[2018] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2013

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

BETWEEN	**THE POLICE FEDERATION**	**1ST APPELLANT**
AND	**MERRICK WATSON (Chairman of the Police Officers Association)**	**2ND APPELLANT**
AND	**THE SPECIAL CONSTABULARY FORCE ASSOCIATION**	**3RD APPELLANT**
AND	**DELROY DAVIS (President of the United District Constables Association)**	**4TH APPELLANT**
AND	**THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Mrs Jacqueline Samuels Brown QC, Lorenzo Eccleston, Miss Marsha Samuels and Donald Gittens instructed by JamLawCaribbean for the appellants.

Richard Small, Mrs Shawn Wilkinson and Miss Yanique Taylor instructed by the 1st respondent.

Miss Althea Jarrett instructed by the Director of State Proceedings for the 2nd respondent.

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

30, 31 May, 1, 2 June 2016 and 16 March 2018

PHILLIPS JA (DISSENTING IN PART)

[1] This appeal sought to challenge the decision of the Full Court delivered on 30 July 2013, wherein Marsh, Campbell and Fraser JJ found *inter alia*, that: (i) the Commissioner of the Independent Commission of Investigations (the 1st respondent) and his investigative staff had the power to arrest, charge and initiate prosecutions of police officers; (ii) there was no requirement for a ruling from the Director of Public Prosecutions (the DPP) before police officers are criminally charged; and (iii) that the 1st respondent's power to arrest, charge and prosecute did not undermine the constitutional authority of the DPP. This decision is being challenged on the basis that *inter alia*, the Full Court failed to recognize or accept that neither the Independent Commission of Investigations Act, 2010 (the Act) nor common law, conferred the power to arrest, charge or to initiate prosecutions on the 1st respondent or his investigative staff, and that the Full Court failed to give sufficient regard to the long-standing custom and practice for the DPP to issue a ruling before police officers are charged with criminal offences.

Background

[2] The Police Federation (the 1st appellant) is constituted by section 67(1) of the Constabulary Force Act, and represents police officers on matters affecting their general welfare and efficiency. Merrick Watson (the 2nd appellant) is a Superintendent of Police, and Chairman of the Police Officers' Association, a voluntary association consisting of police officers above the rank of Inspector. The Special Constabulary Force Association (the 3rd appellant) is constituted by section 26(1) of the Constables (Special) Act, and

represents special constables (as they then were) on matters affecting their general welfare and efficiency. Delroy Davis (the 4th appellant) is the Chairman of the United District Constables Association, a voluntary association consisting of district constables.

[3] The 1st respondent is constituted pursuant to section 3 of the Act and as indicated, is the Commissioner of the Independent Commission of Investigations (INDECOM), which is a Commission of Parliament that undertakes investigations concerning allegations of unlawful and/or arbitrary actions by members of the security forces and other state agents. Pursuant to section 3(1) of the Act, INDECOM consists of the 1st respondent and pursuant to section 8 of the Act, INDECOM for the purposes of the Act, may appoint and employ employees and agents including investigators. In section 2 of the Act "investigator" is defined as in relation to an investigation under the Act as "an employee or part of [INDECOM] assigned duties in relation to that investigation". Pursuant to section 26(1) of the Act, INDECOM's functions may be performed by any member of its staff or by any other person (not being a member of the security forces or a specified official) authorised for that purpose by INDECOM.

[4] The 1st respondent had claimed and purported to exercise the power to arrest, charge and prosecute police officers under section 20 of the Act and the common law. However, the appellants contended that the 1st respondent had no such authority, and any purported exercise of such powers was being done in contravention of the Constitution of Jamaica (the Constitution). The appellants therefore filed an amended fixed date claim form on 10 October 2011, containing an application for administrative orders and/or constitutional redress, in which they sought the following:

"[1] A Declaration that section 20 of the Act, construed against the provisions of sections 13(a) and 15 of the Constitution, does not confer on the [1st respondent], the power to arrest and/or charge anyone at all for any criminal offence, or for the offence of murder, or for any felony, and neither does the common law.

[2] A Declaration that section 20 of the Act, construed against the provisions of sections 13(a) and 15 of the Constitution, does not confer on the [1st respondent], and neither does the common law, the power to arrest and/or charge a member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the [DPP] that the member be so charged.

[3] A Declaration that under the Police Services Regulations 1961, sections 31 and 33, now in force under and pursuant to the Constitution, the [1st respondent] cannot lawfully charge any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the [DPP] that the member be so charged.

[4] A Declaration that any act by the [1st respondent] to charge any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged, would likely contravene the rights of such a member under sections 13(a) and 15 of the Constitution in that it would deprive such member a Legitimate Expectation, derived from the practice and custom of the DPP, that such member would not be so charged in the absence of such a ruling.

[5] A Declaration that any act by the [1st respondent] to charge any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District

Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged, would likely contravene the rights of such member, under Section 15 of the Constitution, not to be unlawfully deprived of the member's personal liberty.

[6] Interim Relief by way of an injunction to restrain the [1st respondent] from arresting and/or charging and/or from in any manner to interfere with or restrict the personal liberty of any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or of the Rural Police, for or on account of any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged.

[7] All necessary and consequential directions." (Underlined as in original)

[5] The grounds upon which these orders had been sought are, *inter alia* that:

"[1] The [1st respondent] has claimed and has purported to exercise a power of arrest and charge for the criminal offence of murder against members of the Federation and of the aforesaid associations and of the Jamaica Constabulary Force, and has grounded his power under Section 20 of the Act, and under common law.

[2] The claim and exercise of power aforesaid are in violation of the constitutional provisions referred to above, for the following reasons:

(a) they are not, on any reasonable interpretation of the Act, against sections 13(a) and 15 of the Constitution, founded therein, nor under common law.

(b) they are repugnant to the procedure and guidelines set out in the Police Service Regulations 1961.

(c) they violate the legitimate expectation of the [appellants] and their members to a ruling from the DPP whether they should be arrested and/or charged for Murder or any criminal offence.

[3] This claim is made under Section 25 of the Constitution of Jamaica and involves the interpretation of the Act generally, particularly section 20 thereof, and the sections referred to in the said section 20." (Underlined as in original)

[6] The claim form was supported by a joint affidavit filed on 10 October 2011, and sworn to by the appellants' various representatives and Corporal Malica Reid. Corporal Reid deponed *inter alia*, that he had been arrested and charged by an investigator from INDECOM for the murder of Frederick Mickey Hill in Negril in the parish of Westmoreland on 4 November 2010. He averred that he was detained at the Savanna-La-Mar Police Station, and placed before the Parish Court where he was fingerprinted. He further deponed that on 1 March 2011, the 1st respondent in addressing the Parish Court indicated that the INDECOM investigators who arrested him had acted as private citizens, and he (the 1st respondent), was acting as their counsel. The DPP, he stated, entered a *nolle prosequi* terminating the charges brought against him by the 1st respondent, and had preferred a voluntary bill of indictment against him, charging him with murder, which at that time was pending before the Home Circuit Court. He indicated that he had been granted leave to seek judicial review of the 1st respondent's exercise of such powers, but his claim had been struck out due to a procedural error.

[7] The appellants in their affidavit also contended that they have been longstanding members of their respective police forces, and they were not aware of any instance

before the passage of the Act, where a police officer had been charged with a criminal offence without a ruling from the DPP. As a consequence, it was their view, that police officers have a legitimate expectation that entitles them to such a ruling.

[8] The appellants also deponed that the 1st respondent's purported exercise of the power to arrest, charge and prosecute was a breach of the Constitution and there were no alternative forms of redress for the constitutional breaches complained of.

[9] The 1st respondent filed an affidavit in response on 29 December 2011, indicating that Corporal Reid's application for judicial review had indeed been terminated and he asserted that neither himself nor his investigative staff had arrested and charged any additional police officers at the time the application had been made.

The Full Court's decision

[10] The claim was heard by the Full Court consisting of Marsh, Campbell and Fraser JJ on 13, 14, 15 and 16 February 2012. On 30 July 2013, the Full Court, save one aspect, refused the orders sought by the appellants. Submissions were made in support of the application by counsel for the appellants, counsel for the 2nd respondent and the DPP appearing *amicus curiae*. Submissions in opposition to the orders sought by the appellants were made by counsel for the 1st respondent. All three judges in the Full Court supplied written reasons for their decision and I will now summarise the same.

Marsh J

[11] A submission in *limine* was made by counsel for the 1st respondent, that the application for administrative orders and/or constitutional redress amounted to an

abuse of the process of the court because: (i) alternative remedies existed; (ii) no issues had been joined between the appellants and the respondents; and (iii) the matters to be determined raised questions of statutory interpretation and common law, and not constitutional issues. Marsh J dismissed the submissions made *in limine* on the basis that the issues raised by the appellants were not academic, as the circumstances they complained of could amount to a breach of their constitutional rights by the 1st respondent. That submission was also rejected on the basis that section 19(4) of the Constitution did not oblige the court to refuse applications for constitutional redress made under Chapter III of the Constitution (the Charter of Fundamental Rights and Freedoms) since it provides that the court "**may**" decline to do so where other means of redress are available to the applicant.

[12] Marsh J examined sections 4, 13 and 14 of the Act and found that it gave wide and extensive investigative powers to the 1st respondent which include the power to arrest and initiate prosecutions. In reliance on **R v Rollins** [2010] UKSC 39; [2010] 4 All ER 880 and **Regina (Hunt) v Criminal Cases Review Commission** [2001] QB 1108, he found at paragraph [87] that it would:

> "...be an aberration for Parliament to have established an independent body removed from the Police Force to investigate allegations against members of the Police Force, among others, by citizens of Jamaica, but still have the [1st respondent] and his investigators having to rely on the police or the DPP to initiate arrest and charge police officers against whom allegations are made by citizens. This would certainly be a classic case of an 'absurd state of affairs' that 'Parliament cannot have intended'. (per Sir John Dyson SCJ in ***R v Rollins*** [[2010] UKSC 39; [2010] 4 All ER 880]."

The learned judge further opined that it would be inconsistent with INDECOM's independence for it to investigate, prepare files and then hand them over to the police to effect arrests.

[13] Marsh J cited **Chokolingo v Law Society of Trinidad and Tobago** (1978) 30 WIR 372 to support his finding that courts will jealously guard the right of a private citizen to institute criminal proceedings, and where a prosecution is initiated by a statutory body, it must be in keeping with the objects for which that body was established. The learned judge further stated that section 25 of the Act did not assist in determining whether INDECOM had the power to arrest and prosecute police officers, nor did the Act undermine or diminish the DPP's constitutional powers, since the DPP is empowered to take over or discontinue charges by virtue of section 94(3)(a)-(c) of the Constitution.

[14] In relation to whether there was a legitimate expectation that the DPP would issue a ruling before police officers are charged, Marsh J found that while regulation 33 of the Police Service Regulations 1961 would bind the Police Services Commission, the Commissioner of Police and the members of the police force, the regulations did not bind the 1st respondent and its investigative staff. The learned judge, in refusing the orders sought by the appellants, concluded at paragraph [107] that:

> "i. The [1st respondent] and his investigators have the power of arrest both at common law and by virtue of the Act, having been conferred with powers of a constable by Section 20 of the said Act.
>
> ii. The [1st respondent] and his investigators have powers at Common Law to charge and initiate

prosecutions of members of the Police Force for the purposes of the Act.

iii. There is no requirement for a prior ruling by the DPP before members of the Police Force can be arrested and charged by the [1st respondent] and his investigators; and

iv. The powers of the [1st respondent] and his investigators in no way dilute the DPP's constitutional authority to continue, to take over or discontinue any prosecution where such a course is deemed by the DPP to be an appropriate one."

Campbell J

[15] Campbell J examined the legislative framework establishing INDECOM in accordance with the principles outlined in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12. Having done so, he noted that under section 4 the Police Public Complaints Act (now repealed and replaced by the Act), the DPP and the Police Services Commission had hegemony over criminal proceedings, however, with the passage of the Act in 2010, that provision was removed, so INDECOM was not fettered by the powers of the DPP. As a consequence, the learned judge found that the DPP had no constitutional hegemony in the exercise of her powers under section 94 of the Constitution over the 1st respondent's investigative process.

[16] The learned judge rejected counsel for the appellants' submission that the Act would be unconstitutional if it conferred the power to arrest and charge on the 1st respondent and his investigators without making them subject to the same regime of discipline and dismissal that applies to police officers generally under the Constitution. This submission was rejected on the basis that in the learned judge's view, the 1st

respondent and his investigative staff were not subject to any authority other than the Constitution. The learned judge also found that the appellants' reliance on **Inland Revenue Commissioners and Another v Rossminister Ltd and Others** [1980] AC 952, did not lend support to the appellants' arguments since the appellants did not point to any ambiguity or obscurity in the Act that they had identified, to which the interpretation of that case could be applied. As a consequence, the learned judge indicated that the appellants had failed to demonstrate that there were any restrictions on the 1st respondent's common law right to effect arrests and initiate prosecutions.

[17] Utilising authorities such as **R v Rollins**; **Gouriet v Union of Post Office Workers and Others** [1977] 3 All ER 70; and **Broadmoor Special Hospital Authority and Another v Robinson** [2000] QB 775, Campbell J noted that it had long been established that criminal proceedings may be commenced by a private citizen. The Constitution itself, according to him, recognizes the right of an ordinary citizen to bring criminal prosecutions, since section 94(3)(c) of the Constitution acknowledges the undeniable constitutional right of any person or authority to commence criminal proceedings. He noted that if the Act were to be interpreted in a manner that prevented the 1st respondent and his investigators from initiating prosecutions then that would have the effect of encroaching on rights, long enjoyed by private citizens, to effect arrests and to institute criminal proceedings. The learned judge also found that the 1st respondent and his investigators had the right to bring prosecutions subject to statutory restrictions, and the fact that such a right is not expressly stated in the Act is not an irregularity. He further stated that "it would have

been absurd and defeating of the steps that Parliament had taken, to restrict by implication the [1st respondent's] right to prosecute" and as a consequence found that there had been no evidence before him to disturb the 1st respondent's right to prosecute.

[18] Campbell J, in reliance on **Desmond Grant and Others v DPP and Another** [1982] AC 190, also rejected counsel for the 1st respondent's submission *in limine* that, *inter alia*, the declarations sought had not raised constitutional issues. Despite this refusal the learned judge felt constrained to point out that alternative means of redress had indeed existed if the appellants were of the view that their rights were being infringed such as actions that INDECOM had acted ultra vires; judicial review of the 1st respondent's actions with prerogative writs of certiorari, mandamus and prohibition; and/or civil remedies for false imprisonment and damages.

Fraser J

[19] Fraser J joined with Marsh and Campbell JJ to reject the point *in limine* made by counsel for the 1st respondent.

[20] He found as flawed the argument that the Act was unconstitutional because it did not make the 1st respondent and its investigative staff subject to the regime of discipline applicable to police officers. The learned judge opined that the Act appoints the 1st respondent and his investigators as constables only for the purposes of giving effect to the Act itself, and so the 1st respondent and his investigators did not have all the powers and privileges of constables. Fraser J examined various provisions in the

Act, in particular sections 4, 13, 14, 20 and 22 and found that the Act itself only confers the powers of a constable to give effect to sections 4, 13 and 14 of the Act. Nonetheless, he explored the powers of arrest at common law and having regard to **Dallison v Caffery** [1965] 1 QB 348, accepted that a constable had wider powers of arrest than a private citizen.

[21] Fraser J also examined section 3, 13, 15 and 17-22 of the Constabulary Force Act with regard to the powers of a constable and in answer to submissions made by the 2nd respondent and the DPP that the power to arrest ought to have been expressly given to INDECOM, the learned judge said at paragraph [278]:

> "...I find it has been expressly given – by a clear statement that the powers, authorities and privileges of a constable have been conferred on the [1st respondent] and his investigative staff to give effect to sections which outline INDECOM's extensive investigative functions under the Act. I do not find the wording of the Act to be either 'ambiguous or obscure' when subjected to the test outlined in [**Rossminister**]. Undoubtedly one of the seminal powers and a vital part of the authority of the constable that sets him apart from the private citizen, is the wider power of arrest without warrant in the course of an investigation. A wider power conferred both by common law and by statute."

[22] Fraser J also compared the provisions of the Act with those contained in the Customs Act, and found that the powers of a constable have always been exercised by customs officers. Since in his view the 1st respondent has been given much wider investigative powers then those that exist under the Customs Act, he found that there exists a greater need for the 1st respondent and his investigative staff to exercise the powers of arrest under the Act.

[23] The learned judge examined section 33 of the Justices of the Peace Jurisdiction Act which empowers any person to make an application for the execution of a warrant, noted that the person making such a request must have a reasonable suspicion that an offence has been committed, and as a consequence, at paragraph [290] stated that:

> "...it would be incongruous for INDECOM to be required to conduct all the investigations and then hand over the file to a member of the police force to effect an arrest. That member would have to acquaint himself with the investigations and form a reasonable suspicion that the alleged offence was committed before he could act..."

[24] Fraser J therefore found that section 20 of the Act had clothed the 1st respondent and his investigative staff with the powers of a constable which includes the power of arrest. Those powers are both at common law and pursuant to the Constabulary Force Act, and are required to give effect to the investigative purposes of the Act.

[25] With regard to the power to charge and initiate prosecutions, Fraser J accepted that the Act does not specifically confer those powers on the 1st respondent or his investigative staff. However, he noted, that since section 94 of the Constitution gives the DPP the power to "take over" and "discontinue" prosecutions, it follows by necessary implication that persons other than the DPP may initiate prosecutions. He also mentioned the fact that the right of a private citizen to initiate prosecutions has also been preserved under section 29 of the Justices of the Peace Jurisdiction Act. The learned judge also referenced the United Kingdom's Legal Guidance to the Crown Prosecution Service, 'Consents to Prosecute', which specifically references the

categories of offences for which proceedings cannot be instituted without the prior consent of the Attorney General or the DPP. The learned judge therefore concluded that the right to launch private prosecutions continues to be enjoyed in Jamaica.

[26] Fraser J, after examining authorities such as **Chokolingo**; **R v Rollins**; **Broadmoor**; and **Regina (Hunt) v Criminal Cases Review Commission**, found them to be:

> "[310] ...persuasive authority for the proposition that the legislature did not need to specifically indicate that INDECOM should have the power to initiate prosecutions given the remit given to INDECOM and the acknowledged existence of the common law power of private individuals to prosecute. The fact that hitherto it has not been the practice of agencies to prosecute offences but rather to rely on the Office of the DPP to conduct such prosecutions, has not extinguished the right of any agency with legal personality to pursue such prosecutions, provided there is no statutory impediment and the prosecution falls within the scope of their objects. It follows that if INDECOM wishes to pursue its own prosecutions it has the power at common law to do so.
>
> [311] I have come to that conclusion fully cognizant of Section 25 of the Act which requires an investigator on the request of the DPP in relation to a prosecution arising out of an incident, to attend court and provide such other support as the DPP may require in relation to proceedings instituted under the Act. That section is unremarkable. It is predicated on the acknowledged practice that the DPP would prosecute such matters. That does not however preclude the exercise by INDECOM or officers on its behalf of the common law power to itself prosecute matters it has investigated."

[27] The learned judge in reliance on **Scopelight Ltd and Others v Chief Constable of Northumbria Police and Another** [2009] EWHC 958 (QB); [2009] All ER (D) 57 (May) also found that there were adequate safeguards to rein in prosecutions which were not in the public interest. He also noted that the 1st respondent's right to prosecute does not undermine the DPP's constitutional powers and particularly the power to take over and discontinue proceedings. The learned judge found that the 1st respondent and his investigative staff have the power to arrest, both under common law and by virtue of the Act, the 1st respondent having been conferred with the powers of a constable. Further, pursuant to common law, the 1st respondent and its investigative staff also have the power to initiate prosecutions in furtherance of the statutory objectives of INDECOM.

[28] In relation to whether police officers have a right to a ruling from the DPP before being charged with a criminal offence, and whether a failure to do so violated a legitimate expectation that this would be done, the learned judge, accepted the submissions of counsel for the 1st and 2nd respondents that the Police Service Regulations binds the Police Service Commission, the Commissioner of Police and members of the police force but did not bind the 1st respondent, nor did the Police Service Regulations require the consent of the DPP before a police officer could be charged. The learned judge accepted the interpretation of regulation 31(5) of the Police Service Regulations as stated in **Regina ex parte George Anthony Lawrence v The Commissioner of Police and Another** [2010] JMCA Civ 13 that that regulation ensures that members of the police force are not subjected to criminal and disciplinary

proceedings simultaneously and further that the very regulation itself acknowledges that charges may lawfully be instituted against police officers without the DPP's prior approval. The learned judge opined that the Police Service Regulations seek to address statutory breaches which may be criminal and did not seem to address offences, like murder which are contrary to common law. Consequently, whether or not the need for a prior ruling is grounded in the Police Service Regulations or by custom, neither the Police Service Regulations nor custom binds INDECOM, and so there would be no legitimate expectation to a prior ruling by the DPP.

