[2022] JMCA Crim 62

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE LAING JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00015

APPLICATION NO COA2022APP00106

ANTHONY CASTELLE v R

Hugh Wildman instructed by Hugh Wildman & Company for the appellant

Janek Forbes, Ms Ashtelle Steele and Ms Sharelle Smith for the Crown

11, 12 July and 9 December 2022

LAING JA (AG)

Introduction

[1] On 16 January 2017, a trial commenced before a Judge of the Parish Court for the parish of Saint James ('the Parish Court Judge'), at Montego Bay in that parish, in which Anthony Castelle, a Senior Superintendent of Police ('the appellant'), was tried along with District Constable Rohan McIntosh ('DC McIntosh'), on an indictment that contained two counts. On the first count, they were charged with the offence of unlawful wounding, contrary to section 22 of the Offences Against the Person Act, and the second count charged them with the offence of misconduct in a public office contrary to common law. On 22 November 2018, DC McIntosh was found not guilty on both counts and the appellant was convicted on both counts. On 14 December 2018, the appellant was sentenced to pay a fine of $1,000,000.00 or serve 30 days' imprisonment at hard labour

on the count of unlawful wounding. He was admonished and discharged on the count of misconduct in a public office.

The trial

The Crown's case

[2] The case for the prosecution was that on 22 January 2016, Mr Lenford Grant was the driver of a Toyota Corolla motor car ('the motor car'). He was driving in Montego Bay in the parish of Saint James with six passengers in the motor car including Janice Hines, who was seated on the back seat of the motor car. Mr Grant was instructed to stop by police officers who were conducting a joint operation with officers from the Transport Authority. He disobeyed those instructions, and the motor car was pursued by the appellant and DC McIntosh, in an unmarked service vehicle with a siren blaring and bright blue flashing lights. The appellant was the driver of the service vehicle.

[3] The appellant discharged approximately five rounds from his service firearm, one of which struck Janice Hines while she was seated in the motor car. The motor car crashed into a wall and Mr Grant escaped on foot. Janice Hines was taken to the Cornwall Regional Hospital by the appellant, where she was treated for the injuries she had sustained.

The appellant's case

[4] The appellant gave an unsworn statement from the dock. He admitted that he pursued the motor car and that he fired warning shots in the air. He asserted that he did not injure anyone because he did not fire at the motor car.

The application for extension of time to file grounds of appeal

[5] The appellant made an application for an extension of time to file grounds of appeal. The application was supported by affidavits sworn to by the appellant and Ms Althea Grace-Marie Grant, who represented the appellant in the Parish Court. By these affidavits, the appellant and his former attorney explained that verbal notice of appeal was given, following the handing down of the sentences. However, through ignorance of the legal requirement, Ms Grant failed to provide any grounds of appeal in keeping with

section 296 of the Judicature (Parish Courts) Act ('the Act'). Grounds of appeal were not filed until 27 April 2022. Accordingly, Mr Wildman argued that the appellant would suffer a grave injustice if he were not granted an extension of time within which to file his grounds of appeal, in light of these circumstances.

[6] The Crown objected to the granting of the application on the ground that no good cause had been shown for the failure to file grounds of appeal. It was noted that the sentence was given in November 2018. It was also argued by Mr Forbes that a constitutional claim had been filed in the Supreme Court in August 2020 in which Mr Wildman appeared, so he ought to have known that no grounds of appeal were filed in the instant appeal. Mr Forbes highlighted para. 12 of Mr Castelle's affidavit in which he averred that he retained Mr Wildman to prosecute his appeal, although counsel acknowledged that there was no indication of the date that Mr Wildman was so retained.

[7] This court noted that section 296 of the Act, permits the Court of Appeal to "hear and determine" an appeal notwithstanding the grounds of appeal were not filed within the time specified in the Act, that is, 21 days. By virtue of section 296, this court must be satisfied that "good cause" has been shown for this failing, before granting an extension. Whereas "good cause" is not defined in the Act, the court was guided by the case law, including civil cases in construing the meaning of that term. In that regard, the court considered the interests of justice as being paramount (see **The Commissioner of Lands v Homeways Foods Limited and Stephanie Muir** [2016] JMCA Civ 21 at paras. [44] and [45]).

