[2019] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 9/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS P WILLIAMS JA (AG)

GERVILLE WILLIAMS
PETRO GREEN
KENNETH DALEY
FRANCIS RENNALS
DAVID HUTCHINSON
DEVON NOBLE
ORETTE WILLIAMSON (deceased)
MARCEL DIXON **v R**

Peter Champagnie for appellants Williams, Green, Daley and Rennals

Mrs Valerie Neita-Robertson for appellants Hutchinson and Noble

Robert Fletcher for appellant Dixon

Richard Small and Miss Krystle Blackwood for the Independent Commission of Investigations

Miss Keisha Prince for the Crown

7, 8 April 2016 and 18 January 2019

BROOKS JA

[1] The appellants, Messrs Gerville Williams, Kenneth Daley, Francis Rennals, David Hutchinson, Devon Noble and Marcel Dixon and Ms Petro Green were convicted in the Corporate Area Parish Court (then Resident Magistrate's Court) on 28 July 2014 for the

offence of failing to comply with a lawful requirement of the Independent Commission of Investigations (INDECOM), without lawful justification or excuse. Her Honour, Mrs Georgiana Fraser (as she then was), who presided over the trial, sentenced each of the appellants, on 31 July 2014, to pay a fine of $650,000.00 or to serve six months imprisonment in lieu of payment. They were each allowed time to pay. They have paid the fines but have appealed against their convictions and sentences. Mr Orrette Williamson, who was convicted along with the appellants, has, regrettably, since died.

[2] The appellants, who, at the time, were members of the Jamaica Constabulary Force (JCF), were each charged, on separate informations laid by Mr Isaiah Simms, an investigator of INDECOM. The details of the charge were that they had each failed, without lawful justification or excuse, to obey a notice issued by INDECOM, which required them to attend at the Video Identification Unit (VIU) on 14 September 2010 at 9:00 am, and report to Mr Isaiah Simms and other officers of INDECOM, to:

a. provide INDECOM with a statement; and

b. answer questions touching and concerning occurrences in the vicinity of Tredegar Park, Lauriston, Brooklyn and Spanish Town, in the parish of Saint Catherine between 8:00 pm on 12 August 2010 and 8:00 am on 13 August 2010 (the Tredegar Park incident), including the circumstances that led to the death of Mr Derrick Bolton and Mr Rohan Dixon.

[3] The prosecution of the matter was with the written permission of the Director of Public Prosecutions.

The prosecution's case

[4] The prosecution's case was that on 1 September 2010, Mr Terrence Williams, the Commissioner of INDECOM (hereinafter called "the Commissioner"), signed notices pursuant to section 21 of the INDECOM Act (section 21 notices) addressed to each of the appellants. The requirements contained in the notices have been set out above.

[5] On 3 September 2010, Mr Vivian Richards, an INDECOM investigator, received nine envelopes, which, he said, contained notices. These notices, he said, "were to invite [the appellants] to a parade at Central Police Station" (page 127 of the record of appeal).

[6] Mr Richards subsequently gave the nine envelopes to Deputy Superintendent of Police (DSP) Eva Tewarie. She said that she received nine sealed envelopes addressed respectively to the eight appellants and one other person, Constable Keddy Lewis. DSP Tewarie said that she served the sealed envelopes on appellants Williams, Green, Hutchinson, Rennals and Dixon. She endorsed and detached a section 21 notice, which had been attached to the outside of each of the envelopes.

[7] DSP Tewarie further testified that she gave the envelopes for appellants Daley, Noble and Williamson to, then Corporal, Simone Fyffe-Taffe. Corporal Fyffe-Taffe had been promoted to the rank of sergeant by the time she testified at the trial, but will be

referred to below, for consistency, as Corporal Fyffe-Taffe. She testified that on 8 September 2010, she delivered sealed envelopes to each of those appellants, and detached and endorsed a section 21 notice from each envelope. Corporal Fyffe-Taffe testified that Constable Lewis was not served because he was not available at the time. She, however, was present and saw when the envelope that was intended for him was later opened. She said that the envelope did not contain a section 21 notice, as was on the outside of the envelope, but rather an identification parade form.

