of Appeal's finding that Mr Albert Diah was obliged to obey the order of a superior officer and was further "obliged to only comply with an instruction contained in a force order". Counsel argued that this conclusion was arrived at by the Court of Appeal from their interpretation of: (i) the service law, as provided by section 20(1) of the Constitution; (ii) section 13(3)(a) of the Constitution; and (iii) the subsidiary legislation to the Constitution, the Police Service Regulations, 1961.
- (b) This court's finding that there was an inconsistency between the Constitution, the Police Service Regulations, 1961 and the Constabulary Force Act, on the one hand, and the provisions of the Act, on the other hand.

(c) The question as to whether the Commissioner and its investigative staff possess the right to initiate prosecution without the consent of the DPP.

[26] Contrary to the arguments posited by Mr Williams, I find that the contention that this case involved matters of interpretation of the Constitution is without merit. The discussion of this court, with respect to provisions relating to service law, was focused primarily on an examination of Mr Diah's defence, his uncertainty as to how to proceed and his ultimate decision to comply with the direction of his superior officer. There was no final decision which involved the interpretation of the Constitution in this regard.

[27] Similarly, Mr Williams placed much reliance on section 94 of the Constitution, arguing that the court's decision involved an interpretation of that section. Counsel contended that, in order to arrive at the finding that INDECOM had no capacity to sue, be sued, or to prosecute, the Court of Appeal had to consider section 94 of the Constitution. Having done so, counsel argued that the court found that INDECOM was not a juristic person and, as such, rejected the suggestion that the prosecution could be brought by INDECOM.

[28] Section 94 of the Constitution recognises that prosecutions may be brought by the DPP or "by any other person or authority". Subsections (3), (4), (5) and (6) read as follows:

"(3) 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.

(4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

[29] The question of whether INDECOM is covered by the Constitution does not properly arise from an interpretation of the Constitution. In **Eric Frater v The Queen** [1981] 1 WLR 1468, Lord Diplock made the point that the consideration of the application of the words of the Constitution to particular facts was not the same as an

interpretation of the Constitution. Of note, is the Board's guidance, at page 1470 of the decision, that:

“...vigilance should be observed to see that claims made by appellants to be entitled to appeal as of right under section 110(1)(c) are not granted unless they do involve a genuinely disputable question of *interpretation* of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right.” (Italics as in original)

[30] The ruling of this court is that INDECOM does not have the statutory power to prosecute, and is not a juristic person that would have the common law power to initiate a private prosecution. No interpretation of section 94 of the Constitution could grant INDECOM this power. In my view, only a different interpretation of the Act could grant that power to INDECOM.

[31] It is accepted that the Constitution is to be given a "generous and purposive construction" and that constitutional remedies are not denied to parties based on procedural hurdles. However, this purposive construction has to be weighed alongside their Lordships' warning that "vigilance should be observed", so as to guard against an applicant seeking to appeal to Her Majesty in Council, as of right, under section 110(1)(c), unless the matter involves a genuinely disputable question as to the interpretation of the Constitution.

[32] In the light of this, whilst the matter did involve a final decision in a criminal proceeding, I cannot agree with the applicant that the Court of Appeal's decision

involved a question on the interpretation of the Constitution, in order for leave to be granted as of right, pursuant to section 110(1)(c).

Whether question(s) raised in the proposed appeal should be submitted to Her Majesty in Council, pursuant to section 110(2) of the Constitution

[33] In order to obtain leave to appeal to Her Majesty in Council by virtue of section 110(2)(b), the applicant must establish that it is prescribed by statute. This prescription is grounded in section 35 of the Judicature (Appellate Jurisdiction) Act, which provides that:

"35. The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V or VI where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

[34] There are two relevant considerations to be established under this section: (i) leave must be sought by the DPP, a prosecutor or a defendant from any decision of the Court of Appeal given by virtue of provisions of Parts IV, V or VI; and (ii) the decision must involve a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought.

[35] For the purposes of this application, the relevant part of the Judicature (Appellate Jurisdiction) Act is Part V, which deals with the appellate criminal jurisdiction of the Parish Courts. Section 22 provides that:

"22. Subject to the provisions of this Act, to the provisions of the [Judicature (Parish Court) Act] regulating appeals from

[Parish Court Judges] in criminal proceedings and to rules made under that Act, an appeal shall lie to the Court from any judgment of a [judge of the Parish Court] in any case tried by him on indictment, or on information in virtue of special statutory summary jurisdiction.