[8] We accepted that the delay was inordinate and that the explanation offered for the delay was not a good one. However, we also accepted that the cause of the delay was the conduct of counsel and not of the appellant. In such circumstances, the appellant should not be prejudiced where his counsel was at fault. On the other hand, we found that there would have been no prejudice to the Crown, if time was extended. Importantly, we also concluded that there were arguable grounds of appeal involving

issues of law which were potentially novel and which deserved the consideration of the court. Accordingly, we made the following orders:

1. The amended notice of application to file grounds of appeal as filed 10 June 2022 is granted.

2. Time is extended to 3 May 2022 for the applicant to file grounds of appeal.

3. The grounds of appeal filed on the same date, 3 March 2022 are permitted to stand except for the submissions at grounds 1 and 2.

4. Counsel for the applicant is to file amended grounds of appeal on or before 4 pm on 11 July 2022.

The grounds of appeal

[9] The appellant filed the following grounds of appeal:

> "1. The Learned Parish Court Judge erred in law in failing to appreciate that the arrest and charge of the Appellant by the Senior Investigative Officer of INDECOM, Mrs. Glasene Perc-Lee [sic], was an illegality, which could not be cured by the Clerk of Courts conducting the prosecution.
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> 2. The Learned Parish Court Judge erred in law in failing to uphold the no case submission that was made on behalf of the Appellant, that at the end of the prosecution's case, there was no evidence connecting the Appellant, Anthony Castelle, to any injury to the victim, as the fragments recovered from the motor car did not establish that such fragments came from the firearm that was in the possession of the Appellant.
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> 3. In any event, the Learned Parish Court Judge erred in law in failing to appreciate that there was no medical evidence tendered by the Crown to show that the Complainant was in fact injured by any missile coming from the weapon of Mr Castelle.
>
> 4. The Learned Parish Court Judge erred in law in failing to appreciate that by acquitting the co-accused, Mr Rohan McIntosh, who was charged jointly with the Appellant, on the basis that there was no fragment connected to his gun found in the motor car, should have guided the Parish Court Judge

to acquit Mr Castelle, as there was no bullet found in the car connecting [sic] to Mr. Castelle's gun.

5. The Learned Parish Court Judge erred in law in failing to appreciate that, where persons are charged jointly in the commission of an offence and there is no evidence connecting either of the accused persons to the offence, and there was no evidence that they were acting in concert, both must be acquitted.

6. The Learned Parish Court Judge erred in law in failing to appreciate that in assessing whether the circumstantial evidence relied on by the Crown was sufficient to ground a conviction, it had to satisfy the standard that it leads to one conclusion and one conclusion only, and inconsistent with any other rational explanation."

Ground 1

The appellant's submissions

[10] Mr Wildman highlighted the fact, (and it is not in dispute), that the Independent Commission of Investigations ('INDECOM') carried out the investigations as well as the arrest and charge of the appellant. He submitted that it has been established by the Privy Council in the case of **Commissioner of the Independent Commission of Investigations v Police Federation and others; Dave Lewin (Director of Complaints of the Independent Commission of Investigations) v Albert Diah** [2020] UKPC 11 ('the **INDECOM** case'), that under the provisions of the Independent Commission of Investigations Act 2010, ('the INDECOM Act'), INDECOM does not have the power to arrest and charge anyone during the course of its investigations, because it is a purely investigative body and its sole function is to investigate and to turn over the fruits of its investigations to the Director of Public Prosecutions ('DPP'), who should determine whether criminal charges should be preferred.

[11] Mr Wildman submitted that the prosecution that was launched against the appellant by INDECOM was a nullity, and when the Parish Court Judge had the indictment preferred against the appellant and embarked on the trial, she had no jurisdiction to do so. As a result, the trial was a nullity. Counsel relied on the case of **R v Monica Stewart**

(1971) 17 WIR 381 ('**Monica Stewart**') in which this court held that the trial before the magistrate was a nullity, in the absence of a signed order for indictment. He further argued that the involvement of the Clerk of the Courts in the prosecution could not have saved the charges, which were a nullity and remained a nullity up to the point of conviction.

[12] Mr Wildman further asserted that the witness statements that were collected by INDECOM could not have been used to mount the prosecution against the appellant because the disclosure of those statements would have amounted to a breach of the INDECOM Act. In support of his submissions, Mr Wildman relied on the House of Lords case of **Director of Public Prosecutions v Head** [1959] AC 83 in which Lord Somervell opined that a man ought not to be sent to prison on the basis that an order is a good order, when the court knows it would be set aside if proper proceedings were taken to that effect. Counsel argued that in this case, the order for indictment would have been quashed had there been *certiorari* proceedings and this court ought to take that into consideration.