[8] On 10 September 2010, the eight endorsed section 21 notices in respect of the appellants were received by Mr Simms. The endorsed notices were admitted into evidence as exhibits 1-8.

[9] On 14 September 2010 at 9:00 am, none of the appellants attended at the VIU. Mr Simms testified that he was unaware as to whether any of them had written statements regarding the Tredegar Park incident. He said, however, that on 14 September 2010 he received a call from a female attorney-at-law in connection with the matter. He testified that he also received a call from a male attorney-at-law in respect of the matter, but he could not recall the date of the latter call. It was his further evidence that there was no specific notice period for persons to attend in response to INDECOM notices, but, based on the recommendation of the Commissioner, the practice was usually to give three days' notice.

[10] It was also a part of the prosecution's case that appellant Hutchinson, by an affidavit filed in related constitutional proceedings before the Supreme Court, had

admitted that he had received a section 21 notice, dated 1 September 2010, requiring him to attend the VIU on 14 September 2010. Although appellant Hutchinson deposed that he received that notice on 12 September 2010, the prosecution's case was that only one set of notices were prepared for attendance on 14 September 2010, and that those were the notices that were served by DSP Tewarie and Corporal Fyffe-Taffe.

[11] The prosecution also relied on written submissions made by counsel representing all the appellants in the constitutional proceedings. According to the prosecution's case, the submissions were able to bind those appellants. The submissions, it was said, indicated that the appellants had all received the notices.

Appellants' case

[12] The appellants, in their defence, each made unsworn statements from the dock. The appellants Williams, Daley, Rennals and Green, in essence, each stated that on the date that they were required to attend at the VIU they were of the view that they each would have been subjected to an identification parade as a suspect, and thus, had the honest belief that they ought not to have attended without an attorney-at-law. Appellant Green further stated that she was of the view that another date would have been scheduled, since her attorney-at-law had, by then, written to the Commissioner seeking to have the date rescheduled.

[13] Appellants Hutchinson, Noble and Dixon, in their unsworn statements, indicated that they were not served with anything, but that they each collected a sealed envelope from the Operations Office at the Spanish Town Police Station. Their envelopes,

appellants Hutchinson and Noble stated, contained a notice and an identification parade form, whereas appellant Dixon stated that his envelope contained only an identification parade form. Those contents, they contended, led each of them to contact an attorney-at-law. Appellants Hutchinson and Noble indicated that they were led to believe that a later date would have been rescheduled for them to attend at the VIU. Appellants Hutchinson and Noble stated that they collected their envelopes on 12 September 2010. Appellant Dixon did not state when it was that he collected his envelope, but stated that it was not his intention to disobey the notice. He said that the "matter arose out of a misunderstanding" (see page 187 of the record of appeal).

Grounds of appeal

[14] In this appeal, the appellants Williams, Green, Daley and Rennalls advanced the following supplemental grounds of appeal, filed on 29 January 2016:

> "Ground 1
> That the verdicts are unfair in that [INDECOM] in failing to grant and [sic] adjournment and the learned [Parish Court Judge] in arriving at her decision failed to have sufficient regard to the Constitutional Right to Counsel of the Appellants and the breach of that constitutional right which arose when [INDECOM] failed to grant the adjournment that was requested by the Appellants through their Counsel."
>
> "Ground 2
> That the notices from [INDECOM] were short served and did not provide the Appellants with a reasonable time to place themselves in a position to comply therewith."

[15] On 15 February 2016, appellants Messrs Hutchinson and Noble filed supplemental grounds, which stated:

"GROUND 1
The Learned [Parish Court Judge] erred when she permitted the Prosecution to re-open their case to prove the element of service."

"GROUND 2
'That the Learned [Parish Court Judge] erred when [she] failed to uphold the Submissions of No Case made on behalf of the [appellants Hutchinson and Noble].'"

"GROUND 3
'That the Learned [Parish Court Judge] failed to adequately and accurately direct herself in relation to the case for the Defence and as a consequence the [appellants Hutchinson and Noble] were denied a fair trial.'"

"GROUND 4
'That the Learned [Parish Court Judge] erred by using the evidence adduced in the Affidavit of the [appellant] David Hutchinson to the detriment of the [appellant] MARCEL DIXON. That in so doing, the said MARCEL DIXON was prejudiced and accordingly was denied a fair trial.'"