[29] Finally, at paragraph [334] of the judgment, Fraser J concluded that:

> "i. The [1st respondent] and the investigative staff of INDECOM have the power of arrest both under common law and by virtue of the Act, having been conferred with the powers of a constable;
>
> ii. The [1st respondent] and investigative staff have powers at common law to charge and initiate prosecution of members of the Police Force;
>
> iii. There is no requirement for a ruling of the DPP before members of the Police Force are arrested and charged by officers of INDECOM; and
>
> iv. The powers possessed by officers of INDECOM to arrest, charge and prosecute members of the Police Force in no way undermine the constitutional authority of the DPP who still retains the authority to take over and/or discontinue any prosecution where such action is deemed appropriate by the DPP."

[30] The Full Court thereafter made the following order:

> "Subject to [the] fact that the Act does not confer a power to charge, the Order of the court is that the Declarations and Injunctive relief sought are refused."

The appeal

[31] The appellants filed a notice of appeal on 10 September 2013, challenging the Full Court's decision to refuse the orders they had sought and also challenged various findings of law made by the Full Court as follows:

> "[1] The [1st respondent] and his investigators have the power of arrest both under common law and by virtue of the [A]ct, having been conferred with powers of a constable by section 20 of the said Act.
>
> [2] The [1st respondent] and his investigators have powers at Common Law to charge and initiate prosecutions of members of the Police Force for the purposes of the Act.
>
> [3] There is no requirement for a prior ruling by the DPP before members of the police force can be arrested and charged by the [1st respondent] and his investigators.
>
> [4] The powers of the [1st respondent] and his investigators in no way dilute the DPP's constitutional authority to continue, to take over or discontinue any prosecution where such a course is deemed by the DPP to be an appropriate one."

[32] The grounds of this appeal are as follows:

> "[1] Regarding [1] above, the court below wrongly failed to recognize or accept that by the clear and express words of Section 20, in conferring the powers of a constable on the 1st Respondent, the Act restricted those powers to facilitate only the investigative duties of the 1st Respondent.
>
> [2] Regarding [1] above, further, the court below wrongly failed to recognize or accept that even if the terms of Section 20 were ambiguous in conferring the said powers, such ambiguity should be interpreted with judicial restraint, to exclude rather than to include the power to arrest, as legislation that seeks to confer powers which conflict with constitutional rights must use clear and unambiguous words to achieve that result.

[3] Regarding [2] above, the court below wrongly failed to recognize or accept that any reliance by the [1st respondent] and his investigators on powers at Common Law to charge and initiate prosecutions of members of Police Force, would be inconsistent with the clear and unambiguous statutory regime established by the Act which did not in its terms or necessary intendment provide or confirm such a power.

[4] Regarding [3] above, the court below wrongly failed to give sufficient regard or recognition to the long-standing practice and custom of the DPP to issue a ruling before members of the police force can be arrested and charged for criminal offences arising from circumstances that occur in the execution of their duties, and also failed to give sufficient regard to the legitimate expectation of the Appellants to such a ruling."

[33] The appellants sought the following orders from this court:

"[1] A Declaration that Section 20 of [the Act], construed against the provisions of Sections 13(a) and 15 of [the Constitution] does not confer on the [1st respondent], the power to arrest anyone in general, or a member of the Jamaica Constabulary Force or of the Island Special Constabulary Force or a District Constable in particular, for any criminal offence.

[2] A Declaration that section 20 of the Act, construed against the provisions of Sections 13(a) and 15 of the Constitution, does not confer on the [1st respondent], and neither does the common law, the power to arrest a member of the Jamaica Constabulary Force or of the Island Special Constabulary Force or a District Constable, for any criminal offence, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the [DPP] that the member be so arrested.

[3] A Declaration that the common law does not confer on the [1st respondent] the power to charge a member of the Jamaica Constabulary Force or of the Island Special Constabulary Force or a District Constable, for any criminal offence, or for any felony, arising from circumstances that

> occur in the execution of their duties, in the absence of a ruling from the [DPP] that the member be so charged.
>
> [4] A Declaration that any act by the [1st respondent], under the Act to arrest, or under common law to charge, any member of the Jamaica Constabulary Force or of the Island Special Constabulary Force or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged, would contravene the rights of such a member under sections 13(a) and 15 of the Constitution, in that it would deprive such member of a Legitimate Expectation, derived from the practice and custom of the DPP, that such member would not be so charged in the absence of such a ruling, and would constitute an unconstitutional deprivation of the member's personal liberty."

[34] Written and oral submissions were advanced by all parties and the DPP appearing *amicus curiae*. It is of note, that in the appeal, both the 2nd respondent and the DPP completely changed the positions that they had advanced in the Full Court, and joined the 1st respondent in opposition to the appeal.

[35] Counsel for the 1st respondent Mr Richard Small, complained about the manner in which counsel for the appellants, Mrs Jacqueline Samuels-Brown QC, advanced her submissions in support of the appeal. I must say I share Mr Small's concern, as the submissions made by the appellants' counsel were new and different and there were indeed at least three different versions of the appellants' submissions that had been proffered before us. I also share Mr Small's further complaint that the arguments advanced were not made in support of any specific grounds of appeal challenging any findings of fact and law, and so I am constrained to summarize the arguments as best

as I can, in accordance with the grounds to which they relate. As a consequence, the arguments referred to are not in keeping with the manner in which they were advanced at the hearing before us.

Appellants' submissions

[36] Mrs Samuels-Brown noted that the Full Court had erred in failing to give effect to the clear and express words of section 20 of the Act. In reliance on **Croxford v Universal Insurance Company Limited and Another Appeal** [1936] 2 KB 253, Queen's Counsel contended that it is a fundamental rule of statutory interpretation that if the language is clear and explicit it must receive the full effect of what is stated, unless the meaning of those words leads to a result that is contrary to Parliament's intention. Mrs Samuels-Brown, in reliance on that case, also posited that an interpretation or construction of a statute by the court is only necessary where the words of the statute are ambiguous. In light of these principles of statutory interpretation, Queen's Counsel asserted that the plain language of section 20 of the Act is clear and unambiguous and does not confer any power to arrest, charge or prosecute police officers on the 1st respondent and his investigative staff. Moreover, when section 20 is read in accordance with sections 4, 13 and 14 of the Act, it is evident that what is being accorded to the 1st respondent and his investigative staff, are the powers of a constable that are required to facilitate investigations by INDECOM. Accordingly, counsel submitted that the Full Court erred in going beyond the clear and unambiguous terms of the statute in order to construe it.

[37] Mrs Samuels-Brown contended that by going beyond the clear and unambiguous terms of section 20 of the Act, the Full Court presumed that the Act was ambiguous. Queen's Counsel further posited that if the Act is indeed ambiguous, then it ought to be interpreted in accordance with the dicta in **Rossminister**, which held that where the words of a statute are ambiguous, a construction should be placed on it that is less restrictive of individual rights which would otherwise enjoy the protection of law. Consequently, Queen's Counsel argued that the Full Court erred when it interpreted the Act in a manner that purports to trespass upon a citizen's right to liberty, without clear and express language to that effect.

[38] Queen's Counsel cited **Jones v Director of Public Prosecutions** [1962] AC 635 to support her argument that where the interpretation or construction of a statute is required, the statute must be construed as a whole. In exploring the relevant provisions of the Act, counsel made the following submissions:

1. There are no inclusive or extended definitions of the terms "investigator" and "investigation" in the Act. However, the term "function" is expressed to "include powers and duties", and so could **not** be extended to include the power to arrest, charge or prosecute.
2. The provisions contained in sections 4, 13, 14, 18, and 21 of the Act are specific as to the tools to be employed by INDECOM in carrying out its extensive investigative functions.

3. Section 20 of the Act gives the 1st respondent and his investigative staff the "**like powers**, authorities and privileges as are given by law to a constable", but not "**all the powers**" of a constable. This section can be compared to schedule 3, paragraph 19 of the Police Reform Act 2002, where INDECOM's counterpart in the United Kingdom, the Police Complaints Commission, is given "**all those powers** and privileges" of a constable.

4. Section 23 of the Act provides that INDECOM's recommendations for action should be carried out by the "relevant force" or the "relevant public body". This contemplates that even a public body or special force may decline to act on INDECOM's recommendations.

5. Sections 10(3)(c), 16, 17(10)(d), 18(3) and 25 of the Act requires consultation with and reports to the DPP by INDECOM.

6. Sections 17(8) and 17(9) of the Act mandate INDECOM to make its own assessment of investigations and make recommendations.

[39] Mrs Samuels-Brown asserted that the learned judges of the Full Court erred when they ignored section 25 of the Act, which when read in accordance with the preamble, makes it is clear that INDECOM ought to act in collaboration with the DPP and make recommendations for action to the DPP and other persons. Counsel also indicated that the diligence, integrity and vigilance of the DPP had not been called into question at any time and so it is not surprising that the Act requires consultation with the DPP for final action to be taken by her. Consequently, the scheme of the Act supports the plain language of the Act which excludes any reference to the power to arrest, charge and prosecute.

[40] Queen's Counsel conceded that private citizens do have the power to arrest, charge and prosecute at common law, but noted that a person who can institute prosecutions against another individual is not always entitled, of his own motion, to arrest that same individual for the charge being prosecuted. Mrs Samuels-Brown also accepted, as was stated by the Full Court, that the ordinary powers of arrest or detention by a private citizen is far more restricted than that of a constable. According to Queen's Counsel, if the 1st respondent and his investigative staff had exercised its powers as private citizens, then they would continue to have the power to arrest, charge and prosecute at common law. However, Mrs Samuels-Brown argued that the rights of private citizens could not be ascribed to INDECOM, since by virtue of section 3(1) of the Act, INDECOM is a Commission of Parliament and therefore an extension of Parliament and a part of the legislature. It is not, according to counsel, a corporate body or by any other device, a juridical person. Additionally, it was counsel's contention

that the 1st respondent himself had no juridical personality under the Act and could not use his powers as a private citizen to arrest, charge and prosecute police officers. As a consequence, counsel argued that the Full Court's reliance on **R v Rollins** and **Chokolingo** was erroneous since the bodies involved in those cases had juridical personality, while INDECOM is an entirely different creature of statute that is without legal personality.

[41] It was Queen's Counsel's further contention that the Act is unconstitutional because the controls which exist by statute and under the Constitution on policemen in the exercise of their functions did not apply to the 1st respondent and his investigators. Mrs Samuels-Brown contended that these controls represent a part of the fair procedures established by law, and by ascribing the powers of a constable to a body or persons without the said controls and protections, would operate to deprive citizens of the constitutional protection of law to which they are entitled under section 13 of the Constitution.

[42] Mrs Samuels-Brown argued that the Full Court was wrong to find that there had been no legitimate expectation that the DPP would make rulings as to whether police officers are to be charged because there was an entrenched policy by the State, under the Police Service Regulations, upon which police officers have come to rely, that such a ruling would first be obtained. Campbell J, according to Queen's Counsel, made a very valuable comparison between the repealed Police Public Complaints Act and the Act, but nonetheless she argued that the legislature had indeed preserved in the Act, the legitimate expectation of the referral of matters to the DPP.

[43] In all these circumstances, Queen's Counsel contended that based on the varied ways in which the Full Court erred in arriving at its decision, the appeal and the orders sought in the form of declarations and injunctive relief ought to be granted.

1st respondent's submissions

[44] Mr Small submitted that the Act was created to investigate alleged abuse of citizens' rights by members of the security forces. Counsel noted that by virtue of section 5 of the Act, INDECOM is not subject to the direction or control of any other person or authority and, as a consequence, had been given primacy in the investigations it undertakes. Counsel therefore asserted that the Full Court was correct to find that the 1st respondent and his investigative staff have the power to arrest, charge and prosecute police officers since there were no provisions in the Act, nor were submissions advanced that indicated that those powers could not be accorded to them.

[45] INDECOM, according to counsel, acts through individual persons such as the 1st respondent and his investigative staff to prosecute and effect arrests, and so the fact that it is an unincorporated body would not prevent individuals assigned to it from performing its required functions. Counsel indicated that the 1st respondent can be sued and had indeed been sued by the appellants, which therefore detracted from the argument that INDECOM is a mere extension of Parliament.

[46] Mr Small posited that given INDECOM's mandate, and the powers given to it to achieve its mandate, it would be inconceivable if the 1st respondent and its investigative staff did not have the power to arrest. Counsel asserted that if INDECOM were to

involve the police in its investigations, then this would be contrary to the Act's purpose; undermine its independence; and would result in an absurdity that could not have been Parliament's true intent. Counsel also posited, in reliance on section 33 of the Justices of the Peace Jurisdiction Act and **Commissioner of Police of the Metropolis v Raissi** [2008] EWCA Civ 1237, that both a constable and a private citizen can apply for a warrant of arrest and can arrest with or without a warrant, but accepted that a constable enjoys greater powers when it comes to an arrest without a warrant since a citizen must first have a reasonable suspicion that a felony has been committed, while a constable can arrest based on second hand information. In reliance on **R v Self** [1992] 3 All ER 476, counsel contended that the common law powers of arrest seem to be wider than the statutory power of arrest contained under section 15 of the Constabulary Force Act. Counsel cited **Holgate-Mohammed v Duke** [1984] AC 437 to support his argument that a constable may arrest a suspect without a warrant during an investigation for any legitimate aim. Consequently, counsel asserted, that section 20 of the Act gives the 1st respondent and his investigative staff the powers of a constable for the purposes of carrying out investigations under the Act, and since a constable can arrest with or without a warrant, so too can an INDECOM investigator.

[47] Counsel urged this court to accept that the constitution itself recognises that there are some restrictions on the right to personal liberty, since section 14(1) of the Constitution provides that one's liberty may only be restricted on reasonable grounds in accordance with fair procedures established by law. Counsel therefore contended that if an arrest is lawful, there can be no reliance on any claim that one's personal liberty had

been improperly infringed. However, counsel argued that in every case, it is for the court to determine whether someone has been arbitrarily deprived of his right to personal liberty and the law provides alternative recourses for unlawful arrests.

[48] With regard to the right to initiate prosecutions, counsel cited section 94 of the Constitution and argued that given the language of the provisions contained therein, the Act, by necessary implication, confirms that persons other than the DPP may initiate prosecutions as it states that the DPP may "take over" and "discontinue" such prosecutions. Counsel argued that the Constitution did not alter the common law right of citizens to bring private prosecutions but recognized that right as one which is accorded to every citizen. Counsel cited **Hayter v L and Another** [1998] 1 WLR 854 to show that notwithstanding the passage of time and the growing infrequency of private prosecutions, courts have continued to guard jealously the right of private citizens to institute criminal proceedings. Counsel also relied on section 29 of the Justices of the Peace Jurisdiction Act and Form 15 (the information) attached to its first schedule, to show that there is recognition that prosecutions can be initiated by persons other than police officers.

[49] Counsel then went on to cite cases such as **Chokolingo**; **Gouriet v Union of Post Office Workers**; **Scopelight**; **R v Rollins**; **Broadmoor**; **Regina (Hunt) v Criminal Cases Review Commission**; and **Rex v A E Chin** (1946) 5 JLR 31 in which the common law right to initiate private prosecution by citizens and co-operations had been expressly recognised. Counsel cited **Commissioner of Police and Another v Steadroy C O Benjamin** [2014] UKPC 8 in support of his argument that this right

survives even a decision by the DPP not to prosecute. Since all the bodies in the cases aforementioned have been vested with the right to privately prosecute at common law, counsel argued that this is a right which the 1st respondent and his investigative staff also enjoyed. Moreover, counsel contended that if this court were to find that the 1st respondent and his investigative staff did not have the power to prosecute, this too would result in an absurdity since it would directly contravene the independence that INDECOM was given, once it had to await the outcome of a ruling from the DPP.

[50] In response to submissions on the issue of legitimate expectation derived from the Police Service Regulations, counsel submitted that **George Anthony Lawrence v Commissioner of Police** makes it clear that section 31(5) of the Police Service Regulations is designed to ensure that members of the police force are not made subject to simultaneous disciplinary and criminal proceedings. Counsel also argued that as per that regulation, the ruling of the Attorney-General (now DPP) or Clerk of the Court is only required prior to the institution of disciplinary proceedings, and the Police Service Regulations do not state that such a ruling is a pre-condition for the charging of a police officer before the criminal courts. Counsel also submitted that section 33 of the Police Service Regulations reinforces the point that proceedings against police officers may be lawfully instituted without referral to the DPP since it states that the advice of the DPP shall be sought unless proceedings "**have been or are about to be instituted**" (emphasis added). Counsel also relied on **Rohan Ellis v R** [2012] JMCA Crim 8 where in interpreting section 30 of the Police Service Regulations which contains provisions similar to those in the Police Service Regulations, this court held that the

requirement for a referral to the Attorney-General before a public officer is charged is not mandatory, but merely directory, and indeed procedural. Counsel therefore concluded that there is no merit to the appellants' arguments in this regard.

[51] Counsel rejected the assertion that the appellants had a legitimate expectation derived from practice and custom that a police officer would not be charged without first obtaining a ruling from the DPP, as he indicated that there are a number of other instances in which the DPP is invited to make a ruling upon whether persons are to be charged (for example in motor manslaughter cases), and that did not create a legitimate expectation that such a ruling is to be made in every case. Counsel urged this court to accept that there had been no substantial proof to ground a legitimate expectation because: (i) no practice can undermine the lawful right of a citizen to bring a private prosecution; (ii) no alleged practice between the appellants and the 2nd respondent can bind the 1st respondent to the extent that it will limit his right to prosecute; and (iii) legitimate expectation may only be applied in a claim for judicial review.

[52] Counsel urged this court to dismiss the appeal since the findings of the Full Court, he submitted, were sound and involved a consideration of all the relevant circumstances in the instant case and the applicable law. Counsel asked the court to take judicial notice of the public's perception of the police force and the justice system and said that this court should strive to maintain the principles of fairness and equal treatment for all citizens.

2nd respondent's submissions

[53] The amended fixed date claim form in the record before us does not name the 2nd respondent as a party to the claim before the Full Court. But on appeal before us, the 2nd respondent indicated that although named as a party to the claim before the Full Court, the 2nd respondent decided against participating in the proceedings. However, at the commencement of the hearing in the court below, the 2nd respondent and the DPP were invited by that court to make submissions on the point *in limine* raised by the 1st respondent, which they did. The 2nd respondent's position on the substantive issues at that time was that in order for the 1st respondent to exercise the power to arrest, charge and prosecute, such powers must be specifically stated in the Act and should not be accorded to the 1st respondent by inference, since it interferes with the right to liberty, a fundamental constitutional right. However, in submissions before this court, the 2nd respondent proceeded to advance what they describe as an "evolved position" which completely contradicted the position they had advanced before the Full Court in the court below, and adopted submissions made by counsel for the 1st respondent opposing the appeal. I will therefore only summarise the arguments advanced by the 2nd respondent to the extent that they add to or differ from those advanced by counsel for the 1st respondent.

[54] Miss Althea Jarrett, for the 2nd respondent, indicated that despite the attractiveness of the arguments advanced by counsel for the appellant that the Act limits the role and function of INDECOM, "that argument is an unnaturally restricted and narrow approach to interpreting INDECOM's investigatory functions under the Act".

This is so because the argument itself did not acknowledge the fact that the power of arrest has long been a critical tool used by the police to facilitate their own investigations. Miss Jarrett further contended, in reliance on **R v Secretary of State for the Environment, Transport and the Regions and Another, ex parte Spath Holme Ltd** [2001] 1 All ER 195 and **Jamaica Public Service Company Limited v Dennis Meadows and Others** [2015] JMCA Civ 1, at paragraph 23 of the 2nd respondent's written submissions, that when section 20 of the Act conferred upon the 1st respondent and his investigative staff the "like powers" of a constable, without enumerating, delimiting or circumscribing those powers (save for use in carrying out the purpose of the Act), the intention of Parliament must have been to give to the general words "**like powers**" their ordinary meaning and to confer on the 1st respondent and his investigators, in the course of conducting investigations under the Act, "**all**" the powers of a constable at common law and by statutory enactment. Those powers, according to counsel, include the power to arrest with or without a warrant.