The respondent's submissions

[13] The Crown conceded that the decision in the **INDECOM** case established that INDECOM and its officers did not have the legal authority to lay an information against the appellant or any other police officer. It was also conceded that INDECOM did not have the legal authority to arrest or charge the appellant or any other officer and accordingly it acted *ultra vires* the INDECOM Act. Despite these concessions, it was submitted that the appellant was tried on an indictment, signed by a duly appointed Clerk of the Courts, after the Parish Court Judge granted the order for indictment pursuant to section 272 of the Act. Therefore, although the process by which the appellant was brought before the court was irregular, he nonetheless submitted to the jurisdiction of the court.

[14] The Crown submitted that the trial could only be considered a nullity where no order of indictment was granted or signed by the Parish Court Judge, which was not the

situation in this case. Reliance was placed on the case of **Wayne Hamil v R** [2021] JMCA Crim 12 ('**Hamil**'), a decision of this court in which the appellant appealed against his conviction in the Circuit Court, on the basis that that the court had irregularly assumed jurisdiction over charges that had not been properly initiated by an authorised person and which were, because of that procedural defect, the trial was a nullity. The argument of the appellant was similar to that being deployed by the appellant in this case, which was that the initiation of the criminal process was flawed since it was led by INDECOM, and accordingly the entire process in the Circuit Court was equally flawed and a nullity. However, this court found that the preliminary enquiry ('PE') undertaken by the resident magistrate was valid and that the proceedings in the Circuit Court on an indictment preferred by Crown Counsel for the Director of Public Prosecutions, was free from any procedural taint.

Discussion and analysis

The jurisdiction of the Parish Court

[15] The Parish Court is a creature of statute. The proceedings for trial of a criminal charge before a Judge of the Parish Court are governed by the provisions of the Act. The Act also makes reference to the role of the judge of a Parish Court, presiding in the capacity of two or more Justices of the Peace, in the court of Petty Sessions. The Justices of the Peace Jurisdiction Act governs the operations of the Judge of the Parish Court acting in this jurisdiction. As such, the latter statute is also relevant and reference will be made to it herein.

[16] The jurisdiction of the Judge of the Parish Court to try certain offences is conferred by section 268 of the Act. Provisions are made for summary trials on information and for trials on indictment. An "information" is a formal written charge which contains the details in respect of the offence for which the accused person is to be brought before the Parish Court. Section 64(1) of the Justices of the Peace Jurisdiction Act provides for the contents of an information as follows:

> "64.(1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any committal proceedings or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

[17] The laying of an information is an initiating process. This is so whether the accused person will ultimately face a summary trial on the information, a trial on indictment before the Judge of the Parish Court, or be committed to the Circuit Court for trial in cases where the Judge of the Parish Court does not have the jurisdiction to try the particular offence. The laying of the information provides the basis for the accused person to be summoned to appear before the court or for a warrant on information to be issued for his attendance (see sections 2, 3, 4 and 9 of the Justices of the Peace Jurisdiction Act).

[18] An indictment is a written or printed accusation of the crime, made at the suit of the Crown against one or more persons. Section 4(1) of the Indictments Act provides for what an indictment should contain. In terms of its contents, the indictment is similar to an information, although its format is different.

[19] A trial on indictment in Jamaica takes place in four circumstances:

a. Where an order for indictment is made in respect of an offence triable in the Parish Court;

b. Where the accused has been committed for trial in the Supreme Court;

c. Where the accused is being tried in the High Court Division of the Gun Court; and

d. Where a bill of indictment is preferred by the DPP.

[20] The instant case arises out of the first of these circumstances. Where an indictable offence is before a Judge of the Parish Court, usually the prosecution will make a brief opening as to the allegations and the facts which it intends to prove. It will request an order for indictment in terms of a previously prepared draft (which is usually shared with counsel for the defence). If the Judge of the Parish Court is satisfied that the case is within his jurisdiction, and that the offence can be adequately punished in keeping with his powers, he is required to make an order that an indictment be preferred before him. This order will contain the offence or offences for which the accused person is to be tried and will be endorsed on the information on which the defendant was brought before the court. The indictment upon which the defendant is to be tried, signed by the clerk of the courts will then be preferred and the trial would proceed.