"GROUND 5
'That the verdict was unreasonable having regard to the evidence.'"

"GROUND 6
'That in all the circumstances the sentence imposed by the Learned [Parish Court Judge] was excessive.'"

[16] The grounds filed by appellant Dixon, on 26 January 2016, are framed as follows:

"GROUND 1
The learned [Parish Court Judge] erred in not accepting the No-Case Submission made on behalf of Marcel Dixon.

GROUND 2
The learned [Parish Court Judge] erred in permitting the crown to reopen its case.

GROUND 3
The learned [Parish Court Judge] erred by making improper use of the evidence adduced in the affidavit of David Hutchison, such evidence being prejudicial and of no probative value in relation to the case against Marcel Dixon.

GROUND 4
The learned [Parish Court Judge] erred in that she did not demonstrate sufficient understanding of the case for the defence to enable her to conduct a fair and balanced assessment of the case against Marcel Dixon. This deficiency denied the [appellant Dixon] a fair trial and a real prospect of an acquittal.

GROUND 5
The verdict is unreasonable having regard to the evidence.

GROUND 6
The sentence is manifestly excessive having regard to the circumstances of the case and the evidence presented."

[17] The submissions made by counsel were not always restricted to the appellants whom they represented, but co-ordination and co-operation by counsel allowed overlapping according to the relevant issues.

[18] Based on the grounds advanced, the issues in this appeal are as follows:

a) Whether the appellants had any constitutional entitlement to have counsel present for the taking of the statements.

b) Whether the learned Parish Court Judge correctly exercised her discretion when she allowed the prosecution to reopen its case (this ground is in respect of appellants Hutchinson, Noble and Dixon).

c) Whether the learned Parish Court Judge erred in not upholding appellants Hutchinson, Noble and Dixon's no case submissions.

d) Whether the learned Parish Court Judge made improper use of the evidence adduced in the affidavit of appellant Hutchinson against appellants Dixon and Noble.

e) Whether the learned Parish Court Judge failed to adequately and accurately direct herself on the case for the appellants Hutchinson, Noble and Dixon.

f) Whether the verdict of the learned Parish Court Judge was unreasonable in the light of the evidence adduced.

g) Whether the sentence imposed by the learned Parish Court Judge against appellants Hutchinson, Noble and Dixon was manifestly excessive.

Issue a): Whether the appellants had any constitutional entitlement to have counsel present for the taking of the statements.

The submissions

[19] Mr Champagnie, for appellants Williams, Green, Daley and Rennalls submitted, for this issue, that the learned Parish Court Judge's verdict is unfair because she failed to give sufficient regard to the appellants' constitutional right to counsel. He argued

that that right would have arisen when the appellants were required to attend at the VIU. He submitted the action of INDECOM would have deprived them of such right and led to them being subsequently charged.

[20] Learned counsel submitted that a generous and purposive approach ought to be given to the interpretation of the appellants' right to communicate with and retain counsel as stated in section 14(2)(d) of the Charter of Fundamental Rights and Freedoms in the Constitution. A generous and purposive interpretation, he submitted, would include the right to counsel of one's choosing. He placed much reliance on **R v McCrimmon** [2010] 2 SCR 402; 2010 SSSC 36 in support of these submissions.

[21] Mr Champagnie argued that the evidence demonstrated that INDECOM sought to breach the appellants' right to counsel of their choice. He submitted that the appellants Williams, Green, Daley and Rennalls were each served on 12 September 2010 to attend at the VIU on 14 September 2010. They were, however, of the mistaken belief that they were required to attend an identification parade. In those circumstances, he argued, sufficient time would not have been allowed for them to retain legal representation for the date specified. Consequently, learned counsel submitted, counsel on their behalf communicated to INDECOM that the stipulated date was inconvenient and requested that the date be rescheduled. The requested rescheduling of the date was not granted and appellants Williams, Green, Daley and Rennalls were charged for failing to comply with the directives in the notice. This failure on the part of INDECOM

to reschedule, he complained, constituted a breach to the appellants' right to counsel and in turn the verdict of the learned Parish Court Judge would be unfair.