[55] Counsel also argued that in order to satisfy section 13 of the Constabulary Force Act and in reliance on **The Attorney General v Glenville Murphy** [2010] JMCA Civ 50 and **O'hara v Chief Constable of the Royal Ulster Constabulary** [1997] 1 All ER 129, the police officer himself must have an honest belief that the offence was committed, that belief being founded on reasonable grounds. Miss Jarrett asserted that in **R v Waterfield; R v Lynn** [1963] 3 All ER 659, in considering whether an officer has unlawfully exercised the powers of arrest, regard must be had to whether that officer was exercising his lawful duty when he effected the arrest and also whether the

arrest was justifiable in accordance with his duties. Counsel therefore urged this court to accept that these principles ought to apply when deciding whether the 1st respondent's right to effect arrests is unconstitutional.

[56] On the point of whether the 1st respondent and his investigators have the power to initiate and conduct prosecutions of police, counsel agreed that, pursuant to **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; [2014] 3 All ER 90; **R v Rollins**; **Broadmoor**; and **R (Hunt) v Criminal Cases Review Commission**, the 1st respondent and his investigators did not possess the statutory right to prosecute, but they did possess a common law right to prosecute.

[57] On the issue of whether a ruling is required by the DPP before police officers are charged by the 1st respondent and its investigative staff, counsel argued that there is no conditional right for such a ruling to be made by the DPP. Counsel submitted that the Commissioner of Police is only required to obtain a ruling from the DPP under regulation 33 of the Police Service Regulations where criminal proceedings have not yet been instituted. Counsel also noted that, in her submissions before the Full Court, the DPP herself conceded that there was no rule as a matter of law, requiring a ruling by the DPP before a police officer could be charged, but did say that such a practice has developed over a matter of time. Counsel noted, in reliance on **O'Reilly and Others v Mackman and Others** [1983] 2 AC 237; **Council of Civil Service Unions and Others v Minister for the Civil Service** [1984] 3 All ER 935; and **Legal Officers' Staff Association and Others v The Attorney General and Another** [2015] JMFC

FC 3, that while the Full Court had accepted that such a practice existed, it had nonetheless, correctly found that for the purposes of legitimate expectation, such an expectation would only bind the Police Service Commission and not INDECOM.

[58] In all these circumstances, counsel posited, there was no inconsistency between section 20 of the Act and the other provisions contained therein, and that the decision of the Full Court was unassailable. She therefore urged this court to dismiss the appeal.

DPP submissions acting as *amicus curiae*

[59] The DPP, represented by Miss Kathy-Ann Pyke on appeal, also posited an "evolved position" since Miss Pyke made submissions before us that directly contradicted the submissions that the DPP herself had advanced in the Full Court below. Miss Pyke indicated to the court that the DPP had accepted the decision of the Full Court on all aspects and endorsed the submissions advanced by both counsel for the 1st and 2nd respondent. The submissions that had been advanced are also summarised to the extent that they added to or differed from those advanced by counsel for the 1st and 2nd respondent.

[60] In relation to whether the Act conferred the power to arrest and charge on INDECOM, counsel asserted that by implication, section 20 of the Act empowered the 1st respondent and his investigative staff to arrest and charge police officers. Counsel further argued in reliance on **Giebler v Manning** [1906] 1 KB 709 and **R v Rollins**, that the right to prosecute exists for all private citizens except where the class of persons competent to prosecute an offence is expressly restricted by statute.

[61] Counsel also urged this court to accept that there was no merit to this appeal and so it ought to be dismissed.

Submissions on the use of parliamentary debates

[62] Queen's Counsel appearing for the appellant stated that the provisions contained in section 20 of the Act are clear and unambiguous and do not confer the power to arrest, charge and prosecute police officers on the 1st respondent and his investigative staff. However, she indicated that when the learned judges of the Full Court found that INDECOM had such powers, they were interfering with the ordinary and natural meaning of the words contained in section 20 of the Act. Mrs Samuels-Brown indicated that the natural and ordinary meaning of words used in legislation should be applied unless they are ambiguous, obscure and their interpretation would lead to an absurd result. Since the respondents and the Full Court would by implication be stating that section 20 of the Act is ambiguous, obscure or would lead to an absurdity if its natural and ordinary meaning is accepted, then this court, she submitted, ought to look at the parliamentary debates to aid in its construction of the Act. Mrs Samuels Brown submitted, in reliance on **Pepper v Hart** [1993] AC 593 and **Harding v Wealands** [2006] UKHL 32; [2007] 2 AC 1, that where there is perceived ambiguity in the language of a statute, resort may be had to the parliamentary debates. She argued therefore it was indeed permissible for this court to examine the purpose of the Act, as stated by the then Minister of Justice and Attorney-General, Senator Miss Dorothy Lightbourne QC, as an aide in resolving any ambiguity.

[63] Counsel for 1st respondent, the 2nd respondent and counsel representing the DPP objected to this request on the basis that **Pepper v Hart** is no longer good law and has been criticised in **Jackson and Others v Attorney General** [2005] UKHL 56 at paragraph [97], **Presidential Insurance Company Ltd v St Hill** [2012] UKPC 33; [2013] 3 LRC 7 and **Petal Eleanor Murray v Kenneth Anthony Neita** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV0176, judgment delivered 18 August 2006. Moreover, counsel for the 1st respondent, Mr Small, indicated that the issue of whether this court should review the debates in the Hansard, was a new argument as it had not been canvassed in the court below. Counsel on behalf of the 1st respondent, Mrs Shawn Wilkinson, indicated that the court should not have regard to the parliamentary debates because: (i) the stipulated conditions in **Pepper v Hart** had not been fulfilled; (ii) there were no ambiguities which the court was being asked to resolve and on which reliance on the parliamentary debates could assist; and (iii) the appellants had not indicated the particular aspects upon which they intended to rely, since this ought to have been stated in an affidavit.

[64] Counsel for the appellants in response to the objections raised, stated that having regard to the public law nature of the matter before this court, this court has the power to consider material that was not before the court below. Counsel stated that in **Harding v Wealand** (decided a few months after **Jackson v Attorney General**), the House of Lords (as it then was) found parliamentary debates useful in statutory interpretation. Indeed, counsel posited that in **Jackson v The Attorney General** at paragraph [40], the House of Lords indicated that where there is a perceived ambiguity

or obscurity, reliance on the parliamentary debates may be necessary. In the instant case, counsel submitted that it was the appellants' position that the Act is unambiguous, while the respondents and the DPP had contended that the Act is ambiguous, and so the implication of the right to arrest, charge and prosecute was necessary. As a consequence, Queen's Counsel argued that the portion of the parliamentary debates to be relied on would prove that such contentions are unfounded, and so this court ought to examine these debates in determining this appeal.

Issues

[65] Based on the grounds of appeal filed and the submissions advanced herein, in my view, there are four issues which require consideration:

1. Whether the Act confers upon INDECOM, the 1st respondent and his investigative staff the power to arrest, charge and prosecute. (grounds 1, 2 and 3)
2. Should the court utilise parliamentary debates to aid in its construction and interpretation of the Act? (grounds 1, 2 and 3)
3. Whether the 1st respondent and his investigative staff:
    (i) have the power to arrest and charge by virtue of statute and the common law; (ground 2) and/or

(ii) have the power to initiate and undertake prosecutions at common law (ground 3),

and if so, what is the effect if any, having regard to the statutory regime.

4. Is there a legitimate expectation enjoyed by the appellants that the DPP would make rulings as to whether police officers are to be charged with a criminal offence before they are so charged? (ground 4)

Discussion and analysis

Issue 1: Whether the Act confers the power to arrest, charge and prosecute on INDECOM, the 1st respondent and his investigative staff? (grounds 1, 2 and 3)

[66] This court is being asked to decide whether the Full Court was correct to find that the Act, whether by express words or implication, conferred upon INDECOM, the 1st respondent and his investigative staff the power to arrest, charge and prosecute police officers. In making this determination, one must canvass the principles relevant to statutory interpretation. My learned brother Brooks JA in **Jamaica Public Service Company Limited v Dennis Meadows**, at paragraph [54], quoted page 49 of Cross' Statutory Interpretation, 3rd edition, which he indicated accurately summarised the major principles of statutory interpretation as follows:

> "1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he

must also determine the extent of general words with reference to that context.

2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.

3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute**…" (Emphasis as in original)

[67] It is evident from reading several authorities that the courts seem to frown upon any approach to statutory interpretation that implies a secondary meaning into a statute, unless the plain and ordinary meaning of the words in the statute are ambiguous or leads to an absurd result. Indeed, Lord Scott in the House of Lords case of **Croxford v Universal Insurance Company Limited**, at page 280 stated that where the words of an Act of Parliament are clear, there is no room for applying any other principles of interpretation, as these are merely presumptions in cases of ambiguity. In another House of Lords case, **Rowell v Pratt** [1938] AC 101 at page 105, Lord Wright stated that:

> "Now it is true that if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is just, reasonable and convenient, while the other is not, the Court will prefer the former. But if the words properly construed admit of only one meaning, the Court is not entitled to deny to the words that meaning, merely because the Court feels that the result is not in accordance with the ordinary policy of the law or with what

> seems to be reasonable. The Court cannot mould or control the language. This is particularly true of legislation in these days, when Parliament has established so many new institutions and bodies, and has imposed on individuals so many duties and disabilities for which in the former law no precedents can be found. A statute must be construed as a whole and with some regard to its apparent purpose and object. The language of one part may help to interpret the language of another. On the other hand, it is seldom that the construction of one statute can be determined by comparison with other statutes. Apart from some general rules of construction, each statute, like each contract, must be interpreted on its own merits."

[68] In **Duport Steels Ltd and Others v Sirs and Others** [1980] 1 WLR 142, yet another House of Lords decision, a dispute arose between the employees of the British Steel Corporation (BSC) and their employers, the BSC, with regard to wages. When the wage dispute was not settled, the union for BSC employees (the Iron and Steel Trades Confederation) called a strike by its members in the public sector. The strike did not achieve its desired objective and so the union called on its members in the private sector to join the strike. Companies in the private sector of the steel industry filed a writ seeking an injunction against union representatives that would prevent the unions from inducing the employees in the private sector to break their contracts of employment by participating in a strike, interfering with the supply of steel and/or to picket their premises.

[69] Jones J at first instance exercised his discretion to refuse to grant the injunctions sought, as he found that the unions' defence that they were acting in furtherance of a trade dispute under the United Kingdom Trade Union and Labour Relations Acts 1974 and 1976, would be likely to succeed at a trial. Section 13 of the 1974 Act provides that

any act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort unless it induces another person to break a contract or interfere with its performance, or it interferes with the trade business or employment of another person. The Court of Appeal reversed the decision of Jones J and granted the injunctions sought on the basis that *inter alia*: (i) there was a question as to whether one of the disputes could fall within the definition of a trade dispute; (ii) the employers and workers in the private sector would be subjected to severe economic loss, inconvenience, and distress in a dispute to which they are not a party; and (iii) the entire country may potentially suffer disastrous economic consequences if the injunctions were not granted.

[70] The unions appealed to the House of Lords. The House of Lords allowed the appeal and reversed the decision of the Court of Appeal on the basis that *inter alia*, the question whether an act was done in contemplation or furtherance of a trade dispute was subjective and depended upon a proper construction of the Act. Accordingly, in the court's view, there was no justification for implying limitations into that Act so as to restrict the immunities enjoyed by persons who act in furtherance or contemplation of trade disputes, even if such actions may result in serious consequences to the nation. Lord Diplock in giving guidance as to how courts are to interpret statutes said at pages 157-158:

> "My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based

upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.

A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed; if it had, it would have made some provision in the Act in order to prevent them. It is at least possible that Parliament when the Acts of 1974 and 1976 were passed did not anticipate that so widespread and crippling use as has in fact occurred would be made of sympathetic withdrawals of labour and of secondary blacking and picketing in support of sectional interests able to exercise 'industrial muscle.' But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts, and, if so, what are the precise limits that ought to be imposed upon the immunity from liability for torts committed in the course of taking industrial action. These are matters on which there is a wide legislative choice the exercise of which is likely to be influenced by the political complexion of the government and the state of public opinion at the time amending legislation is under consideration.

It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of

> interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest. The frequency with which controversial legislation is amended by Parliament itself (as witness the Act of 1974 which was amended in 1975 as well as in 1976) indicates that legislation, after it has come into operation, may fail to have the beneficial effects which Parliament expected or may produce injurious results that Parliament did not anticipate. But, except by private or hybrid Bills, Parliament does not legislate for individual cases. Public Acts of Parliament are general in their application; they govern all cases falling within categories of which the definitions are to be found in the wording of the statute. So in relation to section 13 (1) of the Acts of 1974 and 1976. for a judge (who is always dealing with an individual case) to pose himself the question: 'Can Parliament really have intended that the acts that were done in this particular case should have the benefit of the immunity?' is to risk straying beyond his constitutional role as interpreter of the enacted law and assuming a power to decide at his own discretion whether or not to apply the general law to a particular case. The legitimate questions for a judge in his role as interpreter of the enacted law are: 'How has Parliament, by the words that it has used in the statute to express its intentions, defined the category of acts that are entitled to the immunity? Do the acts done in this particular case fall within that description?'"

[71] These principles have been accepted and applied by this court in **The Independent Commission of Investigations v Digicel (Jamaica) Limited** [2015] JMCA Civ 32, wherein INDECOM had asked this court to widen the category of persons who could obtain information under section 47 of the Telecommunications Act, even though the statute specifically stated the persons who were entitled to such access, which did not include INDECOM. My learned brother Brooks JA, at paragraphs [21] and [22], in refusing INDECOM's request, stated that the words of the statute must be given

their ordinary and natural meaning, and not some pre-conceived notion of what the statute is purported to mean.

[72] It therefore is necessary to ascertain whether the plain and ordinary meaning of the words used leads to an absurd result or one that contravenes Parliament's intention. The Judicial Committee of the Privy Council in **Eaton Baker and Another v R** [1975] AC 774, has provided guidance on how courts may ascertain Parliament's intention. Lord Diplock at page 784 said:

> "To read into the Jamaican statute words that the Jamaican legislature has itself apparently rejected, so as to enable the court to give to the statute an effect which it would not otherwise have, would be a usurpation of the functions of the Jamaican legislature. This is not the function of a court of law..."

[73] Similar views were expressed by the House of Lords in **Attorney General v Prince Ernest Augustus of Hanover** [1957] AC 436, where Viscount Simonds at page 461 stated that:

> "For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

[74] Assistance in construing Parliament's intention can also be gleaned from another House of Lords case, namely that of **Blackson-Clawson International Ltd v**

Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, where Lord Reid at pages 613- 614 said:

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further inquiry is permissible...
>
> One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself 'in the shoes' of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind."

[75] So once the statute is clear of any ambiguity and there is no inherent inconsistency with any known policy of the legislature or any other provisions in the statute, it is the duty of the court to give effect to what it says. In the instant case, it would be relevant to examine the overall context of the Act, including the words in the preamble and other relevant legislation such as the Police Public Complaints Authority Act which the Act repealed.

[76] Based on the guidance gleaned from these cases, I will now examine the overall scheme of the Act, in order to ascertain whether the overall context of the Act supports the plain and ordinary meaning given to the provisions in the Act in order to determine

whether the Act confers the power to arrest, charge and prosecute on INDECOM, the 1st respondent and his investigative staff. The Act is relatively short and so the provisions contained therein will be explored according to their relevance to this appeal.

What is INDECOM?

[77] With regard to the status of INDECOM, section 2 of the Act provides that "Commission" means the Independent Commission of Investigations constituted under section 3. INDECOM consists only of the 1st respondent (section 3(1)). By virtue of section 8, the 1st respondent may appoint and employ his employees (including investigators defined in section 2 of the Act) and pursuant to section 26, the functions of INDECOM may be performed by any member of its staff or by any other person (not being a member of the security forces or a specified official) authorised for that purpose by INDECOM. Section 3(1) and (2) provides that:

> "(1) For the purposes of this Act, there is hereby constituted a Commission of Parliament to be known as [INDECOM].
>
> (2) [INDECOM] shall consist of a Commissioner, who shall be appointed by the Governor-General by instrument under the Broad Seal, after consultation with the Prime Minister and the Leader of the Opposition, from persons of high integrity, who possess the qualifications to hold office as a Judge of the Supreme Court of Judicature of Jamaica."

[78] Black's Law Dictionary, 7th Edition, defines "commission" as *inter alia*, "[a] body of persons acting under lawful authority to perform certain public services" and "parliament" is defined therein as "[t]he [s]upreme legislative body of some nations". Accordingly, INDECOM being a "Commission of Parliament" is a body of persons acting under the authority of the legislature to perform certain public functions. There is

nothing in the Act which ascribes separate legal personality to INDECOM, nor is it incorporated under the Companies Act. INDECOM is therefore not a juridical person. There is no provision in the Act empowering INDECOM, as a Commission of Parliament, to sue and be sued. As a Commission of Parliament, not incorporated pursuant to the Companies Act, and not being a body corporate, INDECOM is constrained to operate within the confines of the Act which established it. The 1st respondent and his employees in their individual capacities however have a legal personality in law and in that personal capacity, they can sue and be sued.

[79] INDECOM's object and purpose can be found in the preamble to the Act which states that the Act is:

> "AN ACT to repeal the Police Public Complaints Act; to make provision for the establishment of a Commission of Parliament to be known as the [INDECOM] to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons; and for connected matters."

The preamble to the Act, having stated that it is repealing the Police Public Complaints Act, states that the Commission of Parliament established under the Act, is to undertake investigations in relation to actions of members of the security forces and other agents of the state. The name of the Act itself viz the "The Independent Commission of Investigations Act" declares its object and purpose.

[80] Section 2 defines the 1st respondent as "the person appointed pursuant to section 3 as Commissioner". Section 27 outlines the privileges enjoyed by the 1st respondent and his staff in the following instances:

> "(1) Except in the case of proceedings for an offence under section 34(c) [sic], no proceedings shall lie against the Commissioner or any person concerned with the administration of this Act for anything he may do or say in the performance of his functions under this Act.
>
> (2) Anything said or any information supplied or document or thing produced by any person for the purpose or in the course of, any investigation carried out under this Act shall be absolutely privileged in the same manner as if the investigation were proceedings in a court of law.
>
> (3) For the purposes of the Defamation Act, any report made by [INDECOM] under this Act and any fair and accurate report thereon shall be deemed to be privileged."

[81] Section 5(1) stipulates that INDECOM is an independent body as it provides that "[s]ubject to the provisions of the Constitution, in the exercise of the powers conferred upon it by this Act, [INDECOM] shall not be subject to the direction or control of any other person or authority". However, INDECOM is answerable to Parliament by virtue of section 30(1) of the Act, which provides that INDECOM may from time to time be required to submit a report to Parliament in respect of matters being investigated by INDECOM, and by virtue of section 30(2) of the Act which requires INDECOM to submit an annual report to Parliament in relation to the execution of its functions or any investigation which may require Parliament's special attention. It is clear that INDECOM is authorised to operate without the direction or control of any other person or authority in the exercise of the powers conferred on it by the Act. It is therefore critical, for the resolution of this appeal, to ascertain what are the powers conferred on this independent body by the Act. I will also examine how these powers are curtailed, if at all, by other provisions in the Act.

The powers and functions of INDECOM

[82] Before I examine the sections related to the powers and functions of the 1st respondent and his investigative staff, I must first outline some important definitions as outlined in section 2 of the Act as follows:

> "'complaint' means any complaint referred to in section 11, about the conduct of a member of the Security Forces or a specified official and includes a report under section 12 or 13;
>
> 'concerned officer' means-
>
> (a) any member (of whatever rank) of the Jamaica Constabulary Force;
>
> (b) any member (of whatever rank) of the Jamaica Defence Force when acting in support of the Jamaica Constabulary Force;
>
> (c) any member (of whatever rank) of the Island Special Constabulary Force and any person appointed as a parish Special Constable under the Constables (Special) Act;
>
> (d) any member of the Rural Police,
>
> about whom a complaint is made;
>
> 'concerned official' means the specified official about whom a complaint is made;
>
> ...
>
> 'functions' includes powers and duties;
>
> 'incident' means any occurrence that involves misconduct of a member of the Security Forces or of a specified official-
>
> (a) resulting in the death of, or injury to, any person or that was intended or likely to result in the death of, or injury to, any person;

(b) involving sexual assault;

(c) involving assault or battery;

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

(e) although not falling within paragraphs (a) to (d), is, in the opinion of [INDECOM], an abuse of the rights of a citizen;

'investigation' means an investigation into any occurrence carried out by [INDECOM], for the purposes of this Act;

'investigator' in relation to an investigation under this Act means an employee or a part of [INDECOM] assigned duties in relation to that investigation;

'public body' means-

(a) a Ministry, department or agency of Government;

(b) a Parish council, the Kingston and St. Andrew corporation;

(c) a statutory body or authority;

(d) a company registered under the Companies Act, being a company in which the Government or an agency of Government, whether by the holding of shares or by financial means, is in a position to influence the policy of the company;...