[21] In assessing the merits of this ground, it is necessary to examine in detail the relevant sections of the Act, which address the procedure to be employed in the trial of indictable offences in the Parish Court. Sections 272 to 274 of the Act provide as follows:

> "272. On a person being brought or appearing before a Judge of the Parish Court in Court or in Chambers, charged on information and complaint with any indictable offence, the Judge of the Parish Court shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Judge of the Parish Court that the accused person shall be tried, on a day to be named in the order, in the Court or that a preliminary investigation shall be held with a view to a committal to the Circuit Court.
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> 273. It shall be lawful for any Judge of the Parish Court, in making any order under section 272 directing that any accused person be tried in the Court, by such order to direct the presentation of an indictment for any offence disclosed in the information, or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Judge of the Parish Court the accused person ought to be charged and may also direct the addition of a count or counts to such indictment. And, upon any such

> enquiry, it shall be lawful for the Judge of the Parish Court to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did or did not strictly disclose any offence.
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> 274. The trial of any person before a Parish Court for an indictable offence, shall be commenced by the Clerk of the Courts preferring an indictment against such person and there shall be no preliminary examination."

[22] The issue of the Parish Court Judge's jurisdiction to hear the charges was raised during the course of the trial of the appellant. The Parish Court Judge's analysis and the reasons for her decision in relation to this issue can be found at paras. 82 and 83 of her reasons and findings of fact, as follows:

> "82. At the time of considering the no case submission and delivering my decision, I found no authority on point to guide me. I did not believe that the defect in the institution of proceedings made the entire proceedings a nullity. At the commencement of the trial in 2017, the accused did not indicate that they objected to the jurisdiction of the court to hear the matter, or that they appeared under protest. The jurisdiction point was first raised before me on August 8, 2018. By that point the accused had made numerous appearances. It is clear, based on the Court of Appeal decision in ***The Police Federation v Indecom***, that each information was incorrectly laid by the INDECOM Officer and the warrant of information issued on May 18, 2016 had compelled the attendance of the accused. However, by their continued attendance at court without protest, it seemed to me that the accused waived the defect or irregularity in the proceedings by submitting to the jurisdiction of court [sic].
>
> 83. In addition, I formed the opinion that once the indictment was preferred, it potentially cured the defect in the institution of proceedings, since they were now charged on the indictment. The Judicature (Parish Courts) Act expressly confers jurisdiction on a Judge of the Parish Court to try indictable offences and to add charges as counts to the

> indictment where the accused had not been charged with those offences previously. Pursuant to section 272 of the Judicature (Parish Courts) Act, the accused is required to be pleaded to the charges on the indictment. I formed the view that once the order for indictment was made, the indictment was preferred, and the prosecution was conducted by the Clerk of Court (in keeping with section 289 of the Judicature (Parish Courts) Act and section 94 of the Constitution, the indictment cured the defect in the institution of proceedings by INDECOM."

It is this analysis which falls for us to interrogate and determine.

The nature of the breach and whether the defect in the originating process was cured by the order for indictment and the clerk of the courts preferring an indictment

[23] It is common ground between the parties that the **INDECOM** case has decided with finality that INDECOM does not have the power to prosecute an offence, which had been the subject of an investigation by INDECOM, referred to as an incident offence. The Privy Council by its judgment in that case, upheld the majority decision of this court to similar effect in **Albert Diah v R** [2018] JMCA Crim 14, which was delivered on 16 March 2018, while the case against the appellant was continuing. At para. 43 of the **INDECOM** case, Lord Lloyd-Jones stated:

> "[43] In summary, therefore, a power to prosecute for incident offences is not an incident of, ancillary to or consequential upon the Commission's statutory function, nor does the Commission require such a power in order to be able effectively to discharge its statutory function which, the Act makes clear, is an investigative function. It would not facilitate the discharge of that function or in any way enhance the fulfilment of the Commission's duties. There is nothing in the 2010 Act to suggest that it was intended that the Commission should perform any function in relation to the prosecution of incident offences. As a result, the implication of the powers contended for becomes an impossibility. For these reasons the Board considers that the Court of Appeal was correct in its conclusion that the Commission, and the Commissioner and Commission officials in their official capacity have no power to prosecute in respect of incident offences."

[24] In the case under consideration, INDECOM performed its investigations and purported to lay informations charging the appellant. These informations provided the basis for obtaining a warrant on information, which compelled the appellant's attendance before the Parish Court. It is undisputed that this process, having been conducted by officers of INDECOM, was improper.

[25] Further, the witness statements provided to the clerk of the courts formed the basis of the allegations and facts which were intended to be proved, and grounded the application to the Parish Court Judge for an order for indictment.

[26] Whether the irregularity in the originating process was cured by the Parish Court Judge granting an order for indictment, and the signing of that indictment by the Clerk of Courts as an authorised officer, depends on whether the information, which commenced the proceedings against the appellant, was a mere irregularity or a nullity. The Crown, in responding to the appellant's complaints, has asserted that the conclusions reached by the Parish Court Judge were sound and that the trial could only be considered a nullity if no order of indictment was granted or signed by the parish court judge. These submissions are consistent with those made by the Crown before the learned parish court judge at the trial and which were clearly adopted by her.