[36] I am satisfied that the first requirement would have been met, this being an appeal from a decision of the Parish Court, pursuant to section 33 of the Act.

[37] The second consideration under section 35, with respect to criminal proceedings, requires that the matter encompasses "a point of law of exceptional public importance and it is desirable in the public interest that a further appeal be brought". This wording is similar to that of section 110(2)(a), which speaks to "great general or public importance or otherwise", in civil proceedings.

[38] In **Director of Public Prosecutions v Leary Walker** [1974] 1 WLR 1090, the Court of Appeal sought guidance from the Privy Council on the objective evidential value of an unsworn statement as well as the circumstances in which the judge should leave the issue of self-defence to the jury. Special leave was granted to the DPP to appeal to the Privy Council on the basis that the decision involved a point of law of exceptional public importance and it was desirable that a further appeal should be brought. Mr Walker had been tried for murder, for which his defence was automatism, provocation and diminished responsibility. The issue of self-defence was never raised. In his unsworn statement, Mr Walker declared that he had been arguing with his wife and, during the argument, she had seized his testicles and he, feeling faint from the pain, had picked up the knife and stabbed her. The jury found him guilty of manslaughter on the ground of diminished responsibility. On appeal to the Court of

Appeal, the learned judges found that the evidence raised issues of self-defence which ought to have been left to the jury. As such, the learned judges allowed the appeal, quashed the conviction and ordered a new trial. The DPP was granted special leave to appeal to the Privy Council. Allowing the appeal, the Privy Council made the following observations:

(a) The force used by Mr Walker was far greater than that which was necessary to defend himself. Moreover, as his statement had not disclosed that he had acted in self-defence and since that defence had neither been raised during the trial nor was there evidence to support it, the trial judge was correct in not leaving the issue to the jury; and

(b) Of relevance to this proceeding, the Board noted that the appeal involved a point of law of exceptional public importance, as, if the decision of the Court of Appeal was left to stand, it would encourage judges to leave "not only any possible but also any impossible defence" to the jury and consequently "divert the due and orderly administration of justice".

[39] In further determining whether leave ought to be granted on the basis that the issue that is being proposed involves a point of law of exceptional public importance

and it is desirable in the public interest that a further appeal should be allowed, guidance may be obtained from the decision from the High Court of Ireland in **Arklow Holidays Ltd v An Board Pleana'la** [2007] 4 IR 112, to which Mr Williams very helpfully referred us. There, the applicant had sought leave to apply for judicial review of a decision that had been made by the first respondent granting permission for a waste water plant, pursuant to section 50(4)(f) of Ireland's Planning and Development Act 2000. That Act provided that an application for judicial review would be final, and that no appeal would be permissible from such a decision, unless the High Court certified that the decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be permitted to the Supreme Court. Leave to seek judicial review was granted on some but not all of the grounds advanced. In relation to the grounds in respect of which leave was refused, an appeal certificate was sought. In considering the legal basis on which an issue that is being proposed involved a point of law of exceptional public importance and whether it was desirable in the public interest that a further appeal should be allowed, Clarke J reasoned thus:

"2. That there must be an uncertainty as to the law in respect of a point which has to be of exceptional importance.

...

3. That the importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case.

...

4. That, while every point of law arising in every case was a point of law of importance, that of itself, would be insufficient for the point of law concerned to be properly described as of exceptional public importance.

...

5. That the requirement that the court should be satisfied that it was desirable in the public interest that an appeal should be taken to the Supreme Court is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. Even where it could be argued that the law in a particular area was uncertain, the court might decide that it was not appropriate to certify the case for appeal to the Supreme Court on the basis that it was not desirable in the public interest to grant leave to appeal.

...

6. That, while issues and questions concerning the public nature of the development involved were not necessarily decisive, such factors were matters which should be taken into account by the court in assessing whether it was in the public interest to grant the certificate.

7. That the point of law which was being advanced as being of exceptional public importance must arise from the decision which was being challenged.

...."