'relevant Force' means any one of the Security Forces-

(a) involved in an incident; or

(b) in relation to which a complaint is made, or an investigation is carried out, under this Act;

'relevant public body' means the public body-

(a) involved in an accident; or

(b) in relation to which a complaint is made, or an investigation is carried out, under this Act;...

'Security Forces' means-

(a) the Jamaica Constabulary Force;

(b) the Jamaica Defence Force;

(c) the Island Special Constabulary Force;

(d) the Rural Police; and

(e) Parish Special Constables.

'specified official' means-

(a) a correctional officer;

(b) such other public officer, as the Minister may by order specify; being a person upon whom is conferred any of the powers, authorities and privileges as are conferred by law on a member of the Jamaica Constabulary Force."

[83] From a review of the sections detailing INDECOM's powers and functions it is indeed true that INDECOM has very wide and substantive investigative powers. Section 20 of the Act provides that:

> "For the purpose of giving effect to **sections 4, 13 and 14**, the Commissioner and the investigative staff of [INDECOM] shall, in the exercise of their duty under this Act have the **like powers**, authorities and privileges as are given by law to a constable." (Emphasis supplied)

[84] Section 4 of the Act sets out INDECOM's functions and provides that:

> "(1) Subject to the provisions of this Act, the functions of [INDECOM] shall be to-
>
> (a) conduct investigations, for the purposes of this Act;

(b) carry out in furtherance of an investigation and as [INDECOM] considers necessary or desirable-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[85] Section 13 of the Act provides that "[a]n investigation under this Act may be undertaken by [INDECOM] on its own initiative".

[86] Section 14 of the Act states that:

> "(1) [INDECOM] shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of-
>
> (a) the seriousness of the case;
>
> (b) the importance of the investigations;
>
> (c) public interest considerations; and
>
> (d) the particular circumstances in which the incident occurred.
>
> (2) [INDECOM] may manage, supervise, direct and control an investigation carried out by the Security Forces or the relevant public body in relation to an incident, where, in the opinion of the Commission, it is necessary to direct and oversee that investigation.
>
> (3) Where [INDECOM] takes action under subsection (2), it shall notify the responsible head or the responsible officer, as the case may be, and direct that no action shall be taken until [INDECOM] has completed its investigation."

[87] When the ordinary and natural meaning of the words used in section 20 are construed, it is evident that section 20 of the Act does not expressly confer upon INDECOM, the 1st respondent and his investigative staff the power to arrest, charge and prosecute police officers. In my view, the words used in section 20 are neither ambiguous nor obscure. The natural and ordinary meaning of the words contained in section 20 of the Act gives INDECOM, the 1st respondent and his investigative staff the like powers, authorities and privileges given by law to a constable only for the purposes of giving effect to sections 4, 13 and 14. In other words, it seems to me therefore, that INDECOM, the 1st respondent and his investigative staff, in exercising duties under the

Act, shall have those like powers, authorities and privileges given to the constable in order to comply with sections 4, 13 and 14, but for no other purpose.

[88] Taken cumulatively, sections 4, 13 and 14 all address the manner in which INDECOM will undertake investigations pursuant to the Act. Section 4 sets out the functions of INDECOM in respect of the conduct of investigations for the purposes of the Act, to carry-out inspections of records, weapons and buildings in relation to the relevant public body or relevant force; and to obtain periodic reviews of disciplinary procedures applicable to the security forces and specified officials; and to take the necessary steps to ensure that responsible heads and officers submit reports of incidents and complaints to INDECOM concerning the conduct of members of the security forces and specified officials. In exercising its functions under the Act INDECOM shall *inter alia*, have access to all reports, documents and/or other information or any premises in order to obtain records and other relevant information, and retain the records and require persons to furnish the required information as INDECOM may deem fit. Section 13 permits INDECOM to undertake investigations on its own initiative. Section 14 of the Act sets out the factors which INDECOM ought to assess for the purpose of determining the most appropriate method of investigation. INDECOM may also, based on its opinion, manage, supervise, direct and control an investigation undertaken by the security forces or the relevant public body in relation to an incident and direct that no actions are to be taken until INDECOM has completed its investigations. There is nothing in sections 4, 13 and 14 of the Act which give INDECOM the power to arrest charge and prosecute.

[89] Section 6 of the Act speaks to the establishment of offices; section 7 speaks to the appointment of a Director of Complaints; section 8, the employment of other persons; and section 9, prescribes that the 1st respondent and the staff of INDECOM are required to take an oath of secrecy before they perform any function assigned under or by virtue of the Act.

[90] Sections 10, 11, 12, 31 and 40 of the Act also illustrate the manner in which INDECOM ought to conduct investigations pursuant to the Act. Section 10(1) of the Act provides that:

> "A complaint may be made to [INDECOM] by a person who alleges that the conduct of a member of the Security Forces or any specified official-
>
> (a) resulted in the death of or injury to any person or was intended or likely to result in such death or injury;
>
> (b) involved sexual assault;
>
> (c) involved assault (including threats of harm, reprisal or other intimidatory acts) or battery by the member or official;
>
> (d) resulted in damage to property or the taking of money or of other property;
>
> (e) although not falling within paragraphs (a) to (d), is, in the opinion of [INDECOM] an abuse of the rights of a citizen."

[91] It is evident from section 10 that INDECOM can investigate incidents not only related to physical persons, but also to physical property rights and incidents which in INDECOM's opinion would result in an abuse of the rights of citizens. Section 11 of the Act states that the responsible head or officer of a relevant public body or relevant

security force shall make a report to INDECOM forthwith, where an incident resulted in the death or injury to any person, or no later than 24 hours in any other case. Under section 12, INDECOM has the power to request a report from the relevant security force or relevant public body where an incident had occurred that would significantly impact public confidence. Section 31 of Act provides that INDECOM may initiate or continue investigations notwithstanding any civil proceedings related to the subject matter of the investigation. Section 40 provides that notwithstanding the repeal of the Police Public Complaints Act (replaced by the Act), any complaint made immediately before the commencement of the Act may be continued by INDECOM.

[92] These sections delineate the types of investigation to be conducted by INDECOM in relation to which persons or entities the investigation is to be conducted, within what period, and in what manner; that the reports in relation thereto are to be submitted to INDECOM, particularly where public confidence is affected; that investigations can be initiated and continued even if civil proceedings are extant; and that INDECOM may continue any investigation commenced under the Police Public Complaints Act.

[93] INDECOM has certain powers during the course of an investigation. Sections 18(1) and (2) of the Act provide that INDECOM may hold public, private or partially public or private hearings. Section 21(1) of the Act provides that INDECOM may require a member of the security forces, a specified person (a correctional officer or a public officer exercising the powers of a member of the Jamaica Constabulary Force) or any other person, who in its opinion is able to assist in the investigation, to furnish a statement, or produce any document or thing under that person's control in connection

to the investigation. Section 21(3) states that INDECOM may summon before it and examine on oath any complainant; a member of the security forces; specified officials or any other person, who in its opinion can assist in the investigation. However, I should note that the power to summon contained therein is not a wide ranging power as it is limited to matters being investigated by INDECOM. During the investigatory hearings under section 21(3), the 1st respondent has the powers of a Supreme Court judge. Section 21(5) limits the nature of evidence for the purpose of an investigation which is compellable to that which could only be given in a court of law.

[94] Pursuant to section 22(1), notwithstanding anything contrary in any other law, when conducting investigations, INDECOM is given the 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 that section. Section 22(2) of the Act speaks to the establishment of protocols between the Commissioner of Police and INDECOM to facilitate investigations by INDECOM. It provides that:

> "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."

Section 22(3) of the Act states:

> "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."

[95] The Act also provides a mechanism for alternative dispute resolution. Section 15 of the Act gives the Director of Complaints (defined in section 7 as one of five persons appointed to ensure that investigations in a particular region are done in accordance with the Act), the power to conduct informal resolution of complaints where the complaint if proved, may not result in a criminal or disciplinary charge, or where the parties consent to such a resolution. Section 16(2) stipulates that INDECOM may continue or discontinue investigations based on whether the matter being investigated is resolved by mediation or any other alternative dispute resolution.

[96] Section 17 of the Act illustrates the formal procedure to be utilised when handling complaints. It specifies that where a complaint has not been resolved pursuant to sections 15 or 16 of the Act, INDECOM shall commence an investigation forthwith into the complaint. Section 17(10) provides that INDECOM shall, *inter alia*, prepare a

report on the investigation including its recommendations for action to the following persons:

> "(a) the complainant;
>
> (b) the concerned officer or the concerned official;
>
> (c) the responsible head or the responsible officer;
>
> (d) the [DPP];
>
> (e) the Office of the Special Coroner (where the incident involves the death of any person);
>
> (f) the Police Service Commission (where the incident involves the misconduct of a member of the Jamaica Constabulary Force, the Island Special Constabulary Force, the Rural Police and the Parish Special Constables);
>
> (g) the Public Service Commission (where the incident involves the misconduct of a specified official); and
>
> (h) the Chief of Defence Staff (where the incident involves the misconduct of a member of the Jamaica Defence Force);"

Section 17(11) provides that INDECOM may furnish a copy of the report to the Solicitor General if deemed appropriate in any particular case.

[97] Section 23 of the Act is rather interesting because it seems to be the only section in the Act that stipulates the recourse to be had by INDECOM when a recommendation it makes has not been complied with. Section 23(1) provides that where a report has been made by INDECOM containing recommendations, those recommendations are to be carried out by the relevant public body within the specified manner and time prescribed, and a report of compliance must be made to INDECOM within a specified date. Section 23(2)(a) states that lawful and necessary steps are to be taken to ensure

compliance, and section 23(2)(b) provides that if the responsible head decides not to comply with INDECOM's recommendations, it must give reasons for that decision. Section 23(3) provides that where a recommendation is made in a report by INDECOM to the relevant force or public body, and that force or body fails to comply with those recommendations, then INDECOM must cause a report to be laid on the "Table of each House of Parliament".

[98] It is of note that section 23 is absent of any statement that INDECOM should thereafter pursue their recommendation resulting in possible arrest of any individual or prosecution of any matter which, in my opinion, is reflective of the policy of the legislature, namely that the purpose and object of INDECOM is to have full and comprehensive suzerainty over investigations into certain actions of members of the security forces or any specified official, resulting in *inter alia* the death or injury to any person or the damage to property, and the taking of any property, and the abuse of the rights of citizens.

[99] Section 24 of the Act is also interesting, it provides that INDECOM shall take such steps as are necessary to ensure that a complainant, concerned officer or concerned official, who is not satisfied with a decision of INDECOM, in relation to an investigation, is advised of the right to seek judicial review of that decision. Accordingly, the right of judicial review relates only to a decision made by INDECOM in relation to an investigation having been conducted by INDECOM.

The role of the DPP

[100] Several sections of the Act indicate that consultations with, and referrals to the DPP are to be made. Section 10(3) of the Act provides that on receipt of a complaint under section 10(1), the Director of Complaints shall: (a) record it in the prescribed form and furnish to the complainant a copy of that record signed by the person receiving the complaint; (b) cause an investigation into the complaint to be made forthwith; and (c) if in the opinion of INDECOM the conduct complained of constitutes an offence, forward a copy of the complaint to the DPP forthwith. 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 alternative methods of dispute resolution. As indicated in paragraph [96] herein, a copy of the report created pursuant to section 17 of the Act, ought to be sent to the DPP. In section 18 of the Act, as indicated, INDECOM may conduct either public or private hearings during the course of an investigation, but section 18(3) 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."

[101] Finally, I mention for completeness section 33 of the Act which creates offences under the Act. It states 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; or
>
> (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."

Section 33 creates special statutory summary offences for *inter alia* obstructing, hindering or resisting INDECOM or any person exercising INDECOM's functions under the Act, or failing to comply with any lawful requirement of INDECOM or any person

exercising INDECOM's functions under the Act without lawful justification or excuse. Persons guilty of those offences are liable to a fine, imprisonment or both fine and imprisonment. No argument was advanced before us in respect of section 33 and understandably so, since in my view, nothing turns on it for the purposes of this appeal. Section 33 creates special statutory summary offences. There is nothing in section 33 that gives INDECOM, the 1st respondent or his investigative staff the power to arrest, charge and prosecute offences created by that section.

The Police Public Complaints Act

[102] INDECOM's predecessor was the Police Public Complaints Authority established under the Police Public Complaints Act now repealed. It is indeed true that INDECOM as a body, has much wider investigative powers than the Police Public Complaints Authority, since INDECOM can investigate not only police officers but also certain public officials and public bodies, and can investigate property damage or abuse of the rights of a citizen without the direction or control of any other person or authority. While INDECOM has been given much more expansive investigative powers, the Police Public Complaints Authority was not expressly given the powers to arrest, charge or prosecute, but may have done so through the persons appointed under that body, who were in fact police officers.

Interpretation of the Act within its context

[103] It is clear from an analysis of the scope and context of the Act that as already stated, INDECOM, though a Commission of Parliament inclusive of the 1st respondent and his investigators, is not a juridical person. It is also evident that INDECOM has been

given expansive investigatory powers. However, based on an examination of the overall framework of the Act, I am of the view that INDECOM's object and purpose is to investigate. My view is strengthened when one examines the preamble to the Act (stated in paragraph [79] herein); the fact that the powers and functions which have been ascribed to INDECOM are all investigatory; and the fact that there is nothing in the Act from which any power to arrest, charge or prosecute can be gleaned.

[104] Section 17(10) of the Act is quite instructive. As indicated, it directs INDECOM to prepare reports, make recommendations and forward them to the list of persons stated in paragraph [96] herein. As a consequence, had there been an express recognition of the right of INDECOM, the 1st respondent and his investigative staff to arrest, charge and prosecute there would not have been any requirement for referral of reports to other bodies including the Commissioner of Police or the DPP. Indeed, 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] in construing INDECOM's primary purpose, and in particular section 17 of the Act, 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..."

[105] Additionally, as stated in paragraph [96] herein in relation to section 17 of the Act, paragraph [93] in relation to section 21 of the Act, and paragraphs [97] and [98] in relation section 23 of the Act, the powers ascribed to INDECOM are all within the context of an investigation, not outside it, and any interpretation of the Act cannot add words so as to extend and confer powers to INDECOM which are not expressly stated in the legislation. In fact, as indicated, in my view, the provisions contained in the Act, do not give INDECOM, the 1st respondent and his investigative staff the power to arrest, charge and prosecute, instead the Act directs that INDECOM should consult with, make and submit reports to a number of persons including the DPP and the Commissioner of Police and where a recommendation made by INDECOM has not been upheld, the only recourse by INDECOM is through Parliament.

[106] When one examines paragraph [100] herein which references the numerous sections in the Act wherein reports to and consultations with the DPP are required and specifically, section 25 of the Act, which places an obligation on INDECOM investigators to attend court and give assistance and support to the DPP if required, it is indeed evident that the DPP plays an important role in INDECOM's obligations under the statute. Indeed, once INDECOM makes a report, the DPP should also be furnished with a copy; INDECOM must consult with the DPP to hold mediation or alternative dispute resolution; and where it proposes to hold a hearing, it must consult with the DPP prior to commencement of such a hearing. I therefore find as erroneous the finding by Marsh J at paragraph [97] of the judgment in the court below, that section 25 of the Act is "unhelpful" in deciding any issues which arose in the instant case, and that of Fraser J

at paragraph [311] that that section is "unremarkable". Indeed, why would Parliament make the DPP's role crucial to the obligations INDECOM is required to perform under the Act if it was not Parliament's intent that the DPP would initiate and or undertake prosecutions?

[107] Sykes J at paragraph [266] of **Gerville Williams**, in my view, accurately summarised INDECOM's object and purpose as follows:

> "[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."

[108] In all the circumstances, there is no inherent inconsistency within section 20 of the Act, nor in my view, the scope of the Act on the whole, that conflicts with the natural and ordinary meaning of section 20 of the Act. The natural and ordinary meaning of the words stated in section 20 of the Act, does not grant INDECOM, the 1st respondent and his investigative staff the power to arrest, charge or prosecute but rather grants like powers, authorities and privileges of a constable which could facilitate INDECOM's investigative process as stated in sections 4, 13 and 14 of the Act. The learned judges of the Full Court went beyond the scope of the Act to ground a finding that pursuant to the Act, the 1st respondent and his investigative staff had the powers to arrest, charge and prosecute. The Full Court noted that it would lead to an absurdity if Parliament were to create an independent body and then rely on the police to effect

arrests and the DPP to initiate prosecutions. It must be remembered that the entities under scrutiny under the Act are not only the security forces but also public bodies. Further, there is in my view, no identifiable absurdity that would be created by establishing protocols between INDECOM and the Commissioner of Police to effect arrests, as is foreshadowed by section 22(1) and (2) of the Act. There is also no absurdity in allowing the DPP to perform her constitutional role with regard to initiating and or undertaking prosecutions, and after making a determination as to which matters to prosecute, based on reports submitted to her by INDECOM, pursuant to section 17 of the Act, make further determinations for discontinuing or continuing prosecutions as the case may be, pursuant to her obligations under the Constitution.

[109] While it is indeed true that INDECOM was created because the integrity of the Police Public Complaints Authority had been called into question as the public had lost confidence in its efficacy, no such allegation has been made against the DPP, the Commissioner of Police or their respective offices. As a consequence, it is my opinion, that when the Act is properly construed, it does not confer upon INDECOM, the 1st respondent and his investigative staff the power to arrest, charge or prosecute.

Issue 2: Use of parliamentary debates to aid in construction of the Act (grounds 1, 2 and 3)

[110] The general rule is that it is impermissible to look to reports of parliamentary debates that took place during the passage of an Act or Bill for assistance in construing that Act. However, the House of Lords in **Pepper v Hart**, recognized that notwithstanding this principle, where in the court's opinion the provisions of an Act are

ambiguous or obscure, or its literal meaning leads to an absurdity, the court may have regard to the official report or record of the parliamentary debates which is: (1) clear; (2) was made by or on behalf of the minister or other person who was the promoter of the Bill; and (3) discloses the mischief aimed at by the enactment or Parliament's legislative intention. An attorney-at-law would normally swear to an affidavit exhibiting the portions of the record of the debates upon which he intends to rely.

[111] The House of Lords in **Jackson and Others v The Attorney General**, **Harding v Wealands** and the Judicial Committee of the Privy Council in **Presidential Insurance Company Ltd v St Hill**, although criticising the speeches in **Pepper v Hart**, have recognized that as stated in **Pepper v Hart**, parliamentary debates may still be a useful aid in construction.

[112] As previously indicated in paragraph [108] herein, I am not of the view that the provisions in the Act are obscure, ambiguous or would lead to an absurdity if they are accorded their literal interpretation. Accordingly, it is my view, that this court ought not to have regard to the record of the parliamentary debates at the time the Bill was being debated, to aid in its construction.

Issue 3(i): The power to arrest (ground 4.2)

[113] The learned judges of the Full Court found that the 1st respondent and his investigative staff have the power to arrest both under common law and under the Act having been conferred with the powers of a constable. In order to ascertain whether such a finding is correct, one must assess the relevant principles related to the power of

arrest under statute and at common law, and ascertain whether such a power has indeed been accorded to the 1st respondent and his investigative staff by virtue of them having been given the **like** powers, authorities and privileges of a constable within the particular context of section 20 of the Act.

[114] Section 1(1) of the Constitution defines a police officer as "a member of the [JCF] or any force, by whatever name called, for the time being succeeding to the functions of the [JCF]". Pursuant to section 2 of the Interpretation Act, every officer and sub-officer of the JCF and all members of the Rural Police are "constables". An "officer" is defined in section 2 of the Constabulary Force Act as "all members of the [JCF] above the rank of Inspector", and "sub-officer" is defined as "all members of the [JCF] above the rank of [constable] and below that of [Assistant Superintendent]". Section 3(5) of the Constabulary Force Act gives every member of the JCF all the powers of a constable whether by virtue of the Act or common law. It stipulates that:

> "Every member of the Force shall have, in every parish of this Island, all powers which may lawfully be exercised by a Constable, whether such powers are conferred by this Act or otherwise."