[27] The necessity for a Judge of the Parish Court to endorse on the information, an order for an indictment to be preferred, has been addressed in numerous cases decided by this court including relatively recently, in the case of **Michael Francis v R** [2021] JMCA Crim 6. In **Michael Francis v R**, this court considered a number of earlier authorities, including **R v Joscelyn Williams et al** (1958) 7 JLR 129 and **Monica Stewart**. The Crown has quite rightly submitted that the case under consideration is distinguishable from those cases because the issue is not the absence of an endorsement, since there was an order for indictment endorsed on the relevant informations.

[28] The Crown has placed heavy reliance on the decision of this court in **Hamil** to support its submission that the trial will only be considered a nullity where there was no

order for indictment. In that case, Mr Hamil faced a preliminary enquiry ('PE') conducted by a Resident Magistrate and was committed to stand trial in the Circuit Court. He was convicted and sentenced on 30 June 2016 in the Trelawny Circuit Court for the offence of wounding with intent to cause grievous bodily harm, for which he was sentenced to pay a fine of $1,000,000.00 or serve three years' imprisonment at hard labour. He appealed his conviction and sentence and submitted that in light of the **INDECOM** case, his trial and conviction should be set aside because the Circuit Court had irregularly assumed jurisdiction over his case. He argued that this was so because the initiation of the criminal process against him by his arrest and charge, which led to the PE, was flawed having been instituted by Mr Morris, a senior investigator of INDECOM.

[29] On the authority of **R v Hughes** (1879) 4 QBD 614 ('**Hughes**'), this court, at para. [105] of the judgment in **Hamil**, held that although Mr Morris in his official capacity did not have authority to lay the information against the appellant, that did not affect the jurisdiction that the learned Judge of the Parish Court had to deal with the case of Mr Hamil when he came before her. This court concluded at para. [113] of the judgment that "the learned [Judge of the Parish Court] fully complied with section 272 of [the Act] by signing an order which was endorsed on the information for a PE to be held". Further at para. [115], the court confirmed its conclusion that the commencement of proceedings by an INDECOM officer, "had no continuing significance after the learned [Judge of the parish court] had assumed jurisdiction over the matter, and made and signed an order for a PE to be held." Accordingly, since the proceedings before the learned Judge of the Parish Court were valid, the proceedings that followed in the Circuit Court were free of any procedural taint.

[30] We have noted that the proceeding before the magistrate in **Hamil** was a PE geared at determining whether there should have been a committal to stand trial in the Circuit Court on indictment, whereas, in the case under consideration, we are concerned with a trial on indictment by the Parish Court Judge. Accordingly, the nature of the enquiry undertaken in **Hamil** is distinct from that with which this court is engaged as is reflected in para. [123] of that judgment as follows:

> "[123] The critical point in the instant case is that the trial of the applicant did not proceed on that initial charge laid by Mr Morris. It proceeded, after a valid PE, on a valid indictment preferred by Crown Counsel on behalf of the DPP — the individual constitutionally charged with prosecuting crimes before the courts of Jamaica. It was not a situation, therefore, as in **Benjamin Leonard MacFoy v United Africa Company Limited**, that subsequent steps taken would collapse, based on the ruling in the **INDECOM** case. This is so, as the process which was followed did not depend on the validity of the information laid by Mr Morris."

[31] The paramount issue in the case under consideration by this court is whether the Parish Court Judge had jurisdiction to make and endorse the order for trial of the appellant on an indictment, in circumstances where the information on which the appellant had been brought before the court was not properly laid. In resolving this issue, it is necessary to determine whether the statutory regime implemented by section 272 of the Act is merely procedural.

[32] In conducting our analysis, we have found value in the English Court of Appeal case of **R v Ashton and others** [2006] EWCA Crim 794, in which the court considered the approach to procedural failures based on a previous decision of that court and made the following observations at paras. 4 and 5:

> "[4] The outcome of each of these cases essentially depends on the proper application of the principle or principles to be derived from the decision of the House of Lords in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, [2005] 3 WLR 303, together with the earlier decision of this court in *R v Sekhon and others* [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655. Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a Defendant's case progresses through the courts (as opposed to the markedly different situation when a court acts without jurisdiction). In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that

> any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.
>
> [5] On the other hand, if a court acts without jurisdiction – if, for instance, a magistrates' court purports to try a Defendant on a charge of homicide – then the proceedings will usually be invalid."