[22] Mr Small, in reply, on behalf of the Crown, submitted that this right to counsel, which is being alluded to by the appellants, was "an entirely new argument on appeal". There were no submissions in respect of this argument before the learned Parish Court Judge and consequently, he submitted, no criticism could properly be made that she failed to give any or sufficient consideration to it.

[23] In any event, learned counsel submitted, if the argument had been considered, it would have failed, because the constitutional right to counsel under section 14(2)(d) of the Constitution is only triggered when a person is arrested or detained. The appellants, Williams, Green, Daley and Rennalls, were at no time arrested or detained upon the issuance of the notices and so this would not have been a relevant consideration for the learned Parish Court Judge when arriving at her verdict.

The law and analysis

[24] Section 14(2)(d) of the Charter of Fundamental Rights and Freedoms in the Constitution, to which Mr Champagnie referred, states:

> "(2) **Any person who is arrested or detained** shall have the right—
> ...
> (d) to communicate with and retain an attorney-at-law." (Emphasis supplied)

[25] The highlighted portion of the above extract makes it very clear that the fundamental right to communicate with and retain an attorney-at-law is one which is limited to persons who have been arrested or detained. The appellants had not been detained or arrested, when INDECOM requested, pursuant to the section 21 notices, that they attend at the VIU, and otherwise obey the requirements of the notice. Accordingly, Mr Small is correct in his submission, that the right protected under section 14(2)(d) of the Charter of Fundamental Rights and Freedoms had not arisen to be enforced, and so could not have been infringed. **R v McCrimmon**, cited by Mr Champagnie, dealt with the rights of a detainee and therefore is to be distinguished from the present case.

[26] There is also no indication on the record, that the constitutional issue had been ventilated before the learned Parish Court Judge. It appears, at page 78 of the record, that a suggestion was made about representation by counsel, but an objection to the suggestion was made and upheld. It was not, however, raised as a constitutional point. The issue was, therefore, not one that would have had an impact on her determination of the case. Accordingly, there is no merit in the complaint under this issue.

Issue b): Whether the learned Parish Court Judge correctly exercised her discretion when she allowed the prosecution to reopen its case.

The prosecution's application to reopen its case

[27] The record reveals that on 11 September 2013, the prosecution closed its case. Counsel for the defence indicated a desire to make submissions that there was no case

to answer. The learned Parish Court Judge made a case management order for the parties to file all written submissions and response by the end of November 2013.

[28] The case was next before the learned Parish Court Judge on 27 May 2014. At that time, the prosecution applied in writing to reopen its case. The reason given for the application was it wished to adduce further evidence of service of the section 21 notices. Counsel for the prosecution said that it was due to oversight that the evidence had not been previously adduced.

[29] Counsel for the defence objected in writing. The objections were made on the same date.

[30] The application had been made prior to the oral no-case submissions. The learned Parish Court Judge granted the application.

[31] Upon the reopening of the prosecution's case, evidence was adduced through the Commissioner as to the affidavit of Mr Hutchinson, which had been filed in the related constitutional proceedings in the Supreme Court.

The submissions

[32] Mrs Neita-Robertson made submissions on behalf of appellants Hutchinson, Noble and Dixon. She argued that the prosecution's application to reopen its case to prove service of the section 21 notices, on the basis of "oversight", ought not to have been granted by the learned Parish Court Judge. She submitted that the prosecution knew or ought to have known that the appellants Hutchinson, Noble and Dixon were

alleging non-service on 6 and 8 September 2010. This, she argued was evident in the light of the fact that the prosecution would have been, since 2011, in possession of the affidavit evidence of the appellant Hutchinson. That affidavit had been filed in the related constitutional proceedings, mentioned above. Notwithstanding that, she complained, the prosecution continue to pursue its "theory" that service of the section 21 notices had been effected on 6 and 8 September 2010.

[33] Learned counsel submitted that the prosecution had a duty, before closing its case, to call all the evidence necessary to prove that case. She submitted that while the law affords a trial judge the discretion to permit the prosecution to reopen its case to adduce additional evidence, such discretion must be exercised sparingly, in the interest of justice and the avoidance of prejudice to the appellants.