[115] The specific list of duties and powers contained within the Constabulary Force Act are numerous and include the duty to keep watch by day and night, to preserve the peace and to detect crime (section 13); to search persons (section 17); to stop and search vehicles (section 19); to prevent congestion in the thoroughfare (section 20); and to control and regulate traffic (sections 21 and 22).

[116] Both private citizens and constables have the power to effect arrests, but the power to arrest given to constables by virtue of the Constabulary Force Act and common law, is much wider than the powers of arrest given to private citizens. The learned authors of Stair Memorial Encyclopaedia, 2nd reissue, paragraph 101 state that:

> "A private citizen is entitled to arrest without warrant for a serious crime he has witnessed and where the citizen has a 'moral certainty' that a crime has been committed. A private citizen may also become involved in arresting someone if he himself does not have the right but is assisting someone who has such a right, albeit that person is another private citizen or a police constable. Should the private citizen arrest anybody, he must hand him over to a police constable as soon as possible or else face the possibility of an action of damages for wrongful arrest. A private citizen does not have a right to arrest anyone for a statutory offence. The only parties who have such rights are police constables or other specified parties whose rights would be set out in the particular statute concerned."

[117] The 1st respondent and his investigative staff are not operating as private citizens who have witnessed a crime or can prove the same with certainty. They are conducting investigations pursuant to the Act based on complaints made, information garnered and records furnished. They have not been given the statutory authority to effect arrests as private citizens under the Act. As a consequence, therefore, the power of arrest that the 1st respondent and his investigative staff are intending to exercise must be derived from other statute or the common law.

[118] A constable may arrest any person with or without a warrant for any offence. The general power to arrest is found in section 13 of the Constabulary Force Act which gives constables the power to:

> "...detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable..."

[119] Section 15 of the Constabulary Force Act gives constables the powers to apprehend without warrant:

> "...any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law, or grant that person bail in accordance with the Bail Act."

[120] The learned editors of Halsbury's Laws of England, Volume 84A (2013), in summarising the instances in which a constable may arrest without a warrant, stated at paragraph 487 that a constable may arrest without a warrant:

> "(1) anyone who is about to commit an offence;
> (2) anyone who is in the act of committing an offence;
> (3) anyone whom he has reasonable grounds for suspecting to be about to commit an offence; and
> (4) anyone whom he has reasonable grounds for suspecting to be committing an offence."

[121] Section 16 of the Constabulary Force Act empowers a constable to execute any warrant lawfully issued by a Justice of the Peace on any person charged with a criminal offence.

[122] Section 20 of the Act gives the 1st respondent and his investigative staff the **"like** powers, authorities and privileges" (emphasis supplied) of a constable for the purpose of giving effect to sections 4, 13 and 14 of the Act. In my view, the 1st respondent and his investigative staff cannot fit within the definition of a "constable" or a "police officer" as they are not members of the JCF or any other force, nor do they hold any rank. As indicated, sections 4, 13 and 14 of the Act speak to the vast investigatory powers that the 1st respondent and his investigative staff possess. The 1st respondent and his investigative staff have been given the "**like**" powers of a constable to facilitate performance of their functions under sections 4, 13 and 14 of the Act, and as a consequence, they are not police officers nor do they possess "**all**" the powers of police officers for all intents and purposes. The duties which INDECOM must perform are all in relation to its statutory obligation to investigate. There are no provisions in the Act which empower the 1st respondent and his investigative staff to keep watch by day and night; to preserve the peace; to search persons; to stop and search vehicles; to prevent congestion in the thoroughfare; and to control and regulate traffic.

[123] I must therefore also reject the submissions by learned counsel for the 2nd respondent that by using the word "**like**" the intention of Parliament must have been to give the 1st respondent and his investigative staff "**all**" the powers of a constable, because it is clear that the word "**like**" cannot mean "**all**". My position is further strengthened when one compares the Act with its equivalent in the United Kingdom, the Police Reform Act 2002, which provides at section 19(7) that references to the "power and privileges of a constable":

> "(a) are references to **any** power or privilege conferred by or under any enactment (including the one passed after the passing of this Act) on a constable; and
>
> (b) shall have effect as **if every such power were exercisable, any every such privilege existed**, throughout England and Wales and the adjacent United Kingdom waters (whether or not that is the case apart from this sub-paragraph)." (Emphasis supplied)

[124] In fact, Fraser J at paragraph [279] of the Full Court's judgment, had indicated that he took judicial notice of the fact that under the Customs Act, customs officers often act in concert with members of the police force, which he stated did not detract from the reality or the extent of the powers of a police officer conferred by the Constabulary Force Act. He however concluded that by parity of reasoning, given the wider investigative powers conferred by the Act, compared to the Customs Act, a greater need existed than in the case of the Customs Act, for wide powers including the power of arrest to be conferred on the 1st respondent and his investigative staff. However, such a finding is in my view erroneous since there are stark differences between the Customs Act and the Act. Section 3 of the Customs Act states that:

> "For the purpose of carrying out the provisions of the customs laws **all officers shall have the same powers, authorities and privileges as are given by law to officers of the Constabulary Force**." (Emphasis supplied)

"Officer" in the Customs Act are defined in section 2 to include:

> "any person employed in the Department of Customs and Excise, the Revenue Protection Division of the Ministry of Finance and **all officers of the Constabulary Force**, as well as any person acting in the aid of any officer or any such person; and any person acting in the aid of an officer acting in the execution of his office or duty shall be deemed

> to be an officer acting in the execution of his office or duty." (Emphasis supplied)

The power to arrest, charge and prosecute is specifically conferred upon officers under the Customs Act. Section 238 states:

> "In addition to any other power of arrest or detention conferred by the customs laws, **any officer may arrest and detain any person whom he finds committing an offence against the customs laws, and take him before a Justice to be dealt with according to law**." (Emphasis supplied)

Section 240 (1) provides that:

> "Subject to the express provisions of the customs laws, any offences under the customs laws **may be prosecuted**, and any penalty or forfeiture imposed by the customs laws may be sued for, prosecuted and recovered summarily, and all rents, charges, expenses and duties, and all other sums of money whatsoever payable under the customs laws may be recovered and enforced in a summary manner on the complaint of any officer." (Emphasis supplied)

Section 246 states:

> "**Any officer may prosecute and conduct any information prosecute or other proceeding under the customs laws in respect of any offence or penalty**." (Emphasis supplied)

[125] In my view, it is not always helpful to use other legislation whether from the same or from different jurisdictions to aid in construction of a particular statute, and one must take care to examine the provisions related to the establishment of the particular public body, under the specific piece of legislation, and the statutory obligations imposed on it, as there may be substantial differences. The reference to "**any**" power or privilege of a constable under the UK Act being conferred is entirely

different from the "**like**" powers of a constable referable to similar provisions under the Act. Additionally, under the Customs Act, any person employed in the department of customs, *inter alia*, is deemed to be an "officer" upon whom the power to arrest, charge and prosecute are expressly given. Accordingly, the learned judges of the Full Court erred when they found that the 1st respondent and his investigative staff had the power to arrest by virtue of them having been conferred with the "**like** powers, authorities and privileges" of a constable under section 20 of the Act, since that section when properly construed bearing in mind its specific reference to investigations under sections 4, 13 and 14 of the Act does not give them the power to arrest. Additionally, no such power can be derived from the Constabulary Force Act, as the 1st respondent and his investigative staff are not police officers or constables within the meaning of the Constabulary Force Act, the Interpretation Act or the Constitution.

[126] Having found that the 1st respondent and his investigative staff have no power of arrest by virtue of being a constable under the Constitution, the Interpretation Act or the Constabulary Force Act, nor are they so empowered by those instruments as private citizens, the next question therefore, is whether the power of arrest has been conferred upon the 1st respondent and his investigative staff as private citizens at common law.

[127] In **Dallison v Caffery**, Caffery, a detective constable, arrested and charged Dallison with breaking and entering a solicitor's office and stealing £173 on 9 April 1959, contrary to the Larceny Act of 1916. He was arrested and charged based on a complaint made by Miss Janet Phillips, a shorthand typist at the office, who stated that she had placed £173 in a safe at the attorney's office, closed the safe but had not

locked it. Sometime after, she saw Dallison, and when she enquired whether he needed help and he replied that he had the wrong office. She thereafter went to the office where she had placed the money in the safe, and saw the safe was open and the money missing. She informed the police, including Caffery, of what had occurred and gave a description of the man whom she had seen. She had pointed out Dallison's photograph twice from a list of 10 photographs of persons matching the description she had given before to Constable Caffery. She also positively identified Dallison at an identification parade. Dallison was arrested and charged for larceny, but was later acquitted after a prosecutor offered no evidence against him citing the fact that the instant case might have been one of mistaken identity.

[128] Dallison thereafter filed a writ for false imprisonment and malicious prosecution against Caffery. At a trial before a jury, the jury concluded that Miss Phillips had given a positive identification of Dallison and so the judge ordered that there was no case to be left to the jury, and directed that judgment should be entered for Caffery. Dallison appealed to the Court of Appeal asking for a new trial on the grounds that there were no reasonable grounds for arresting him on Miss Phillips' identification, and that Caffery had acted unreasonably after he was arrested because he detained him for an unusually long period of time before charging him. However, his appeal was dismissed on the basis that there had been no false imprisonment since Caffery had shown that when he made the arrest he had reasonable cause, based on credible information he had received, for suspecting that Dallison had committed a felony, and as a police

officer, Caffery had acted reasonably in arresting Dallison to make enquiries and searches. Lord Denning MR said at page 366-367:

> "So far as arrest is concerned, a constable has long had more power than a private person. If a constable makes an arrest without a warrant, he can justify it on the ground that he had reasonable cause for suspecting that the accused had committed a felony. He does not have to go further **(as a private person has to do)** and prove that a felony has in fact been committed. So far as custody is concerned, a constable also has extra powers. If a private person arrests a man on suspicion of having committed a felony, he cannot take the man round the town seeking evidence against him: see Hall v. Booth [(1834) 3 Nev. & M.K.B. 316]. The private person must, as soon as he reasonably can, hand the man over to a constable or take him to the police station or take him before a magistrate; but so long as he does so within a reasonable time, he is not to be criticised because he holds the man for a while to consider the position: see John Lewis & Co. Ltd. v. Tims [1952] AC 676]. A constable, however, has a greater power. When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says he was working, for there he may find persons to confirm or refute his alibi. The constable can put him up on an identification parade to see if he is picked out by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. By which I mean, of course, justice not only to the man himself but also to the community at large. The measures must, however, be reasonable." (Emphasis supplied)

Lord Diplock at page 370-371 said:

> "The rule that a person who arrests, detains or prosecutes a suspected felon commits no actionable wrong if he acts honestly and reasonably applies alike to private persons and

> to police officers, but what is reasonable conduct in the circumstances may differ according to whether the arrestor is a private person or a police officer. **One difference, too well settled now by authority to be altered, is that a private person can only arrest if a felony has in fact been committed, whereas a police officer can do so if he reasonably believes that a felony has been committed**; but this, together with the distinction between felony and misdemeanour, is, I believe, the only respect in which the common law has become fossilised. In all others the rule of reasonableness applies. Where a felony has been committed, a person, whether or not he is a police officer, acts reasonably in making an arrest without a warrant if the facts which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. This is what constitutes in law reasonable and probable cause for the arrest. Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest. The trespass by the arrestor continues so long as he retains custody of the arrested person, and he must justify the continuance of his custody by showing that it was reasonable." (Emphasis supplied)

[129] Thus it seems clear that the power to arrest without warrant by a private citizen in relation to any felony can occur in circumstances where the private citizen can prove that a felony has in fact been committed. The constable can arrest, even during the investigation on reasonable cause for suspecting that a felony has been committed.

[130] The Judicial Committee of the Privy Council has recognized however in **Shaaban Bin Hussien and Others v Chong Fook Kam and Another** [1970] AC 942, that the power of arrest can be an important component to an investigation. In that case, the Board had to consider, *inter alia*, whether there was good reason to suspect that either appellant was the driver of a lorry from which timber fell onto a car killing a passenger

in a motor car travelling behind it. In finding that there were good reasons for such suspicions, Lord Devlin on behalf of the Board said at page 948:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control."

[131] This case appears to endorse the position stated in paragraph [129] herein but also indicates that it is more desirable for police officers to effect arrests after the investigation has been completed. So, pursuant to the statutory regime established under the Act, the decision as to whether to effect arrests ought to be a matter for the police based on INDECOM's recommendation after INDECOM has completed its investigation.

[132] The House of Lords in **Holgate-Mohammed v Duke** also recognised that an arrest can be made by a police officer during the course of an investigation. In that case a detective constable arrested the appellant on suspicion that she had stolen

jewellery. She was taken to the police station and questioned. She was released after being detained for six hours without being charged. The appellant brought an action against the chief constable for damages for wrongful arrest. The judge at first instance found that the constable had reasonable grounds for suspecting that the appellant had committed an arrestable offence but nonetheless found that exercise of the power to arrest was wrongfully exercised because she was not cautioned during the interview. The chief constable's appeal to the Court of Appeal was allowed, and the decision of the Court of Appeal was affirmed by the House of Lords which held that since an arrestable offence had been committed and the constable had reasonable cause to suspect that Mrs Holgate-Mohammed was guilty of the offence, he was entitled to arrest her to facilitate an interrogation to either confirm his suspicions by a confession, or in the alternative, to dispel his reasonable suspicions. Lord Diplock at page 445 said:

> "My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The members of the organised police forces of the country have, since the mid-19th century, been charged with the duty of taking the first steps to promote the latter public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the persons they suspect of being the perpetrators as would justify charging them with the relevant offence before a magistrates' court with a view to their committal for trial for it."

[133] In the instant case, on appeal, counsel for the 1st respondent and that of the 2nd respondent and the DPP (as already indicated, having effected a complete *volte face* in respect of their arguments in the court below) all accepted the Full Court's reasoning

that it would be absurd for the 1st respondent and his investigative staff to conduct investigations and then turn over the information obtained in relation thereof to the police to effect arrests. I must say that in my view there is nothing absurd about such a proposition, bearing in mind that investigations over which INDECOM has complete authority do not relate to the security forces alone. **O'Hara v Chief Constable**, was a case in which the appellant was arrested by a constable on suspicion of having been a terrorist based on information the officer had received from his superior officer at a briefing, but was released two weeks later without charge. He subsequently brought a claim for wrongful arrest which was refused by the first instance court and the Court of Appeal. The appeal to the House of Lords was also dismissed on the basis that *inter alia*, it was indeed probable that a person can be arrested by a constable based on what he has been told. Indeed, Lord Hope of Craighead stated at page 139 that:

> "It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."

[134] As indicated previously, in the case of the private citizen, information obtained by what he had been told would not be sufficient for the arrest of anyone by him.

Therefore, the 1st respondent and his investigative staff ought not to be effecting arrests, as private citizens, based on information they received pursuant to their powers under the Act, arising from an incident or a complaint under the Act.

[135] From an overall examination of these cases, it is evident that courts have accepted that the power to arrest with or without a warrant and during the course of an investigation is an important one. However, these powers have been utilized in the main, and examined in most cases at common law in respect of persons who have been appointed as police officers or constables. As indicated, the 1st respondent and his investigative staff are not police officers and have not been appointed as such within the meaning of the Act or as contained in section 1(1) of the Constitution, nor are they police officers or constables within the meaning of the Interpretation Act or the Constabulary Force Act.

[136] I must also say that section 13(3)(a) of the Constitution guarantees every citizen the right to liberty. Lord Browne-Wilkinson in **Regina v Secretary of State for The Home Department, Ex parte Pierson** [1998] AC 539, at page 575 cited a general principle that "basic rights are not to be overridden by general words of a statute since the presumption is against the impairment of such basic rights". Indeed he continued at page 575:

> "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

[137] Thus, if Parliament had intended to legislate to give the 1st respondent and his investigative staff the power to deprive a citizen of his liberty, that intention ought to have been specifically stated. Indeed, under the Custom's Act, as already stated, customs officers, are specifically given the power to effect arrests. Although I acknowledge that private citizens do have the power to arrest, this is limited to instances where they actually witness the crime and moreover, INDECOM cannot assert its rights as a private citizen, since the powers it purports to exercise are conferred by statute. In fact, the 1st respondent and his investigators would be powerless to pursue any arrest in their capacity as private citizens without the vast authority given to them under the provisions of the Act to obtain information and records and take control of incident scenes *inter alia* in the conduct of their investigations. If they were to effect arrests as private citizens they would be doing so without the protection of the Act and based on information received and not based on any moral certainty which runs contrary to the principles surrounding arrests by private citizens at common law. Consequently, the common law powers of arrest and also the statutory powers to effect arrests, cannot be ascribed to the 1st respondent and his investigative staff and the Full Court's finding in that regard is erroneous.

Issue 3(ii): The power to charge and prosecute (ground 4.3)

[138] As indicated previously, in my view, the Act does not confer the power to charge and prosecute on INDECOM, the 1st respondent and his investigative staff. INDECOM is only empowered to investigate, report and make recommendations. It must rely on the DPP and the police to initiate and undertake prosecutions, as the power to do so is not

granted to the 1st respondent and its investigative staff when the Act is properly construed, and when one examines INDECOM's objects and purposes. While it is my view that the powers of the 1st respondent and his investigative staff have not been expressly extended by statute beyond the investigative process, this court must ultimately decide whether the power to charge and prosecute can indeed otherwise be exercised by the 1st respondent and his investigative staff.

[139] It is true that at common law constables have the power to charge and prosecute. This right is also expressly recognised in section 36 of the Constabulary Force Act. Although that section restricts the prosecution of matters, that is, the right to appear in court to officers (JCF members above the rank of Inspector), Inspectors or Sergeants, it nonetheless refers to the right to initiate the process having been undertaken by any member of the force. Although the Interpretation Act stipulates that all members of the JCF are "constables" and by virtue of section 3(5) of the Constabulary Force Act all members of the JCF have all the powers of a constable at common law or otherwise, INDECOM is not a member of the JCF nor is it guided by the ranks and other stipulations in the Constabulary Force Act. Further, as already indicated, the 1st respondent and its investigative staff do not have "**all**" the powers of a constable under the Constabulary Force Act, but only those like powers which as previously stated have been specifically expressed in the Act (see paragraph [122]-[125] herein). Accordingly, INDECOM cannot rely on the power given to constables to charge and prosecute under the Constabulary Force Act.

[140] I must now assess whether the power to charge and prosecute is given to the 1st respondent and his investigative staff at common law, bearing in mind that INDECOM is a Commission of Parliament established under the Act and cannot act on its own.

[141] It is indeed true that any person may lay an information charging someone with an offence, unless statute expressly or by implication restricts the power to charge, or where there can be no prosecution except by or with the consent of some specified authority. This was seen in **Snodgrass v Topping** (1952) 116 JP 332 where Snodgrass laid an information charging Topping with selling milk that was deficient in fat contrary to section 3 of the United Kingdom Food and Drugs Act, 1938. Snodgrass was the chief sanitary inspector and the purchaser of the milk. The justices dismissed the information on the basis that the chief inspector had no power to prosecute. The learned judges in the Queen's Bench Division found that the justices were wrong since the statute contained no limitation whatsoever on the common law right of any person to take proceedings if an offence has been committed, regardless of whether he is an aggrieved person. In the instant case however, in my view, there is a limitation on the common law right to prosecute, as the Act, as previously indicated imbues INDECOM, the 1st respondent and his investigative staff with wide powers to conduct investigations **only** and thus, by its detailed provisions, set out and referred to in paragraphs [77]-[109] herein, impliedly restricts the right of the 1st respondent and his investigative staff from initiating and pursing prosecutions as their role is to have consultations, complete their investigations and submit reports to the persons named in the Act.

[142] Nonetheless, I accept that there is a common law right available to private citizens and persons holding the office of constable to prosecute. A modern statement of this general principle can be found in **Gouriet v Union of Post Office Workers** where Lord Diplock said at page 97:

> "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 [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."