[33] In the case at bar, the offences for which the appellant was tried were offences within the jurisdiction of the court. Therefore, it is the effect of the procedural failures, arising from the involvement of INDECOM, which is the issue with which we are to grapple, in determining whether such failures led to the trial of the appellant being invalid.

[34] We are of the opinion that although this case concerns a trial on indictment in the Parish Court, the effect of the procedural irregularity is the same as it was found to be in **Hamil**, where at para. [115] of the judgment, the court confirmed its conclusion that the commencement of proceedings by an INDECOM officer, "had no continuing significance after the learned [Judge of the Parish Court] had assumed jurisdiction over the matter, and made and signed an order for a PE to be held". In the instant case, we similarly find that the commencement of proceedings by the INDECOM officer had no continuing significance after the parish court judge signed the order for indictment.

[35] Accordingly, we conclude that the nature of the breach was not such as to render the trial a nullity and that the defect in the originating process was cured by the Parish Court Judge granting an order of indictment for the trial of the appellant to proceed and the subsequent proffering of the indictment by the clerk of the courts. The trial of the appellant which ensued following these procedures would not have been tainted by the initial procedural breaches of INDECOM.

The failure to challenge the court's jurisdiction and waiver

[36] The appellant failed to object to the court's jurisdiction before the commencement of the proceedings but sought to do so during the course of the trial after the INDECOM case. The Parish Court Judge, however, refused to uphold the objection and in our view, she cannot be faulted for doing so.

[37] In **Monica Stewart**, this court considered the issue of jurisdiction, and at page 383, Edun JA in delivering the judgment of the court made the following distinction:

> "To resolve the problem in this case it is necessary to clarify that the word 'jurisdiction' meaning the authority of a court or judge to deal with a person who has been brought up before him on a process of the court, is distinguishable from 'jurisdiction' meaning the power of the court or judge to entertain an action, petition or other proceedings."

The learned judge of appeal then proceeded to give examples of the practical application of the distinction in certain cases as follows:

> "The meaning of 'jurisdiction' in the former sense has been considered in many cases. Thus, an irregularity or illegality in the mode of bringing a defendant before the justices, if not objected to at the hearing, does not affect the validity of the conviction: *Gray v Customs Commissioners* [(1884), 48 J.P. 343 D.C.]. In *R. v. Hughes* [(1879), 4 QBD 614], where a defendant was arrested on a warrant issued without information on oath, made no objection to the justices hearing the case, but went into his defence when the case was heard out, the court held this cured the irregularity. Where, however, a defendant appeared and protested against the hearing upon an informal summons, a conviction was quashed: *Dixon v. Wells* [(1890), 25 QBD 249]. Similarly, no objection to jurisdiction can be taken where, for example, the defendant has been described in the information or complaint by a wrong name: *Dring v Mann* [(1948), 112 JP 270].
>
> We turn next to consider the meaning of 'jurisdiction' in the latter sense, that is, the power of a court or judge to entertain an action, petition or other proceedings ..."

[38] In relation to this latter meaning of "jurisdiction", Edun JA concluded thus, at page 384:

> "In the instant case, we are of the view that the words in s 272 of the Judicature ([Parish Courts]) Law, Cap 179:
>
> > 'the [Judge of the Parish Court] shall, after such inquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction … make an order …'
>
> constituted the condition precedent which the [Judge of the Parish Court] had to comply with before assuming any jurisdiction at all.
>
> There is no evidence in the instant case which can prove in the manner stated by s 272 that is, by an endorsement on the information signed by the [Judge of the Parish Court], that she had fulfilled that condition precedent before deciding to hear and determine the case against the appellant. The case of *R. v. Williams* [(1958) 7 JLR 129] correctly states the law on the interpretation of s 272 of the Judicature ([Parish Courts]) Law, Cap 179."

[39] Although Edun JA relied on **Dixon v Wells** to support his opinion as to the relevance of whether there had been an objection to the proceedings, interestingly, Lord Coleridge CJ, who presided in **Hughes**, in his judgment in the case of **Dixon v Wells** [1890] 25 QBD 249 at page 256 was of the view that the issue of whether there was an objection, was not important in **Hughes**. The learned Chief Justice commented as follows:

> "… I cannot disguise from myself the fact that from the language of many of the judges in *Reg. v. Hughes* (1) - although, perhaps, not necessary for the decision of the case - and the judgments of Erle, C.J., and Blackburn, J., in *Reg. v. Shaw* (2), they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in *Reg. v. Hughes* …"

[40] However, the importance of the decision in **Monica Stewart** is that even if there is no objection to the invalidity of the information, there was the need for an endorsement of the order for indictment signed by the Parish Court Judge as a condition precedent for her to hear the case. Therefore, in the absence of that order, there was no jurisdiction in the latter sense of the Parish Court Judge having authority to conduct the proceedings, and so this could not be cured. On that basis, the indictment was bad and a nullity.