[34] In the instant case, however, she argued, the affidavit of appellant Hutchinson, which had been filed in the constitutional proceedings, was of no probative value because it did not support the prosecution's case. Instead, she submitted, it was prejudicial to appellants Noble and Dixon because the facts contained therein were used by the learned Parish Court Judge in arriving at a decision to reject the no-case submission. Accordingly, the exercise of the learned Parish Court Judge's discretion to allow the prosecution to reopen its case, she submitted, was wrongly exercised.

[35] Mr Small submitted that the learned Parish Court Judge correctly exercised her discretion when she allowed the prosecution to reopen its case. He argued that the application by the prosecution to reopen its case was not proving service of the

documents, but rather to prove admission of service and reveal the explanation advanced by the appellants for failing to attend in obedience to the notice. He submitted that it is the wider interests of justice, including the need to ensure that defendants be required to answer the full weight of the potential case against them, which "predominantly animates the decision on whether or not the discretion to allow a reopening of the prosecution's case should be exercised". He relied on **Jolly v Director of Public Prosecutions** [2000] All ER (D) 444, in support of those submissions.

[36] Mr Small argued that the learned Parish Court Judge properly directed herself on the relevant legal principles and thereafter, found that it was just to allow the prosecution to reopen its case, in the light of the fact that, among other things:

a. it was done prior to the oral submissions of no case to answer and the opening of the appellants' case;
b. the evidence was probative and not prejudicial; and
c. the appellants would have been given an opportunity to deal with the evidence heard by recalling witnesses where necessary.

[37] Learned counsel also submitted that despite the learned Parish Court Judge's criticism of the prosecution's omission of the evidence, she rightly concluded that that fact was not the only consideration in the exercise of her discretion.

The law and analysis

[38] The learned editors of Blackstone's Criminal Practice 2018, state at paragraph F6.2: "It is a rule of practice, but not law, that all of the evidence which the prosecution intend to rely on as probative of the guilt of the accused should be called before the close of their case (*Rice* [1963] 1 QB 857)". **R v Norman Clement Pilcher and others** (1974) 60 Cr App R 1 is also supportive of that principle. Lloyd LJ, in **R v Francis** (1990) 91 Cr App R 271; [1991] 1 All ER 225, commented, at page 228 of the latter report, that the rule has been described "as being most salutary". The learned appellate judge opined that there are, however, exceptions to the general rule. He stated that the prosecution may be allowed to reopen its case:

a) to call evidence in rebuttal of a matter that would have arisen unexpectedly or without warning; and

b) to adduce evidence, which had been omitted, where such evidence was a mere formality and not a central issue in the case.

[39] It is in those circumstances that Lloyd LJ proposed that a trial judge has a discretion to allow the prosecution to reopen its case. The discretion, the learned appellate judge observed, must be exercised judicially and must not be exercised in a way that no reasonable judge could have exercised it. If the discretion is not so exercised it will be set aside as being erroneous in law. Lloyd LJ also opined that the discretion, more likely, will be exercised in favour of the prosecution where the

application to call further evidence is made at an early stage after the close of the prosecution's case.

[40] The general rule, Lloyd LJ opined, is not restricted to the two settled exceptions. Instead, in analyzing the extent of the judge's discretion, he observed, at page 229, that:

> "...There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding, and lest it be thought we are opening the door too wide, we would echo what was said by Edmund Davis LJ in *R v Doran* [(1972) 56 Cr App R 429 at page 437] that the discretion is one which should only be exercised outside the two established exceptions on the rarest of occasions."

[41] In **R v Francis**, the court found that the judge did not improperly exercise her discretion when she permitted the prosecution to reopen its case after it had failed to initially lead evidence as to the appellant's position on an identification parade. The omission was not due to oversight by counsel for the prosecution but to a misunderstanding between counsel for the prosecution and for the appellant. The court, at page 229, also found that the omission was "an essential, if minor, link in the chain of the identification evidence".

[42] In **R v Kenneth Codner** (1955) 6 JLR 339, Mr Codner was charged with cultivation and possession of ganja. The prosecution closed its case without having

proved that the stalks of vegetable matter, tendered in evidence, were ganja, as defined in law. The headnote of the report states that the court held:

> "When the case for the prosecution is closed without proof of a fact which ought to have been proved, the Court in considering whether to allow the case for the prosecution to be reopened has a discretion to exercise, and if that discretion is judicially exercised, the Court of Appeal will not interfere."