[143] Much reliance has been placed on the authority of **Chokolingo** by counsel for the respondents and the DPP. However, in that case, the Trinidadian Court of Appeal does no more than reiterate the common law position that any person or a public body may initiate and conduct criminal prosecutions unless the right to do so was expressly or impliedly restricted. Indeed, Sir Isaac Hyatali CJ, in adopting the decision of the House of Lords in **Ashbury Railway Carriage and Iron Company Limited v Riche** [1874-80] All ER Rep Ext 2219 said that "the settled principle in this regard is that what a statute does not expressly or impliedly authorise is to be taken as forbidden". In **Chokolingo**, the law society was incorporated by the Trinidad and Tobago Law Society

(Incorporation) Act 1969 which endowed the law society with the right to sue and be sued in its corporate name. Their objects were prescribed as:

> "(a) to support and protect the character, status and interest of the legal profession generally and particularly of solicitors practising within Trinidad and Tobago...
>
> (c) to consider all questions affecting the interests of the legal profession and to initiate and watch over and, if necessary, to petition the Parliament of this country or promote deputations in relation to general measures affecting the profession, and to procure changes of law or practice and the promotion of improvements in the principles and administration of the law."

So the law society could sue in protection of its own interest. Hassanali J, whose judgment was upheld on appeal, found that the:

> "course and administration of justice was manifestly an interest of the legal profession, and that the law society, in initiating the proceedings, was projecting and supporting the interests of the legal profession, since it sought to have the court investigate and deal with an alleged interference with or obstruction of the administration of justice..."

The law society had instituted proceedings against Chokolingo and the editor of a weekly newspaper as they had published a scandalous and scurrilous article referring to the acceptance of bribes by the judiciary. As already indicated, INDECOM has no right to sue or be sued in its name.

[144] In **R (on the application of Ewing) v Davis** [2007] EWHC 1730, there was a dispute between householders whose property was accessed by a particular road and the owners of the land on which the road ran. As a result of this property dispute, two persons became embroiled in a personal dispute. One of them, Mr H laid four informations against the other, Mr D, charging him with four criminal offences including

using threatening, abusive or insulting words and for harassment. These offences were to be prosecuted by the complainant's (Mr H's) representative, Mr Terence Patrick Ewing. The judge in the Magistrate's Court ruled that the informations were invalid and that the court had no jurisdiction to hear the matter, since Mr Ewing was a third party and was not aggrieved, and so had no locus standi, and moreover, the 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.

[145] The question therefore before the Queen's Bench Division on appeal was whether that ruling was correct. Mitting J found that the informations had been properly laid and that the matter should proceed to a hearing. He made this finding after analysing four cases, namely: **Cole v Coulton** (1860) 24 JP 596; **Back v Homes** [1887] 51 JP 693; **Giebler v Manning**; and **Lake v Smith** (1911) 10 LGR 218, but those were cases in which issues had been raised as to whether local bodies, the police, or any other private person had the right to bring a private prosecution. In all those cases, the court found that such an authority existed. Mitting J then said at paragraph [21]:

> "As I have demonstrated in my analysis of the Victorian authorities, there never was any requirement that a private prosecutor had to demonstrate that it was in the public interest that he should bring a prosecution for an offence against the provision of a public general act... The public interest is established by the nature of the offence created by the statute not by the circumstances alleged or by the relation of the prosecutor to them."

He continued at paragraph [23] to state 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."

[146] However, these cases related to matters in which a general public act authorised the laying of prosecutions. 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). Although Mitting J said limitations on the right to prosecute was for Parliament to enact and not for the courts by decision to achieve, nonetheless the case also recognised that there may be limitations contained within the said general public act itself.

[147] Various authorities stipulate that such limitations may be expressly stated or implied. I intend to canvass some of these cases.

[148] In the case of **Broadmoor**, Broadmoor is a special hospital which provides for the detention of violent, mentally ill persons. Robinson was a patient at the hospital

who suffered from paranoid schizophrenia and was detained there because he killed an occupational therapist while undergoing treatment for his mental illness. He wrote a book and sought to print and publish it. The hospital wanted to restrict the print and publication of the book because it *inter alia*, detailed how Robinson killed his victim and his justification for so doing; to prevent distress to the victim's family; and to protect the history of other patients. The hospital sought the assistance of the Attorney-General to institute proceedings but it declined, and so Broadmoor filed a claim seeking *inter alia*, an injunction restraining publication of the book and it being disseminated to anyone other than those persons named in section 134(3) of the UK Mental Health Act 1983. An ex parte order was made granting the injunctions sought which was continued by successive judges. However, after hearing arguments from both parties, Poole J *inter alia*, discharged it and struck out paragraph 7 in the statement of case which alleged that the hospital had the power to make the application as in his view, the application disclosed no reasonable cause of action.

[149] The hospital's appeal was dismissed by the Court of Appeal, because in the view of the majority of the Court of Appeal while a public body which is required to exercise a statutory responsibility in the public interest could, in the absence of implication to the contrary in the statute, institute legal proceedings, the hospital had no authority to bring proceedings to protect other patients' rights to privacy or confidence, or to prevent distress to the victims family unless the conduct complained of interfered with the performance of the authority's duties. Lord Woolf MR opined that:

> "25. ...A statute can expressly authorise a public body to bring proceedings for an injunction to support the criminal law... In relation to many statutory functions the power to bring proceedings can be implicit. The statutes only rarely provide expressly that a particular public body may institute proceedings in protection of specific public interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions... I would therefore summarise the position by stating that if a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the courts should grant such an application when 'it appears to the court to be just and convenient to do so'."

Lord Woolf MR continued:

> "30. ...To protect other patients, the authority have to rely on the interference which the conduct of which complaint is made would have on the performance of their duties. In particular, the duty of the authority to maintain security, order and a therapeutic environment within the hospital. The position is the same with regard to the family of the defendant's victim. Naturally, the court would wish to protect them from being caused further distress. But regrettably I do not consider that the courts here can help in proceedings brought by the authority. The powers and responsibility of the authority do not extend to providing the protection the family would like unless the conduct complained of affects the authority's responsibilities within the hospital.
>
> 31. As far as jurisdiction is concerned therefore, I regard the court as being able on the application of the authority to grant an injunction if the grant of that injunction is justified in order to enable the authority to perform its statutory responsibilities. It must however be recognised that primarily these responsibilities relate to what happens within the hospital. Conduct outside the hospital can affect what

> happens within the hospital and if this is so *jurisdiction* exists in the court to provide protection by injunction."

[150] **Broadmoor** can be distinguished from the instant case only to the extent that the instant case is not one where INDECOM, a Commission of Parliament without separate legal personality, has been given the responsibility to perform public functions, in a particular area of activity, that would require the assistance of the court to perform those functions. In fact, it cannot act on its own, and prosecution of criminal offences is neither crucial nor essential to INDECOM's responsibility to investigate. Furthermore, prosecution of offences is not one of the functions that INDECOM is required to perform. Any criminal proceedings done in the public interest cannot be implied as necessary to protect INDECOM's special interests in the performance of its functions as an independent investigative body. The principles gleaned therefore from **Broadmoor** are not only apt but applicable to the instant case. Additionally, as already stated, there has been a limitation on that common law right to prosecute in the Act that established INDECOM.

[151] The principles stated in **Broadmoor** were cited with approval by the United Kingdom Supreme Court in **R v Rollins**. In that case, an issue arose as to whether the United Kingdom Financial Services Authority (FSA) had the power to prosecute the offences of money laundering contrary to sections 327 and 328 of the Proceeds of Crime Act 2002 (POCA). This became an issue because the appellant had contended that the FSA's powers to prosecute were limited to offences referred to in sections 401 and 402 of the Financial Services and Markets Act 2000 as amended (FSMA), which did

not include POCA offences. At a preparatory hearing under the Criminal Procedure and Investigations Act 1996 the court at first instance ruled that the FSA had the power to prosecute money laundering offences and the Court of Appeal upheld this finding.

[152] The appeal to the United Kingdom Supreme Court was dismissed as that court found that the FSA had the power of a private individual to prosecute since prior to the enactment of the FSMA, the FSA had the power to prosecute money laundering offences generally, provided that the prosecution fell within the scope of its objects and powers and the prosecution was not precluded or restricted by the terms of the relevant statute. In construing sections 401 and 402 of the FSMA, Sir John Dyson SCJ, in delivering the judgment of the court, noted that:

> [11] ...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...
>
> [15] Section 401 deals with the prosecution of offences under FSMA itself or any subordinate legislation made under it. Section 401(2) provides that proceedings for such an offence may be instituted in England and Wales only by the FSA or the Secretary of State or by or with the consent of the Director of Public Prosecutions. We agree with the Court of Appeal that the purpose of this provision is not to confer the power to prosecute, but to limit the persons who may prosecute for such offences. If the statute had not specified who could prosecute, then any individual could have prosecuted as could any corporate body, provided that it was authorised by its constitution to do so.

[153] In deciding whether the FSA was authorised to do so the learned judge examined its objects, functions and powers. He indicated that:

"[17] Before we turn to the detail of s 402, it is legitimate to ask why Parliament should have intended to deprive the FSA (but no-one else) of the power it previously enjoyed to bring prosecutions for offences other than those mentioned in ss 401 and 402. Mr Miskin was unable to identify any policy reason why Parliament should have intended to do this. No mischief has been identified which required such action. Far from there being any reason why Parliament would have intended to remove from the FSA a power to prosecute which it previously enjoyed, there are reasons internal to FSMA itself which suggest that Parliament would not have intended to deprive the FSA of the power to prosecute for offences of financial crime (of which ss 327 and 328 of POCA are examples). One of the functions of the FSA is, so far as is reasonably practicable, to act in a way which it considers most appropriate for the purpose of meeting the regulatory objectives which include the reduction of financial crime: see s 2 of FSMA. One of the ways that the FSA might reasonably consider that this objective can be met is by prosecuting those who commit offences of a financial nature. It would have been perverse of Parliament to impose on the FSA the general duties set out in s 2 of FSMA and yet at the same time deprive it of the power it previously enjoyed to prosecute financial offences. It would have been even more perverse not to remove the power to bring prosecutions for offences (other than those under FSMA and its subordinate legislation itself) from anyone else, including private individuals. It is most unlikely that Parliament would have intended to create such a regime."

[18] Further, if the power of the FSA is limited to the prosecution of offences under ss 401 and 402 then, as Mr Perry QC points out, there are consequences which it is unlikely that Parliament intended. For example, it means that, if in the course of its investigations, the FSA discovers evidence which would support a prosecution under s 401 or 402 of FSMA *and* a prosecution for other offences, it has to refer the question whether to prosecute those other offences to the DPP. This is a most inefficient and unsatisfactory way of prosecuting crime. It also means that, if the evidence given at trial does not support a count on the indictment which is being prosecuted by the FSA, but it does support a different offence which ex hypothesi the FSA cannot

> prosecute, an application for leave to amend the indictment to add a new count to reflect the evidence cannot be made by the FSA, even though a prosecutor would ordinarily make such an application. Parliament cannot have intended to create such an absurd state of affairs. Finally, it also means that the FSA cannot prosecute an offence of conspiracy to commit offences under FSMA, since the offence of conspiracy, whether under s 1 of the Criminal Law Act 1977 or at common law, falls outside the powers of prosecution expressly conferred by ss 401 and 402..."

[154] The learned judge also noted that in all the circumstances it is unlikely that Parliament intended to restrict the power of the FSA to prosecute offences only to those under sections 401 and 402 of POCA. He further indicated that:

> "[20] The technique usually employed by the legislature to indicate an intention to limit the class of persons who may prosecute a particular offence is the obvious one of stating expressly that a particular offence may only be prosecuted by a specified person or persons. That is the technique that was employed in s 401(2). It is striking that it was not employed in s 402(1). Other forms of words are sometimes used, but to the same effect... There is no such provision in FSMA excluding the power of the FSA to prosecute offences which are not mentioned in s 401 or 402."

[155] Sir John Dyson SCJ indicated that in construing whether the power to prosecute fell within the objects and purpose of the FSA regard must be had to the scope of its objects; its functions; an interpretation of the overall context of the FSMA and other related and relevant legislation. The learned judge noted at paragraphs [11]-[14] of his judgment that before the enactment of the FSMA, the FSA always had the power of a private individual to bring any prosecution, subject to statutory restrictions and conditions, provided that it was permitted to do so in its memorandum and articles of association. The FSA was given this power in clause 3(b) of the April 2000 version of

the FSA's memorandum and articles of association, namely to specifically give the FSA the power "to institute legal or arbitration proceedings or itself to establish and operate procedures for the settlement of disputes".

[156] The instant case is similar to **Rollins** as the Act does not confer on INDECOM the power to prosecute. Indeed, there is no expressed statement that only certain persons can prosecute offences either. In my view, it is clearly implied that members of the police force and the DPP will lay charges and prosecute offences referred to in the Act. The instant case can however be distinguished from **Rollins** as there was no public body, previously existing, which hithertofore had the power to prosecute the offences stated therein. INDECOM's predecessor, the Police Complaints Authority was not expressly given that power. As a consequence, INDECOM had no right to initiate private prosecutions which was being removed, which had existed in the past, and it was not a public body which was being deprived of any rights that they had previously enjoyed. Additionally, as already stated, the purpose, object and function of INDECOM by virtue of the Act was not to prosecute. It is an investigative Commission of Parliament with wide powers of investigation. It also cannot be said, in my view, that it would be absurd for members of the police force and the DPP to initiate, conduct and continue prosecution of criminal offences based on receipt of reports from INDECOM subsequent to completion of their investigation.

[157] In **Regina (Hunt) v Criminal Cases Review Commission**, an appeal was filed challenging a conviction for conspiring to cheat the public revenue. The case was prosecuted at first instance by the Inland Revenue and not the DPP and so the

applicant appealed on the basis that the prosecution ought to have been brought by the DPP as the relevant Commissioner had no statutory power to conduct a prosecution on the Crown's behalf without the consent of the Attorney General. The Court of Appeal dismissed the appeal because it found that the Inland Revenue Commissioners always had the power to pursue prosecutions in court. Lord Woolf CJ at paragraph 20 noted that if the Inland Revenue had been precluded from prosecuting as the appellant had suggested then:

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

[158] In the instant case, there is no evidence that INDECOM was in a peculiarly advantageous position to prosecute any person charged with any criminal offence. As stated previously, there was never any general position that INDECOM could prosecute, and in my view, the Act makes this abundantly clear. There was also no such position in respect of its predecessor, the Police Public Complaints Authority.

[159] **Gujra** related to the decision of the DPP to take over a case instituted by a private prosecutor to discontinue it. In that case, Mr Gujra had instituted two private prosecutions, and the DPP acting by the Crown Prosecution Service in the UK, had

taken over and discontinued those proceedings, as in his view on the basis of the Code under the Act, the evidence adduced in support of the prosecutions, would not result in a reasonable prospect of conviction; in that it seemed more likely that there would be an acquittal rather than a conviction. Mr Gujra applied for judicial review of this decision on the basis that that test under the Code was unlawful, as the right to initiate and conduct a private prosecution would have been so substantially reduced as to have been emasculated, and sought an order that the DPP's decision be quashed. The Divisional Court of the Queen's Bench Division dismissed Mr Gujra's application and he was granted permission to appeal to the United Kingdom Supreme Court.

[160] His main argument before the Supreme Court was that the DPP's actions were unlawful because in taking over and discontinuing the prosecutions, his statutory right as a private citizen to bring a private prosecution had been restricted. It was held by a majority that the DPP's actions were not unreasonable or unlawful. The Supreme Court noted that the UK Parliament had reaffirmed the right of citizens to institute and undertake private prosecutions in section 6 of the Prosecution of Offences Act 1985. The court accepted that public and private bodies could bring private prosecutions. However, it noted that in making his determination, the DPP was correct to consider whether the prosecution was likely to result in a conviction. Despite the DPP's wide discretion whether to take over or discontinue private prosecutions, Lord Neuberger of Abbotsbury PSC said at paragraph 60:

> "...in any case where the Director has not got round to deciding whether to prosecute, or has considered the facts and has decided not to prosecute, a private prosecution

> could be initiated. If that prosecution comes to the Director's attention, he will then have to assess, or, if he has already done so, to reassess, whether there is a better than even prospect of the prosecution succeeding, and whether it is in the public interest that it proceed: if both those tests are satisfied, the prosecution will be permitted to proceed (either because the Director takes it over or as a private prosecution). That, of itself, gives the right to initiate private prosecutions an undoubted, indeed a virtually unlimited, function."

It was not an issue in this case as to whether a private prosecutor could prosecute, but whether the actions of the DPP to discontinue the prosecution, was reasonable given the facts of the case, and the manner in which the Code for Crown Prosecution ought to be interpreted.

[161] Section 94(3) of the Constitution preserves the position that the DPP can continue a prosecution or can terminate the same if in her discretion she deems it fit to do so, which presumes that prosecutions may be initiated otherwise than by the DPP. In the instant case, it appears to me that the 1st respondent and his investigative staff are purporting to exercise the power to prosecute: (i) as private citizens; (ii) by utilising "all the powers of a constable" which they claim have been conferred on them under the Act (section 20); and/or (iii) by virtue of INDECOM being a public body. However, as I have already stated, INDECOM is a Commission of Parliament created under the Act and not a public body with a separate legal identity and therefore cannot pursue prosecutions. Additionally, as already indicated, the Act has established a new regime and does not expressly or impliedly empower the 1st respondent and his investigative staff with the power to effect prosecutions. Section 20 of the Act certainly does not do so. The power to prosecute is not within INDECOM's objects, intents and purposes

under the Act. In my view, the 1st respondent and his investigative staff are purporting to exercise the power to prosecute as private citizens utilising the powers they claim have been given to them under the Act. They cannot in my view aver that they are pursing the power to prosecute at common law, by claiming that they are effecting their right to prosecute as private citizens or public bodies, when they are able to do so only by utilising the vast investigative powers they have been given under the Act. I find that approach entirely untenable and unacceptable.

[162] In **R v Zinga**, Virgin Media Ltd (Virgin) provided cable, telephone and broadband services to customers in the UK. Munaf Ahment Zinga and his associates had set up cable boxes with the appropriate software which enabled those not subscribed to premium services to obtain them without payment to Virgin. Virgin initiated a private prosecution against Zinga for the offence of conspiracy to defraud and with the assistance of the police, secured arrests and obtained search warrants. The appellant and another person were convicted and sentenced to eight years imprisonment. The appeal against that conviction was dismissed. Virgin began confiscation proceedings under the provisions of the UK Proceeds of Crime Act 2002 (POCA). Virgin also sought compensation in the sum of £26,600,000.00 claiming that it had lost £380,000,000.00. Virgin later abandoned its claim for compensation and pursued solely the proceedings for confiscation which would inure to the benefit of the Crown. Zinga claimed that Virgin was not permitted to institute private prosecutions in proceedings under POCA and that such an action was an abuse of process. The court at first instance ruled that it was lawful for a private prosecutor to begin confiscation proceedings and that the

proceedings brought were not an abuse of the process of the court. A confiscation order was made against Zinga under section 6 of POCA in the sum of £8,771,300.00, to be paid to the Crown within six months with a consecutive sentence of 10 years in default of payment.

[163] Zinga filed an application for leave to appeal before the Court of Appeal. He argued *inter alia* that: (i) Virgin was not entitled to bring proceedings for confiscation under POCA since it had no financial or personal interest in the outcome; (ii) the confiscation scheme under POCA could not be delivered by a private prosecutor; (iii) it was not in the public's interest that such draconian powers be exercised by anyone other than a body accountable to the state. The court found that the definition of "prosecutor" under section 40(9) of POCA embraced "the person the court believes is to have conduct of any proceedings for the offence" which, in its ordinary meaning, would therefore in the widest sense include all prosecutors conducting proceedings for the offence including a private prosecutor. It was held that given the definition of "prosecutor" under POCA, Virgin as a private prosecutor may bring confiscation proceedings and when a private prosecutor brought proceedings, it was acting in the name of the Crown. The court must look at the nature of the function being undertaken by the private prosecutor (Virgin) and treat it as a public authority and ensure that the confiscation order was not disproportionate. As indicated, in the instant case, the Act did not refer to or authorise the bringing of or conduct of any prosecution.

[164] In my view, what is important is the nature of the function being prescribed in the Act to be undertaken by INDECOM (to investigate) and those that they

endeavoured to perform (to prosecute). With particular reference to the preservation of the scene of an incident or alleged incident (for instance in this case in Negril in the parish of Westmoreland), it would remain a matter for protocols to be established and for there to be consultation and agreement between the Commissioner of Police and the 1st respondent. In respect of the investigation of a complaint into an incident under the Act, on a detailed examination of the Act as a whole, in my opinion, it contemplates that it is the police and the DPP who should arrest, charge, initiate and conduct prosecutions, after INDECOM had completed its investigation of the incident/offence, without direction or interference from anyone, with complete control of the crime scene and all other relevant items, information and records.