[41] In our view, the case of **Monica Stewart** is of very limited applicability in considering the possible effect of whether there was an objection prior to the commencement of the case. We have found that the order for indictment was properly made as the offences fell within the jurisdiction of the Parish Court and whether there was an objection was not material. In any event, there was no objection to the Parish Court Judge exercising jurisdiction over the appellant or the case at the commencement of the proceedings. We have concluded that the preferring by the clerk of the courts of the indictment on which the appellant was arraigned and tried was lawful and the subsequent objection by the appellant did not have any effect on the jurisdiction of the learned Parish Court Judge which had already been established.

The use of the witness statements

[42] Mr Wildman also submitted that the use of the witness statements collected by INDECOM was also improper and provides an additional basis for a finding that the trial was a nullity. Section 17 of the INDECOM Act addresses the formal handling of complaints, and expressly provides for the limited use of a final investigation report as follows:

> "...
>
> (8) After receiving and considering a final investigation report submitted under subsection (7), the Commission shall make its own assessment of the investigation and form its own opinion as to the matter under investigation.
>
> (9) The Commission shall then prepare a report on the investigation including its recommendations arising therefrom

(whether or not confirming any of the proposed recommendations) as are to be acted upon (hereinafter referred to as 'recommendations for action').

(10) The Commission shall furnish a copy of the report of the Commission to-

(a) the complainant;

(b) the concerned officer or the concerned official;

(e) the responsible head or the responsible officer;

(d) the Director of Public Prosecutions;

(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); …"

[43] It is noteworthy that there is no express provision in this section for the underlying source material such as witness statements to be disclosed to the DPP. However, section 25 addresses the cooperation that should be given to the DPP as follows:

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

[44] The Privy Council in the **INDECOM** case at para. [47] of the judgment confirmed the ambit within which there could have been proper use of the material collected by INDECOM during its investigations and made it clear that it did not extend to private prosecutions by INDECOM or its staff. Lord Lloyd-Jones stated:

> "[47] The Board agrees with the majority of the Court of Appeal that, when the issue is considered as a matter of principle, the legislation establishing the Commission does not expressly or impliedly abrogate the right of individuals to bring a private prosecution in respect of an incident offence which had been subject of investigation by the Commission. However, the Board is equally persuaded that the legislation has made such a private prosecution by the Commission or its staff a practical impossibility. As we have seen, section 28(1) requires the Commissioner and all persons concerned with the administration of the Act to regard as secret and confidential all documents, information and things disclosed to them in the execution of any of the provisions of the Act. Disclosure in breach of the section 28 duty is made a criminal offence by section 33(c). The exceptions to this provision would not apply to a private prosecution for an incident offence. In particular, disclosure for the purposes of such a prosecution, even if brought by the Commissioner or a member of the Commission's staff, would not be in discharge of their official functions. Furthermore, section 28(2) prohibits the Commissioner and his staff from giving evidence in respect of or from producing any such document, information or thing, save in proceedings mentioned in section 28(1) (proceedings under section 33 of the 2010 Act or the Perjury Act by virtue of section 21(3) of the 2010 Act) or section 25 (assistance to the DPP in relation to a prosecution arising out of an incident). Section 28 therefore imposes a total prohibition on the use by the Commissioner or a member of the Commission's staff in such a private prosecution of any information acquired as a result of the Commission's investigation, thereby defeating the entire exercise. Furthermore, the Commissioner and the Commission staff would be committing a criminal offence if they were to try to use any evidence gained in the course of the investigation in support of a private prosecution …"

[45] We have previously made reference to the fact that the witness statements collected by INDECOM in this case provided the facts on which the clerk of courts relied

to apply for and obtain the order of indictment. However, the witness statements provided by INDECOM to the clerk of the courts would not constitute illegally obtained evidence. It is evidence, the use of which subjects the person who has disclosed it to criminal sanction. In any event, even if the witness statements do constitute illegally obtained evidence, cases such as **Kuruma, Son of Kaniu v The Queen** [1955] 2 WLR 223 and **Herman King v The Queen** [1969] 1 AC 304 have established beyond debate that the use of illegally obtained evidence does not render a trial a nullity. We are accordingly of the view that the use of the witness statements would not be a basis for us to find that that trial was a nullity. The objection of the appellant to the use of the witness statements cannot provide a sufficient basis for allowing the appeal.