[40] I agree with Mr Williams' contention that the wording of section 50(4)(f) of Ireland's Planning and Development Act 2000 bears some similarity to the statutory provision that is currently being reviewed by this court. This decision aptly demonstrates the issues to be considered in determining whether a decision of the court involves a point of law of exceptional public importance and whether it is desirable in the public interest that a further appeal should be allowed to Her Majesty in Council.

[41] Consequently, the principles that may be deduced from **Arklow Holidays Ltd v An Board Pleana'la** can be summarised as follows:

- (a) The issues for consideration must go further than a point of law emerging in or from the case. They must be of exceptional importance, this being a clear and additional requirement.
- (b) The court ought to exercise its jurisdiction to deem questions being proposed to Her Majesty in Council as being of *exceptional importance* sparingly.
- (c) The law in question ought to be in a state of uncertainty; and it is for the common good that the law is clarified so as to allow the courts to administer it, not only in the case before them, but for future decisions.
- (d) The point of law must arise from a decision of the court and not from a discussion or consideration of a point of law during the hearing.
- (e) The questions of whether a decision involves a point of law of "exceptional public importance", and whether it is "desirable in the public interest that a further appeal should be brought", ought to be considered separately.

(f) Normal statutory rules of construction apply, such that, among other things, the use of the word "exceptional" is to be given its normal meaning.

(g) There must be some positive public benefit from the appeal, in that the resolution of the point of law would likely resolve other cases.

[42] Several cases have been brought before the courts seeking clarification of the powers of INDECOM. I have no doubt that this is a matter of exceptional public importance and that it is desirable in the public interest for there to be consideration by Her Majesty in Council. A determination of this matter will not only settle issues involved in this case but provide guidance to courts at all levels, generally.

[43] Furthermore, the divergent views of the learned judges, as reflected in the reasoning and decision of the court have left some uncertainty in the law. That these differences of opinion need to be resolved was underscored in the first sentence of the judgment of F Williams JA at paragraph [227], where he stated that:

"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."

[44] I am therefore satisfied that, whilst the criteria as outlined in section 110(1)(c) of the Constitution for conditional leave to be granted as of right have not been satisfied by the applicant, an appeal lies to Her Majesty in Council by virtue of section 110(2)(b).

Conclusion

[45] With the guidance of the court, and with the agreement of all counsel present, for which the court was extremely grateful, discussions were held by the parties as regards the appropriate issues arising from the decision of the Court of Appeal for Her Majesty's consideration. As a result, the following questions were proposed by them:

- "a) Whether [INDECOM] is a person or authority within the meaning of Section 94 of the Constitution. Whether [INDECOM] has the capacity to initiate a prosecution pursuant to the common law, the Justices of the Peace Jurisdiction Act, and the Criminal Justice (Administration) Act. If yes, how should this authority be exercised?
- b) Whether a prosecution by the Commissioner of [INDECOM] or the Commission's investigative staff can be initiated and conducted in the performance of the public or official functions of the Commission?
- c) Whether the order, or absence of an order, of a superior officer amounted to lawful justification or excuse for a police officer to disobey a lawful request of an INDECOM investigator made pursuant to [the Act]?
- d) Whether the Respondent's claim of ignorance as to the legal authority of INDECOM investigators to make a request or give an instruction, can amount to a lawful justification or excuse for disobeying that request or instruction?
- e) Whether in the absence of a Force Order, or existing protocols, the assent of, or other support from a superior officer to a lawful request of an INDECOM investigator, made pursuant to [the Act], is required before the INDECOM investigator can make such a request; and if so, whether the lack of such assent or protocol provides lawful justification or excuse for a police officer to disobey the lawful request of the said INDECOM investigator?

- f) Whether a claim of uncertainty about the lawfulness of a request made by an INDECOM Investigator may amount to lawful justification or excuse for failure to comply with said lawful instruction?
- g) Whether the evidence led though [sic] Senior Superintendent Pinnock raised any issue of contrary orders of INDECOM, or of lawful request given by INDECOM investigators, which required the learned Parish Court Judge to consider a defence of superior orders?
- h) Whether there is a dichotomy of competing instruments of legislation, that is, [the Act], on one hand, and the Constitution (Order in Council) 1961, the Police Services Regulations, 1961, the Jamaica Constabulary Force Act and [the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force], on the other hand. If so, whether, in the circumstances, the respondent was lawfully excused from obeying the lawful request, of the INDECOM investigator?
- i) Whether the Court of Appeal erred in finding that the actions of Mr. Diah in not handing over the firearms to the investigators of [INDECOM], citing that he was following the instruction of Senior Superintendent Pinnock to take the firearms to the laboratory, amounted to lawful justification or excuse in failing to comply with the INDECOM investigator's request?"