[165] In **Steadroy Benjamin**, the main issue was whether the DPP of Antigua and Barbuda had the power to prevent the police from instituting criminal proceedings. Mr Benjamin was an attorney-at-law and Leader of the Opposition in the Parliament of Antigua and Barbuda. He was alleged to have countersigned an application form for a passport and certified a photograph identifying Shane Allen, a Jamaican, as Tyrel Dusty Brann, an Antiguan who had died several months earlier. Mr Benjamin explained to the police that he had made the statements on the application form at the request of Ms Brann, Mr Brann's mother, and had only learned that he was deceased on the date he (Mr Benjamin) gave his statement. Assistant Commissioner Scott instructed Corporal O'Garro to charge Mr Benjamin. The DPP asked the Corporal to delay charging Mr Benjamin because in his opinion guilty knowledge could not be proved. The police nonetheless proceeded to charge Mr Benjamin and drafted the charge in the name of

the Commissioner. The Corporal laid the complaint in the Magistrate's Court contrary to section 6 of the Forgery Act. The court issued a summons against Mr Benjamin. Two further complaints were laid against Mr Benjamin under section 6 of the Forgery Act in the name of the Commissioner.

[166] Mr Benjamin applied for leave to seek judicial review on the basis that in light of the DPP's instruction that he was not to be charged, the Commissioner's decision to lay charges against him was unlawful. He also sought an order that the summonses be quashed. Harris J ruled that the DPP did not have the power to prevent the police from laying the complaints. The Court of Appeal allowed Mr Benjamin's appeal, set Harris J's orders aside and quashed the summonses. The Commissioner's appeal to the Judicial Committee of the Privy Council was allowed. The Board accepted that every citizen and police have a common law power to institute criminal proceedings. In construing sections 88(1)(a), (b) and (c) of the Constitution of Antigua (which is similar to sections 94(3)(a), (b) and (c) of the Jamaican Constitution), the Board held at paragraph 23 that:

> "i) The advent of the Director in 1967, reaffirmed in 1981, has left the composition and command structure of the Royal Police Force, as set out in section 6 of the Police Act, unaffected. The Constitution does not make him a member of the force and he has no right of command over any part of it.
>
> ii) Section 88(1)(a) [similar to section 94(3)(a) of the Jamaican Constitution] confers power on the Director to institute any criminal proceedings in any court other than a court martial. If he exercises this power, he does so in his own name. In that it is a power rather than a duty, he can elect not to exercise it, in other words not to institute such proceedings.

> iii) Section 88(1)(b) and (c) [similar to section 94(3)(b) and (c) of the Jamaican Constitution] expressly recognises, as does the proviso to section 88(2), that criminal proceedings can be instituted by a person or authority other than the Director.
>
> iv) The power conferred on the Director in section 88(1)(c) [similar to section 94(3)(c) of the Jamaican Constitution] to discontinue any criminal proceedings instituted by any other person or authority at any stage, for example even on the day after their institution, raises the question which will have been in the mind of many readers of this Opinion from the outset: does the issue before the Board have any practical importance? In fact an affirmative answer... can be given to that question. Meanwhile the Board notes that, even though invited to say so late in 2008, the Director has never stated whether, if the complaints against Mr Benjamin were validly laid, he would discontinue the proceedings..."

The Board found at paragraph 24 that:

> "...The power of the Director to institute criminal proceedings conferred by subsection (1)(a) [similar to section 94(3)(a) of the Jamaican Constitution] cannot be construed as a power to prevent exercise of the power to do so, expressly recognised elsewhere in the section, by any other person or authority. Subsection (4) [similar to section 94(3)(6) of the Jamaican Constitution] does not enlarge the powers conferred on the Director by subsection (1): it addresses the mode of his exercise of them..."

[167] The Board also examined section 16 of the Antigua and Barbuda Interpretation Act, which is similar to section 40 of the Jamaican Interpretation Act which latter section states that:

> "Where in any Act power is given to any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

The Board found that although proceedings can be discontinued by the DPP, the power to prevent private persons and other authorities from instituting proceedings cannot logically be derived from the power to discontinue those proceedings. Similarly, in our jurisdiction I do not think the power to prevent the initiation of prosecutions could be considered reasonably necessary to enable the DPP to discontinue the proceedings.

[168] Consequently, I unhesitatingly accept the ratio decidendi in **Steadroy Benjamin**, the essence of which seems to be saying that the DPP cannot prevent the police from laying complaints and also the fact that every citizen and police has a common law power to initiate criminal proceedings. I also accept, as was stated by Fraser J and Mr Small, that the Justices of the Peace Jurisdiction Act does presuppose that private citizens do have the right to initiate criminal proceedings and conduct prosecutions. But this case was not dealing with and did not state that the common law power to initiate criminal proceedings cannot be qualified, restricted or limited. Also, as indicated above, the Board criticized the finding of the Court of Appeal in **Steadroy Benjamin** by virtue of its interpretation of section 16 of the Interpretation Act of Antigua and Barbuda, namely, that the DPP's power to prevent the police from prosecution was not incidental to nor implicit in its power under the Constitution of Antigua and Barbuda to discontinue proceedings. Similarly, as previously indicated, the common law power to prosecute, embraced in the Jamaican Constitution, is not ancillary or incidental to the power or duty to investigate. In my opinion, the right of the 1st respondent and his investigative staff to arrest, charge and prosecute is not

reasonably necessary to execute the vast investigative powers given to them under the Act.

[169] I therefore reiterate the position as stated previously in paragraphs [113]-[125] herein, that the 1st respondent and his investigative staff derive their powers from the Act, and they are not constables within the definition of the Constitution, the Interpretation Act or the Constabulary Force Act. Additionally, as stated previously, the Act does not empower the 1st respondent, as a Commission of Parliament, with the power to charge and prosecute criminal offences, nor are those powers in accordance with the Act's objects and purposes. As a consequence, in my view, the right to prosecute as private citizens has been impliedly circumscribed by those objects and purposes, and would be limited and/or abrogated by the Act.

[170] Further, the 1st respondent and his investigative staff in endeavouring to conduct private prosecutions under this new statutory regime, ignore the fact as stated by Lord Bingham of Cornhill in **Jones v Whalley** [2006] UKHL 41 that "[t]he surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest". One cannot therefore interpret the new regime established under the Act, for investigations to be conducted in a way that embraces the right of the 1st respondent and his investigative staff to conduct prosecutions, either as a public body or a private citizen, when INDECOM itself is a Commission of Parliament, without separate legal personality, and when the powers it has derived from the Act, all relate to investigation, and not prosecution. In my view, such an interpretation of the regime

and the specific words of the Act would not be in keeping with what the legislature intended and would be absurd.

[171] In a case from this court **Rex v Chin**, a sanitary inspector employed to the Kingston and Saint Andrew Corporation, laid an information charging Mr Chin for breaching regulations made under the Public Health Law. Section 80 of the Public Health Law 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. It was argued that the proceedings were being taken at the instance of Dr Cruchley, the medical officer of health and the sanitary inspector, as a private citizen, and he was entitled to lay an information and conduct proceedings. The 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."

[172] In this case, the Public Health Law acknowledged that proceedings could be undertaken in respect of offences against the public health law although brought by persons not specifically authorised under the Act. This court 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, in fact to the contrary, as indicated previously, in my view, on any examination of the several provisions of the Act, the right of the 1st respondent and his investigative staff to bring private prosecutions as private citizens has been impliedly abrogated by the Act.

[173] From a reading of all these authorities it is clear that public bodies with a separate legal personality and private citizens do have a common law right to prosecute, unless such a right is expressly or impliedly restricted. Whether or not such a restriction is to be implied is gleaned from applying the principles applicable to statutory interpretation. As indicated, the object and purpose of INDECOM under the Act is to investigate; the Act itself recognises and seeks the intervention of the DPP for certain matters in INDECOM's investigative process; section 25 of the Act requires INDECOM investigators to attend court to give assistance and support to the DPP if required; and where INDECOM's recommendations are not complied with, INDECOM's only recourse is to table a report to each House of Parliament in accordance with section 23(3) of the Act. Accordingly, it is evident that as in **Broadmoor**, the right to initiate and undertake prosecutions is not within INDECOM's objects and purpose, and so the finding that INDECOM had such powers is wrong and ought to be set aside.

[174] If it is that the 1st respondent and his investigative staff are purporting to exercise the right to prosecute as private citizens, since INDECOM is a Commission of Parliament, they must act in accordance with the powers given to INDECOM under the Act. It is important also to recognise on a detailed perusal and analysis of the Act that Parliament could not have intended that the 1st respondent and his investigative staff

should usurp the powers of the DPP and the police without expressly indicating that intention. Additionally, it would be absurd to think that Parliament could have possibly intended that the 1st respondent and his investigative staff would utilise the vast investigative powers given to them under the Act to obtain information that could constitute a criminal offence, and then utilise that same information, obtained under the Act, to prosecute any person in their capacities as private citizens. The power to prosecute criminal offences as private citizens is not a power given to the 1st respondent and his investigative staff under the Act. Indeed, any such alleged power to pursue prosecutions as private citizens has been impliedly restricted by the various provisions of the Act. Accordingly, the 1st respondent must, in my view, first seek the DPP's permission before embarking on any prosecution.

[175] Based on my conclusion that the 1st respondent and his investigative staff have not been given the power to prosecute by the Act, other statutes or at common law, a question arises as to what would be the consequence of all prosecutions undertaken by INDECOM without the DPP's consent. In **Regina (Hunt) v Criminal Cases Review Commission**, Lord Woolf CJ acknowledged that there are cases 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. However, it was not argued before me with any detail as to the consequence of a conviction based on a prosecution conducted by a prosecutor who had no authority to do so and I too like Lord Woolf CJ would decline to make any pronouncements on that issue. I would

say however, based on the authorities canvassed herein, as the 1st respondent and his investigative staff (as representatives of INDECOM) have no power under the Act, statute or common law to prosecute, they ought first to obtain the consent/fiat of the DPP to do so and hereinafter, INDECOM ought only to exercise the powers conferred on them as expressly outlined in the Act.

Issue 4: Is there a legitimate expectation enjoyed by the appellants that the DPP would make rulings as to whether they are to be charged? (ground 4.4)

[176] The appellants contend that based on regulations 31 and 33 of the Police Service Regulations 1961, the 1st respondent cannot lawfully charge any police officer for a criminal offence without a ruling from the DPP. The appellants also claim that there is a legitimate expectation derived from conduct whereby the Commissioner of Police makes referrals of matters to the DPP for ruling before charging police officers with criminal offences. I will therefore assess whether there is indeed a statutory requirement that such a referral is to be made to the DPP and whether the appellants enjoy a legitimate expectation derived from conduct.

[177] Regulation 31(5) of the Police Service Regulations provides that:

> "Where an offence against any enactment appears to have been committed by a member the Commission, or as the case may be the authorized officer, before proceeding under this regulation shall obtain the advice of the Attorney-General or, as the case may be, of the Clerk of the Courts for the parish, as to whether criminal proceedings ought to be instituted against the member concerned; and that if the Attorney-General or Clerk of the Courts advises that criminal proceedings ought to be so instituted, disciplinary proceedings shall not be instituted before the determination of criminal proceedings so instituted."

[178] Regulation 33 of the Police Service Regulations provides that:

> "Where upon a preliminary investigation or a disciplinary enquiry an offence against any enactment appears to have been committed by a member the Commissioner shall, unless criminal proceedings have been or are about to be instituted, obtain the advice of the Attorney-General as to whether criminal proceedings ought to be instituted."

[179] The "Commissioner" in the Police Service Regulations refers to "the Commissioner of Police. "Authorized officer" is defined in section 2 as "the Commissioner or any other Officer not below the rank of Assistant Commissioner of Police or, except in relation to a member of or above the rank of Inspector, a commanding Officer". "Member" is defined as a member of the Jamaica Constabulary Force. It is accepted that reference to the Attorney-General is now a reference to the DPP by virtue of section 4(5)(b) of the Jamaica (Constitution) Order in Council 1962.

[180] When one construes regulations 31(5) and 33 of the Police Service Regulations, it is indeed evident that the advice of the DPP need not be sought before criminal proceedings are instituted against a police officer because that advice is not required where "criminal proceedings have been or are about to be instituted". This court examined these provisions in **George Anthony Lawrence v The Commissioner of Police** where Smith JA at paragraphs [12], [13] and [14] said:

> "[12] Where a member of the Jamaica Constabulary Force ('member') has committed an offence, regulations 31(5) speaks to the procedural requirement which must be adopted before disciplinary proceedings may be instituted against him or her. The regulation imposes a duty on the authorized officer to seek the advice of the Clerk of the Courts or the Attorney-General as to whether the member ought to be subjected to criminal proceedings. If criminal

> proceedings ought to be brought against that member, then as mandated by the regulation, any disciplinary proceedings flowing therefrom, must abide the outcome of the criminal process.
>
> [13] The language of section 31(5) is mandatory. Its objective is to ensure that a member is not made the subject of simultaneous criminal and disciplinary proceedings, arising out of the same offence. In effect, the regulation operates as a safeguard against any prejudice to the member.
>
> [14] Under regulation 33, the necessity to seek the Attorney General's advice would arise if in the course of a preliminary enquiry or disciplinary enquiry it appears that criminal proceedings ought to be instituted against a member."

[181] Indeed, in **Rohan Ellis v R**, Harris P (Ag) in construing regulation 30 of the Public Service Regulations which is identical to section 33 of the Police Service Regulations, found that the receipt of the advice of the Attorney-General as a precursor to the arrest of a public officer is not mandatory, but "merely directory and indeed procedural" (see paragraph [26] of her judgment). Harris P (Ag) however, did indicate that adherence to the section is important as it could minimise the occasion of civil litigation against the Attorney-General if there is resolution in the accused's favour.

[182] With regard to whether there is legitimate expectation by virtue of conduct, the DPP herself had conceded in the Full Court, and counsel Miss Pyke before us, that there was indeed no requirement in law for her to make a recommendation before charges are proffered against a police officer. However, in the Full Court, the learned DPP did indicate that there had been a practice to send referrals to her office. The appellants also deponed that they were not aware of an instance prior to the Act, where a police officer had been charged with a felony without a ruling from the DPP. The learned

editors of Halsbury's Laws of England, Volume 61, 2010, at paragraph 649 summarised the basic principles underpinning the doctrine of legitimate expectation thus:

> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of the decision-maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.
>
> The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision-maker.
>
> In appropriate circumstances the existence of a legitimate expectation may require a public body to confer a substantive, as opposed to a procedural, benefit. In such cases the courts will not permit the public body to resile from the representation if to do so would amount to an abuse of power."

[183] McDonald-Bishop J (as she then was) in **Legal Officers' Staff Association** also examined in detail the principles underpinning the doctrine of legitimate expectation and at paragraph [45] gave a summary of the doctrine:

"(i) The power of public authorities to change a policy is constrained by the legal duty to be fair and other constraints, which the law imposes.

(ii) A change of policy which would otherwise be unexceptionable may be held to be unfair by reason of prior action, or inaction, by the authority.

(iii) If the authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult. This is the paradigm case of procedural expectation.

(iv) If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise. This is substantive expectation.

(v) If, without any promise, it has established a policy, distinctly and substantially, affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change. This is the secondary case of procedural expectation.

(vi) To do otherwise, in any of these instances, would be to act unfairly so as to perpetrate an abuse of power."

[184] As the appellants contend in their affidavit, it was a practice of the Commissioner of Police to make referrals to the DPP before a member of the police force is charged. It would appear from the affidavit evidence that it was a committed and consistent practice to make referrals to the DPP before a police officer was charged. As indicated by the Full Court, although maybe not in parity of reasoning, in my view, this was not a legitimate expectation that would relate or be expected to bind the 1st respondent and his investigative staff. It would bind those who have established the policy so much so that it would operate as McDonald-Bishop J had said in **Legal Officers' Staff**

Association, that though without any promise, it was "a policy distinctly and substantially, affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so". In those circumstances, the police would ordinarily expect a consultation before any change was effected to the previous well-known policy. This, McDonald-Bishop J has described as the secondary case of procedural expectation. However, this claim for legitimate expectation was not formulated as being against the Police Service Commission or the Commissioner of Police and the DPP and who were therefore not made parties to the claim in the court below. As I understand, it the Attorney-General was invited to participate with submissions before the Full Court presumably as the claim included alleged breaches of constitutional provisions. As a consequence, not being a party to the claim no ruling could be made against the Attorney-General in relation to any legitimate expectation claimed on behalf of the appellants. To that extent, therefore, I agree with the Full Court that any such claim by the appellant against the 1st respondent cannot succeed. However, the issue as to whether the appellants have such a legitimate expectation derived from the Commissioner of Police and the DPP remains moot.

Conclusion

[185] In the light of all of the above, I have come to the clear conclusion that on a true and proper construction of the Act, INDECOM, the 1st respondent and his investigative staff have no power to arrest, charge or prosecute. Indeed, the right to do so having been neither expressly nor impliedly authorised by the Act can be taken as having been forbidden. I have also concluded that the provisions in the Act are clear and

unambiguous and need no assistance from parliamentary debates in resolving any ambiguity. I have also concluded that the 1st respondent and his investigative staff have no power to arrest, charge and prosecute by statute or at common law as private citizens. Indeed, in my view, it would be absurd and contrary to Parliament's intention for the 1st respondent and his investigative staff to be given vast powers under the Act to investigate and then utilise their rights as private citizens to arrest charge and prosecute. Finally, I would also conclude that the appellants have not established that there is any legitimate expectation in their favour that could bind INDECOM, the 1st respondent and his investigative staff. I would therefore allow the appeal in part and make the following orders:

1. The appeal against the decision of the Full Court delivered on 30 July 2013 is allowed in part, as the Full Court recognised that the Independent Commission of Investigations Act, 2010 (the Act) does not confer the power to charge, but incorrectly declined to grant further declarations.

2. The order of the Full Court is set aside and the following orders are substituted:

   It is hereby declared that:

   (i) The Independent Commission of Investigations (INDECOM) is not empowered by section 20 of the

Act, statute or common law to arrest, charge and prosecute any person for any criminal offence;

(ii) the 1st respondent and his investigative staff are not empowered by section 20 of the Act, statute or common law to arrest, charge and prosecute any person for any criminal offence;

(iii) the 1st respondent and his investigative staff cannot arrest, charge or prosecute any person for any criminal offence, as private citizens, as the common law right to do so has been impliedly abrogated by the Act; and

(iv) the 1st respondent and his investigative staff cannot prosecute any person for any criminal offence without a fiat from the Director of Public Prosecutions.

3. No order as to costs.

[186] 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.

BROOKS JA

[187] I have read, in draft, the comprehensive judgment of my learned sister, Phillips JA. There is nothing that she has left unexplored in respect of the law relating to the issues in this case. I agree with her analysis of the law. I, however, respectfully disagree with some of her conclusions in respect of the application of the law to the Independent Commission of Investigations Act (the Act). In what follows, I shall refer to the Independent Commission of Investigations as INDECOM, and to the Commissioner of INDECOM as the 1st respondent.

[188] I should first state, for the reasons that I have expressed in **Diah v R** [2018] JMCA Crim 14, which is intended to be delivered on the same date at this judgment, that I am of the view that the 1st respondent and any of INDECOM's investigators may exercise the right, that every person possesses at common law, of being able to institute a private prosecution against a person who, they contend, has breached the provisions of section 33 of the Act. They would do so, not in the capacity of officials of INDECOM, but in their respective private capacities. As, in my view, a distinction may be drawn in certain respects between section 33 and the other provisions of the Act, I shall address a few observations in respect of section 33 before dealing with the other aspects raised by this appeal.

Section 33

[189] Section 33 of the Act deems as an offence, any misleading or attempt to mislead INDECOM, an INDECOM investigator or any person carrying out any function under the Act. It also deems as an offence, any unjustified obstruction of, or failure to comply

with the lawful requirements of INDECOM or any person carrying out any function under the Act. It is the only section in the Act which creates offences, and a fair reading of the Act draws a distinction between incidents, which INDECOM is required to investigate, and actions committed against an INDECOM official during the course of an investigation. In my view, the common law right to institute a private prosecution, in respect of a breach of section 33, has not been removed, either expressly or implicitly, by the Act. The respective judgments in **Diah v R** demonstrate that Phillips JA and I disagree on that issue.