[46] For the reasons expressed herein, we found no merit in ground of appeal 1.

Grounds 2 to 6

[47] Grounds 2 to 6 can conveniently be dealt with together. This is because they are all founded on the proposition that there was inadequate evidence to support the conviction of the applicant and that for that reason the case against the appellant should have been dismissed when the no case submission was made. We do not find this to be so. It is unnecessary to rehearse all the facts of the case but of significance is the fact that there was evidence that the appellant was the only person known to have discharged his firearm, a fact he admitted. There was no evidence that anyone else other than the appellant discharged a firearm at the material time when Ms Hinds was injured. In particular, there was no evidence that DC McIntosh did so.

[48] At the close of the case for the prosecution, there was sufficient evidence of multiple projectile strikes to the motor car and bullet fragments found inside from which it could reasonably be inferred that a bullet or bullets from a firearm penetrated the motor car in which Ms Hinds was seated. The natural inference therefrom is that she was injured (directly or indirectly) by a bullet from a firearm. The evidence disclosed that the appellant was the only person who discharged his firearm while chasing the motor car. Furthermore, a fragment of a metal jacket from a fired firearm bullet which was recovered

from the motor car was examined by a Government Ballistics Expert. He opined that it was discharged from the barrel of a firearm of a similar class to the firearm which the appellant had discharged on the day of the incident. It was, therefore, open to the learned Parish Court Judge to reject the no case submission and to find that there was a case for the appellant to answer, while also discharging DC McIntosh on the basis that there was no evidence against him. The case against DC McIntosh was distinguishable from that against the appellant because there was no evidence that DC McIntosh had discharged his firearm and no other evidence on which it could be properly concluded that he acted in concert with the appellant in the execution of an unlawful joint enterprise. Therefore, the fact that DC McIntosh was found not to be culpable would not have precluded a finding of criminal liability on the part of the appellant. There was, therefore, no basis in law for the no case submission to be upheld in respect of the appellant.

[49] Although the appellant asserted in his unsworn statement that he fired warning shots in the air, which were not directed at the motor car, it was open to the learned parish court judge to have found that he, at least, recklessly discharged his firearm and to infer that Ms Hinds was injured by a bullet that had been discharged from the appellant's firearm. The inference that it was the appellant who caused the injury to Ms Hinds when he discharged his firearm, and no one else, was a reasonable and inescapable one that could have been drawn on the totality of the evidence and in the absence of medical evidence to the contrary. Accordingly, it was open to the Parish Court Judge to find the appellant guilty of the offence of unlawful wounding for which he had been charged. The conviction for this offence is, therefore, unimpeachable.

[50] In respect of the offence of misconduct in public office, the conduct must be deliberate rather than accidental, and must be accompanied by an awareness of the duty to act. In the English Court of Appeal case of **Attorney General's Reference (No 3 of 2003)** [2005] QB 73, Pill LJ in delivering the opinion of the court, at para. 30 made the following observation in relation to the requirement to establish the *mens rea* of the offence:

> "…There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty. The recklessness test will apply to the question whether in particular circumstances a duty arises at all as well as to the conduct of the defendant if it does. The subjective test applies both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission.

[51] Having found that the appellant was guilty of unlawful wounding, the learned Parish Court Judge was entitled to also find on that evidence, as she did, that by discharging his firearm five times, when, as he admitted in his unsworn statement, the thoroughfare was busy with pedestrians and motorists, he had committed the offence of misconduct in a public office. The conduct of the appellant also cannot be considered in a vacuum, and must possess a criminal quality such as where damage to the public, viewed subjectively, is likely to be great (see **Attorney General's Reference (No 3 of 2003)**). In this case, harm to the public from the appellant's conduct was likely and he must have appreciated this. The consequence of such conduct was the wounding of Ms Janice Hinds. Accordingly, the conviction for this offence cannot justifiably be disturbed.

[52] We find that grounds of appeal 2 to 6 also fail.

Disposition of the appeal

[53] Having regard to findings detailed above in respect of the grounds of appeal, we make the following orders:

1. The appeal is dismissed.
2. The convictions and sentences are affirmed.
3. The sentences are to be reckoned as having commenced on 14 December 2018, the date they were imposed.