[46] A close look at these questions leads one to consider the guidance of **Arklow Holidays Ltd v An Board Pleana'la**, which is that the court, in determining whether the questions being proposed involve a question of a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be allowed, must ensure that the points of law arise from the decision of the court and not from discussion and consideration of issues raised in argument or after the hearing. As

a result of that guidance, this court reformulated and consolidated the questions being proposed, so as to ensure that they remain true to the judgment.

[47] Having reviewed the proposed questions, I find that the following issues arise for consideration:

- a) Whether Mr Dave Lewin, in his capacity as an INDECOM investigator, had the power to institute legal proceedings; and, if so, what limitations are there, if any, to that power?
- b) Whether there is an uncertainty caused by competing instruments of legislation, that is, the Act, on one hand, and INDECOM's own protocols, the Constitution, the Police Services Regulations, 1961, the Constabulary Force Act and the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force, on the other hand. If so, whether, in the circumstances, Mr Albert Diah's defence of being lawfully excused from obeying the request of the INDECOM investigator, ought to have been given more direct consideration by the Parish Court Judge?
- c) Whether a claim of uncertainty about the lawfulness of a request made by an INDECOM Investigator may amount to lawful justification or excuse for failure to comply with that request?

d) Whether the Court of Appeal erred in finding that the actions of Mr Albert Diah, in not handing over the police service firearms to the investigators of INDECOM, citing that he was following the instruction of his superior officer to take the police service firearms to the Government Forensic Laboratory, amounted to lawful justification or excuse for failing to comply with the INDECOM investigator's request and ought to have been given more direct consideration by the Parish Court Judge?

[48] In the circumstance, and for the reasons outlined above, I would grant conditional leave for the applicant to appeal, and for the issues outlined in paragraph [47] above to be considered by Her Majesty in Council.

PHILLIPS JA

ORDER

- 1) The application for conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal made on 16 March 2018, as of right, pursuant to section 110(1)(c) of the Constitution, is refused.
- 2) Leave to appeal to Her Majesty in Council from the decision of the Court of Appeal made on 16 March 2018, is granted pursuant to section 110(2)(b) of the Constitution, in respect of the following questions:

- (a) Whether Mr Dave Lewin, in his capacity as an INDECOM investigator, had the power to institute legal proceedings, and if so, what limitations are there, if any, to that power?
- (b) Whether there is an uncertainty caused by competing instruments of legislation, that is, the Act, on one hand, and INDECOM's own protocols, the Constitution, the Police Services Regulations, 1961, the Constabulary Force Act and the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force, on the other hand. If so, whether, in the circumstances, Mr Albert Diah's defence of being lawfully excused from obeying the request of the INDECOM investigator ought to have been given more direct consideration by the Parish Court Judge?
- (c) Whether a claim of uncertainty about the lawfulness of a request made by an INDECOM Investigator may amount to lawful justification or excuse for failure to comply with that request?
- (d) Whether the Court of Appeal erred in finding that the actions of Mr Albert Diah in not handing over the police service firearms to the investigators of INDECOM, citing that he was following the instruction of his superior officer to take the police service firearms to the Government Forensic Laboratory, amounted to

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

3) Leave to appeal is granted on the following conditions:

(a) The applicant shall within ninety (90) days of the date of this Order, enter into good and sufficient security in the sum of One Thousand Dollars (\$1000.00), for the due prosecution of the appeal and payment of all such costs as may become payable by the applicant in the event of final leave to appeal not being granted, or of the appeal being dismissed for want of prosecution, or of the Judicial Committee ordering the applicant to pay costs of the appeal.

(b) The applicant shall, within ninety (90) days of the date of this Order, take the necessary steps to procure the preparation of the record and the dispatch thereof to England.

4) The costs of the application to await the determination of the appeal to Her Majesty in Council.