[190] In **Diah v R**, Mr Diah had been charged with breaches of the provisions of section 33 of the Act. He was not arrested but rather was summoned to attend court. It was therefore unnecessary, in the analysis of the issues in that case, to have considered the question of any common law or statutory right of arrest in respect of an offence committed in breach of section 33 of the Act. It is my view however, as will be explained below, that the 1st respondent and INDECOM's investigators do not have the statutory power to arrest that is given to a constable by section 15 of the Constabulary Force Act. Nor would any of them be entitled to exercise the common law right of arrest against anyone on the basis that that person had breached the provisions of section 33 of the Act. The reasons for the restriction are, firstly, that the offences created by section 33 are not said to be felonies, and secondly, that the common law right of a private citizen to arrest without a warrant is mainly restricted to where there is a moral certainty that a felony has been committed, or to stop a breach of the peace.

[191] Professor Kodilinye, in the fourth edition of his work, Commonwealth Caribbean Tort Law, addresses the issue of the common law right of arrest. He states, in part, at pages 25-26:

> "At common law, certain powers of arrest without warrant are given to police officers and private citizens. One who carries out an arrest within the scope of any such power will have a good defence to an action for false imprisonment, as well as for assault and battery. It is a cardinal principle, however, that in the absence of statutory authority a police officer has no right or power to *detain a person for questioning* unless he first arrests him....
>
> Common law powers of arrest without warrant may be summarised thus:
>
> - A police officer or private citizen may arrest without warrant a person who, in his presence, commits a breach of the peace, or who so conducts himself that he causes a breach of the peace to be reasonably apprehended. **There is no power to arrest after a breach of the peace has terminated, unless the arresting officer or private citizen is in fresh pursuit of the offender or reasonably apprehends a renewal of the breach of the peace**.
>
> - A police officer or private citizen may arrest without warrant (a) a person who is in the act of committing a felony, and (b) a person whom he suspects on reasonable grounds to have committed a felony. But in (b), **there is a distinction between arrest by a police officer and arrest by a private citizen, in that a private citizen who wishes to justify such an arrest must prove that a felony has actually been committed, whether by the person arrested or by someone else**; and if, in fact, no such felony has been committed, he will be liable for false imprisonment and/or assault and battery. **It will be no defence that he had reasonable grounds for believing the arrestee to be guilty**. A police officer, on the other hand, has a good defence, whether a felony has actually been committed or not, so long as he can show that he

had reasonable grounds for suspicion. This is known as the rule in *Walters v WH Smith and Son Ltd* [[1914] 1 KB 595].

- A police officer, but not a private citizen, may arrest without warrant any person whom he suspects on reasonable grounds to be about to commit a felony." (Emphasis supplied, italics as in original)

[192] Bearing in mind those restrictions and the strictures placed on the exercise of the common law right of arrest by civilians, as were carefully explained by Phillips JA in her judgment herein, the 1st respondent and INDECOM's investigators should avoid attempting to arrest anyone in respect of a breach of section 33 of the Act. If the right to institute a private prosecution was to be exercised, the alternative of having a summons issued, as was done in **Diah v R**, would perhaps be the best method to be utilised. That option would avoid the risk of charges of false imprisonment being levelled, and the time and cost involved in litigation in respect of that issue.

The other aspects of the appeal

[193] Section 33 of the Act apart, there are other aspects of the judgment of Phillips JA, in terms of the rights which INDECOM, the 1st respondent and INDECOM's investigators possess, or do not possess, with which I agree, and aspects with which I, respectfully, disagree.

[194] I agree that the overall framework of the Act is such that INDECOM's object and purpose is to investigate. Accordingly, I agree that INDECOM has no authority to prosecute anyone for any offence whatsoever. I share my learned sister's view, for the reasons that she has outlined, that INDECOM is not a juristic person. The Act does not

confer it with any legal personality. I agree with Phillips JA that the Act does not authorise INDECOM to sue or be sued or to initiate any prosecution against anyone. Additionally, not being a juristic person, INDECOM has no common law right or any other authority to institute a private prosecution complaining about any offence in respect of any incident being investigated by the 1st respondent or any of INDECOM's investigators. Nor does INDECOM have the authority to institute any private prosecution in respect of any breach of section 33 of the Act. The Act does not authorise it.

[195] I also agree with Phillips JA that neither section 20, nor any other section of the Act, authorises the 1st respondent, or any of INDECOM's investigators, to arrest or prosecute any person in relation to any offence arising out of any incident, which they may be investigating. It necessarily follows that the Act does not authorise them to arrest or prosecute any police officer in relation to any offence, arising out of any incident, which they are investigating. I accept that the powers, authorities and privileges, as are given to a constable, are bestowed, by section 20 of the Act, on the 1st respondent and INDECOM's investigators, only for the purposes of investigation. The appellants may properly be granted a declaration to that effect. The Full Court was therefore correct in its acknowledgement of a restriction on the power to charge, when it included the following statement in its order: "[s]ubject to [the] fact that the Act does not confer a power to charge…".

[196] I, however, part company with my learned sister in respect of whether the 1st respondent and INDECOM's investigators may benefit from the rights that the common law allows, in this context, to private individuals. Phillips JA has reasoned that the 1st

respondent and INDECOM's investigators have had their common law rights of arrest and private prosecution, which they possess in their respective private capacities, abrogated in respect of incidents which they have been called to investigate. I respectfully disagree with her view on this point. It is my view that, whereas INDECOM is restricted by the Act, the 1st respondent and INDECOM's investigators, as private individuals, have not been so restricted. I wish to stress that to the extent that I will, in what follows, express a view as to the common law rights of any of these persons, it will be in reference to their capacity as private individuals and not as INDECOM officials.

[197] In respect of the issue of the rights possessed by individuals at common law, I rely heavily on **Broadmoor Special Hospital Authority and Another v Robinson** [2000] QB 775, **R v Rollins** [2010] UKSC 39; [2010] 4 All ER 880 and **Rex v A E Chin** (1946) 5 JLR 31, which demonstrate that the common law right of instituting a private prosecution, cannot be abrogated except by Parliament. I associate with that principle (and view it to be inseparable from it), the common law right of arrest (as severely restricted as Phillips JA and Professor Kodilinye have demonstrated that right of arrest to be). Parliament may only be held to have abrogated those rights, if it uses clear and express language to that effect, or does so by necessary implication. Regrettably, I disagree with Phillips JA in respect of her opinion that the common law rights of arrest and private prosecution, possessed by the 1st respondent and INDECOM's investigators, have been impliedly abrogated by the provisions of the Act.

[198] It is my view that stipulating that INDECOM should make reports to various authorities, concerning its investigations, does not impliedly deprive the 1st respondent

and INDECOM's investigators of their, albeit severely restricted, common law rights of arrest in respect of any offence said to be committed during an incident, which they are called to investigate. Nor does it deprive them of their common law right of instituting a private prosecution against any such alleged perpetrator. Any other member of the public is entitled to exercise such rights in respect of any incident, which INDECOM has commenced investigating. It is my view that the 1st respondent and INDECOM's investigators are not, in their private capacities, deprived of their common law rights by virtue of their association with INDECOM. Certainly the Act does not so state.

[199] There is no section of the Act that prevents or restricts the 1st respondent or any of INDECOM's investigators, in their private capacities, from taking any step to arrest or prosecute any person as a result of an investigation. Part III of the Act deals with the method of dealing with complaints. Except for sections 15, 17 and 25 of the Act, every section in part III speaks to the requirements made of INDECOM, rather than individuals functioning as part of INDECOM, and stipulates the steps that INDECOM is to take.

[200] Section 15 is the first of those exceptions. The section deals with the duties of a Director of Complaints employed to INDECOM. That official, by section 15, is authorised to receive complaints that are made against police officers and other officials. A Director of Complaints is also guided by the section in the manner of dealing with the various complaints received. Nothing in the section restricts the Director of Complaints, as a private individual, from exercising any right that that individual may have at common law.

[201] Section 17 is the second of the sections that mention officials of INDECOM. The section gives further guidance to the Director of Complaints and also provides guidance to INDECOM's investigators. It directs investigators on the submission of the reports of their investigations. It is to the Director of Complaints that the investigator is to submit those reports. Again, nothing in that section is inconsistent with either the Director of Complaints or an investigator initiating a private prosecution against any person arising from an investigation into an incident.

[202] In section 25, the third of those sections that mention INDECOM officials, an investigator is required to attend court and support the Director of Public Prosecutions (DPP) in any prosecution arising out of an incident. This requirement does not prevent the investigator from initiating a private prosecution himself or herself.

[203] In the absence of any statutory provision abrogating the common law right to arrest or to initiate a private prosecution, those rights must be deemed to continue to exist.

[204] Support for this stance may be found at paragraph [27] of **R v Rollins; R v McInerney** [2010] 1 All ER 1183, where the English Court of Appeal stated, at paragraph [27]:

> "The continuing survival of the right [of private prosecution], to the extent provided for by that section, is vouchsafed by the decision of the House of Lords in *Jones v Whalley* [2006] UKHL 41, [2006] 4 All ER 113, [2007] 1 AC 63; and, as was observed by Mitting J in *Ewing v Davis* [2007] EWHC 1730 (Admin) at [23], [2007] 1 WLR 3223 at [23], **'[i]f 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.' The importance of the right is illustrated by the reliance placed on it by Lord Woolf CJ in *R (on the application of Hunt) v Criminal Cases Review Commission* [2000] STC 1110 at 1115, [2001] QB 1108 at 1116 (para 20), in support of the common law power of the IRC to bring prosecutions:

> '… Great importance has always been attached to the ability of an ordinary member of the public to prosecute in respect of breaches of the criminal law. If an ordinary member of the public can bring proceedings for breaches of the criminal law, it would be surprising if the Revenue were not in a similar position.'

See also *R (on the application of Securiplan plc) v Security Industry Authority* [2008] EWHC 1762 (Admin) at [33], [2009] 2 All ER 211 at [33], where Blake J observed:

> '… It is hardly remarkable that Parliament should not have given the regulator overt powers of prosecution when a prosecution can be brought by the ordinary citizen in the public as well as the private interest (see *Ewing v Davis* [2007] EWHC 1730 (Admin), [2007] 1 WLR 3223). **In my judgment, the powers available to the private citizen also undermine the contention that in the modern era only the CPS or regulators that are independent of the investigative processes can institute proceedings** …'" (Emphasis supplied)

[205] In **R v Rollins**, the United Kingdom Supreme Court upheld the decision of the Court of Appeal in **R v Rollins; R v McInerney**. Their Lordships accepted the principle, as explained by the Court of Appeal, that the United Kingdom Financial Services Authority (FSA), being a corporate body, possessed the common law right to initiate a private prosecution. Their Lordships affirmed that the right had not been taken away by the relevant statute.

[206] Phillips JA has properly demonstrated that INDECOM, not being a juristic person, did not possess the common law right of instituting a private prosecution. For that reason, as well as the fact that the statute did not grant INDECOM the right to prosecute, Phillips JA rightly, in my view, distinguished **R v Rollins**. The reasoning used in that case by their Lordships, in the judgments of both the Court of Appeal and the Supreme Court, does, however, apply to the 1st respondent and INDECOM's investigators, who, unlike INDECOM, do possess, in their respective private capacities, the common law rights of arrest and of the ability to initiate a private prosecution.

[207] The overarching principle to be derived from the cases is, therefore, that the common law rights exist unless abrogated by statute, either expressly or by necessary implication. In my view, it would be incorrect to seek to limit the 1st respondent and INDECOM's investigators, in their respective private capacities, to the restrictions that bind INDECOM. There is nothing in the Act that requires such an interpretation. It is not within the remit of this, or any other, court to take away the common law right of initiating a private prosecution. The test is not whether the Act authorises the common law power to subsist, but rather, whether the Act abrogates the common law power that is deemed to exist.

[208] It is undoubtedly true that there would seem to be an incongruity if the 1st respondent and INDECOM's investigators were to use their statutory authority and privileges to investigate an incident, and thereafter to claim their right as private individuals to institute a prosecution of some person for an offence, based on that investigation. That is, however, similar, though not identical, to what occurred in **Rex**

v Chin. In that case, a sanitary inspector purportedly conducted investigations on behalf of the Board of Health, but was not a duly authorised officer or servant, of the Board, to initiate proceedings against any person for an offence under the Public Health Law. This court held that he was able to institute a private prosecution for a breach of the provisions of the Public Health Law. It so ruled, despite the fact that the prosecution was based on those investigations.

[209] It must be noted, however, that it would be very challenging for the 1st respondent or any of INDECOM's investigators, in their respective private capacities, to exercise any of their common law rights to arrest or prosecute anyone for any offence arising from any incident, as defined by the Act. As they do not possess the right of arrest that a constable is entitled to exercise, the common law right of arrest would be very restricted. It is unlikely that any of INDECOM's investigators or other officers would have personally witnessed any breach of the peace or any of the incidents that INDECOM had been called upon to investigate. There would normally be little basis for any of them to claim that they had "moral certainty" that a crime had been committed. They would, therefore, be unlikely to satisfy the requirements, cited by Phillips JA as being set out by the learned authors of Stair Memorial Encyclopaedia, 2nd reissue, paragraph 101, who opine:

> "A private citizen is entitled to arrest without warrant for a serious crime he has witnessed and where the citizen has a 'moral certainty' that a crime has been committed. A private citizen may also become involved in arresting someone if he himself does not have the right but is assisting someone who has such a right, albeit that person is another private citizen or a police constable. Should the private citizen arrest

> anybody, he must hand him over to a police constable as soon as possible or else face the possibility of an action of damages for wrongful arrest. A private citizen does not have a right to arrest anyone for a statutory offence. The only parties who have such rights are police constables or other specified parties whose rights would be set out in the particular statute concerned."

[210] Similar, though less restrictive than the situation concerning arrests, practical difficulties would be associated with conducting a private prosecution. In such cases, the investigator would have to be securing the attendance in court of the relevant witnesses and marshalling the relevant evidence. This would be onerous to achieve in the investigator's private capacity.

[211] The 1st respondent and INDECOM's investigators should also bear in mind that, acting as private citizens, they would not have the benefit of the defences in law that a constable would have to charges of wrongful arrest and malicious prosecution. They would, as a consequence, wind up finding themselves personally exposed to the financial consequences of an adverse judgment in a claim based on either or both of those torts.

Summary and conclusion

[212] The order that the Full Court made was as follows:

> "Subject to [the] fact that the Act does not confer a power to charge, the Order of the court is that the Declarations and Injunctive relief sought are refused"

[213] The Full Court is correct in its statement that the Act does not confer a power on INDECOM, the 1st respondent or any of INDECOM's investigators to charge anyone. The Full Court would have been clearer if it had made a declaration to that effect.

[214] I agree with the opinion of my learned sister, Phillips JA, that INDECOM is not entitled, either by virtue of the Act or at common law, to arrest or prosecute any person for any perceived breach of any law. Not being a juristic person, INDECOM has no rights at common law, and it has not been given any such powers by the Act.

[215] The 1st respondent and INDECOM's investigators are, however, not so restricted. They possess, as private individuals, the common law rights of both carrying out an arrest and initiating a private prosecution. Those rights can only be abrogated by Parliament. They cannot be taken away by a court. Parliament may only be said to have abrogated those rights if it uses clear and express language to that effect or does so by necessary implication. In my view, Parliament has not abrogated those rights that vest in the 1st respondent or any of INDECOM's investigators, in their respective private capacities.

[216] Those persons should, however, exercise their rights very cautiously. There will be practical difficulties in exercising those rights. It is unlikely, in respect of any incident that INDECOM has been called upon to investigate, that the 1st respondent or any of INDECOM's investigators would have been witnesses. They would necessarily be acting on information gleaned from others. They do not have the powers or protection that constables have in relation to arrest and prosecution. The better course for them to

adopt would be to refer the results of their investigations to the DPP and allow that official to decide the step to be taken.

[217] Different considerations would apply to an action said to be an offence against section 33 of the Act, where the INDECOM official is hindered or disobeyed in the performance of his or her duty. The INDECOM official will, most likely, be able to give a firsthand account of the commission of the offence. Whereas the common law right to prosecute would exist, there would be no common law right of arrest since a breach of section 33 has not been designated as a felony. If, therefore, a breach of section 33 of the Act is perceived, and the common law right to prosecute was to be exercised, the alleged offender should be summoned. There is unlikely to be any disadvantage in adopting that course as, in most cases, the alleged offender would be identifiable, if not well known, and would also be traceable.

[218] My view of the issues would, therefore, require an order allowing the appeal, in part, due to the difference between my position and that of the Full Court in respect of section 20 of the Act. I am, however, otherwise in agreement with the order made by the Full Court that the appellants were not entitled to the other declarations that they sought.

[219] The orders that ought to be made, in my view, are as follows:

1. The appeal against the decision of the Full Court delivered on 30 July 2013 is allowed in part, as the Full Court correctly recognised that the Independent Commission of

Investigations Act, 2010 (the Act) does not confer the power to charge but incorrectly declined to grant further declarations.

2. The order of the Full Court is set aside and the following order is substituted:

It is hereby declared that:

(i) the Independent Commission of Investigations (INDECOM) is not empowered by section 20 of the Act, statute or common law to arrest, charge or prosecute any person for any criminal offence;

(ii) section 20 of the Act does not empower the 1st respondent or any of his investigative staff to arrest, charge or prosecute any person for any criminal offence;

(iii) section 33 of the Act does not create an offence which would ordinarily empower the 1st respondent or any of his investigative staff to arrest any person for a breach of that section;

(iv) the Act does not abrogate the common law right possessed by the 1st respondent and each member of his investigative staff, in their respective private capacities, to initiate a private prosecution against

any person for any criminal offence under section 33 of the Act;

(v) subject to the restrictions that exist at common law, the Act does not abrogate the common law right possessed by the 1st respondent and each member of his investigative staff, in their respective private capacities to arrest or charge any person or initiate a private prosecution against any person for any criminal offence; and

(vi) the 1st respondent and his investigative staff may exercise their said private rights at common law without first obtaining a ruling from, or the permission of, the Director of Public Prosecutions.

3. No order as to costs.

F WILLIAMS JA

[220] I have read the draft judgments of Phillips and Brooks JJA. Having done so, I find myself to be generally in agreement with the reasoning and conclusion of Phillips JA, but subject to the disagreement and reservations expressed by Brooks JA. The views of Brooks JA with which I agree are succinctly reflected in paragraphs [214] and [215] of this judgment.

[221] In a nutshell, I espouse the view that: whereas INDECOM, not being a juristic person, does not have the right, either by the Act or at common law to prosecute or arrest, the position is not the same with the Commissioner of INDECOM and INDECOM's investigators. The Commissioner and the investigators have, at common law, the right of every other private citizen to bring prosecutions for alleged breaches of section 33 of the Act or for any criminal offence, and also, in limited circumstances, to effect arrests. This common law right has not been abrogated in any way.

[222] I have come to these views having reviewed the Act itself and the relevant authorities. In doing so, I am agreeing with Phillips JA in relation to her conclusion on what she states as issue 2: that, as the relevant provisions of the Act are not obscure, ambiguous or would lead to an absurdity, if they are accorded their literal interpretation, there is no need to refer to the Parliamentary debates as an aid to construction (see paragraph [112] of this judgment). In doing so, I am fully aware that, although we have both taken the same approach, Her ladyship, on the one hand, and Brooks JA and I, on the other, have arrived at different conclusions. However, my view that the provisions of the Act are clear and unambiguous remains the same.

[223] In light of all these considerations, I concur with Brooks JA in respect of the orders that he proposes at paragraph [219] of this judgment.

PHILLIPS JA

ORDER

1. The appeal against the decision of the Full Court delivered on 30 July 2013 is allowed in part, as the Full Court recognised that the Independent Commission of Investigations Act, 2010 (the Act) does not confer the power to charge, but incorrectly declined to grant further declarations.

2. The order of the Full Court is set aside and the following order is substituted:

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   (ii) section 20 of the Act does not empower the 1st respondent or any of his investigative staff to arrest, charge or prosecute any person for any criminal offence.

   BY MAJORITY (Phillips JA dissenting)

   (iii) section 33 of the Act does not create an offence which would ordinarily empower the 1st respondent or

any of his investigative staff to arrest any person for a breach of that section;

(iv) the Act does not abrogate the common law right possessed by the 1st respondent and each member of his investigative staff, in their respective private capacities, to initiate a private prosecution against any person for any criminal offence under section 33 of the Act;

(v) subject to the restrictions that exist at common law, the Act does not abrogate the common law right possessed by the 1st respondent and each member of his investigative staff, in their respective private capacities to arrest or charge any person or initiate a private prosecution against any person for any criminal offence; and

(vi) the 1st respondent and his investigative staff may exercise their said private rights at common law without first obtaining a ruling from, or the permission of, the Director of Public Prosecutions.

3. No order as to costs.