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PRESS SUMMARY

Commissioner of the Independent Commission of Investigations (Appellant) v Police Federation and others (Respondents) (Jamaica)

Dave Lewin (Director of Complaints of the Independent Commission of Investigations) (Appellant) v Albert Diah (Respondent) (Jamaica)

[2020] UKPC 11

On appeal from the Court of Appeal of Jamaica

JUSTICES: Lord Kerr, Lord Hodge, Lord Lloyd-Jones, Lord Briggs, Lord Kitchin

BACKGROUND TO THE APPEALS

Two appeals before the Judicial Committee of the Privy Council (the Indecom appeal and the Diah appeal) raise the question whether the Independent Commission of Investigations (“the **Commission**”) and its Commissioner and staff can initiate prosecutions for certain offences. The Commission was established by the Independent Commission of Investigations Act 2010 (“the **Act**”) to undertake investigations into actions by members of the Security Forces and other State agents that result in a person’s death or injury, or an abuse of their rights.

The Indecom appeal concerns the fatal shooting of Frederick Mikey Hill by police on 4 November 2010. Following an investigation, Commission investigators initiated the prosecution of Corporal Malica Reid for Mr Hill’s murder. The respondents brought an action seeking administrative orders and constitutional redress under section 25 of the Constitution of Jamaica on the ground that the Commission had exceeded its powers.

The Court of Appeal held unanimously that neither the Act nor the common law authorised the Commission or its Commissioner or staff to initiate the prosecution of an offence which had been the subject of a Commission investigation (“an **incident offence**”). The majority (Phillips JA dissenting) held that the Commissioner and Commission staff could bring prosecutions as citizens acting in their private rather than their official capacity. However, in doing so, they were likely to face practical difficulties, for example, in securing the attendance of witnesses at court. The Commissioner now appeals to the Judicial Committee of the Privy Council.

The Diah appeal follows the fatal shooting of Felecia Latoya Henry during a shootout between police officers and gunmen on 29 August 2013. The Commission’s investigation into the shooting was led by the appellant, Mr Dave Lewin, who was then one of the Commission’s Chief Investigators. The respondent, Mr Albert Diah, was the Deputy Superintendent of Police in command of the police officers involved in the shooting. Following the orders of his superior officer, Mr Diah refused to allow the Commission access to the police officers’ firearms. He was subsequently charged and convicted of two offences contrary to section 33 of the Act (“**section 33 offences**”), laid on information sworn by Mr Lewin. Section 33 offences are designed to prevent obstruction of the Commission’s investigative work.

Mr Diah appealed against his conviction and sentence. By a majority (Phillips JA dissenting), the Court of Appeal held that the Commissioner and the Commission’s staff had the power to initiate the

prosecution of a section 33 offence in their private capacities. The majority (Brooks JA dissenting) also found that the trial judge failed to give sufficient attention to the defences raised by Mr Diah, which they considered could have provided him with a lawful justification or excuse for obstructing or failing to comply with the Commission investigator's requests. Mr Lewin now appeals to the Judicial Committee of the Privy Council.

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the Indecom appeal should be dismissed and the Diah appeal should be allowed. Lord Lloyd-Jones gives the advice of the Board.

REASONS FOR THE JUDGMENT

The judgment addresses two preliminary issues. The first concerns the legal status of the Commission and its capacity to act [12]. Although the Act does not expressly incorporate the Commission, it creates the Commission as a distinct entity with perpetual succession. The Commission is consequently in a position analogous to that of a statutory corporation sole; it is a quasi-corporation sole [14]. The Commission, therefore, only has the powers conferred directly or indirectly upon it by the Act or other relevant legislation [15].

The second concerns the approach to the interpretation of the Act [16]. The Act was passed to implement the recommendations of the Inter-American Commission on Human Rights in *Michael Gayle v Jamaica*, (Case 12.418) Report No 92/05, 24 October 2005 [17]. The Commission submitted that the Act should be interpreted in accordance with the mischief rule: that is, in the way that would best meet the need, identified in the *Michael Gayle* case, for independent and effective investigation into the actions of the Jamaican security forces which could lead to independent prosecution. It also relied on the golden rule of interpretation, whereby a statute is to be interpreted so as to give it effect rather than to render it invalid. However, the Inter-American Commission did not require that investigation and prosecution should be undertaken by the same body. Accordingly, neither the mischief rule nor the golden rule of interpretation is of assistance in this case. The whole question is whether the legislature intended that the Commission should have a prosecutorial function, in addition to its investigative function [18].

It is clear that the Commission's role is investigative from the long title to the Act, and from section 4 which sets out the Commission's functions [26]. The Act does not confer any express powers on the Commissioner, the Commission or its staff to prosecute incident offences. Section 20 gives the Commissioner and the Commission's investigative staff "the like powers, authorities and privileges as are given by law to a constable", but these powers are conferred for the purposes of investigation only [27].

The Commission and its Commissioner and staff similarly have no implied power to prosecute incident offences [30]. The legislature has allocated the investigative function to the Commission and the prosecutorial function to the Director of Public Prosecutions [31-33]. The authorities relied on by the Commissioner show that the implication of a power to bring proceedings will depend on the specific characteristics of the statutory regime [34-42]. In this case, there is nothing in the Act to suggest that the Commission should prosecute incident offences, nor that doing so would facilitate or enhance the performance of the Commission's investigative function [43].

The Board reaches a different conclusion in respect of section 33 offences. Each of the section 33 offences is closely related to, and is intended to promote the effective performance and prevent obstruction of the Commission's investigative work. The necessary implication is that the Commission should have the power to prosecute these offences [44].

The Commissioner and Commission staff retain their common law right to prosecute both incident offences and section 33 offences as citizens acting in their private rather than their official capacity.

However, in practice, private prosecutions for incident offences are an impossibility because section 28 prohibits the Commissioner and Commission staff from relying on any evidence acquired as a result of the Commission's investigations [47]. This practical problem does not affect private prosecutions for section 33 offences because they are covered by the express exception in section 28(1)(a) [55].

The defences raised by Mr Diah could not provide him with a lawful justification or excuse for failing to comply with the Commission investigator's instructions to deliver up the police officers' firearms [56-70].

For these reasons, the Board considers that the Indecom appeal should be dismissed [48] and the Diah appeal should be allowed [71]. The Diah appeal should be remitted to the Court of Appeal for further consideration of the appeal against Mr Diah's sentence [72-73].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for the decision. The full judgment of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.