[43] In the recent decision of **Audley Coleman v R** [2016] JMCA Crim 9, in applying the principles in **R v Francis**, this court refused to interfere with the trial judge's discretion wherein she had allowed the prosecution to reopen its case. The application to reopen was made after the prosecution had failed to tender into evidence the forensic certificate to prove that the substance found in the appellant's car was ganja. The failure was considered to have been as a result of an oversight.

[44] This court found that the trial judge's discretion was judicially exercised due to the evidence that had otherwise been led by the prosecution. The court observed that the prosecution had adduced evidence through the investigating officer that:

(a) the items recovered from the trunk of the appellant's car had been taken to the Government Forensic Laboratory for examination; and

(b) he had returned to the laboratory and collected a forensic analyst's certificate along with the samples that had been taken from the items.

[45] There was ultimately no challenge to the fact that those things had been done. The items from the car were tendered into evidence. Accordingly, the court found that the trial judge had exercised her discretion in circumstances where the appellant could not have been taken by surprise and therefore could not have suffered any prejudice.

[46] In the instant case, the learned Parish Court Judge referred to **R v Francis** and other cases, and conducted a careful analysis of the prosecution's application, using the guidance from those cases. She correctly acknowledged that her discretion to admit evidence after the close of the prosecution's case was not confined to the established exceptions and that there is a "wider discretion" which must be exercised cautiously as regards to the specific facts in a case.

[47] In her commendable analysis of the issue, the learned Parish Court Judge considered:

(a) the timing of the application;

(b) the validity of the proffered reason of "oversight";

(c) whether the appellants would have been taken by surprise;

(d) the probative value of the proposed additional evidence as opposed to its prejudicial value;

(e) the fact that only some of the appellants would have been adversely affected by the proposed additional evidence; and

(f) the nature of the proposed additional evidence being in the nature of an admission, and that it would only have affected the person who made that admission.

[48] It is undoubtedly true that the proposed evidence was not a "mere formality". It was essential and significant, given that the aim of the prosecution was to plug a gap that had become evident in its case. By this evidence, the prosecution was seeking to demonstrate that no issue had been joined on the element of service of the section 21 notices. The prosecution also sought to prove that the affected appellants, through their attorneys, had not only admitted to service of the section 21 notices, but had provided an explanation for their failure to attend at the VIU as required.

[49] The timing of the application is also important. The prosecution's application had been made before any no case submissions had been made and before the presentation of the defence had commenced. This was not a case where the defence had showed its hand and the prosecution sought, by reaction, to blunt the force of that display.

[50] Based on the particular circumstances of the case, it must be found that the learned Parish Court Judge exercised her discretion judicially. This court could therefore not interfere with it. The grounds in respect of this issue, accordingly, fail.

Issue c): Whether the learned Parish Court Judge erred in rejecting the appellants Hutchinson, Noble and Dixon's no case submissions.

The submissions

[51] Mr Fletcher, on behalf of appellants Hutchinson, Noble and Dixon, complained that the learned Parish Court Judge erred when she failed to uphold the no case submissions made on their behalf. The learned Parish Court Judge, he submitted, had an overarching responsibility to examine whether the essential elements of the offence for which the appellants were charged had been proved by the prosecution, as is required under the first limb in **R v Galbraith** [1981] 2 All ER 1060; [1981] 1 WLR 1039. Mr Fletcher argued that, in this case, the prosecution was required to prove:

(i) the existence of the section 21 notices;

(ii) service or delivery of those notices on the appellants;

(iii) that the notices were served within a reasonable time (3 days as per INDECOM's practice); and

(iv) that there was no lawful excuse for the appellants' disobedience of the same.

He submitted that it had failed so to do.

[52] Learned counsel submitted that the prosecution's case was one of "botched service". Despite the "very variable evidence" adduced by the prosecution in its attempt to prove service of the purported notices, he argued, "there [was] a clear gap in the proof of sequence". Furthermore, he contended, there was no evidence led by the prosecution to show that the section 21 notices were in the envelopes served. The

evidence, he submitted, appeared to be to the contrary, as Mr Richards testified he was sure that the envelopes contained identification parade forms and Corporal Fyffe-Taffe testified that when the envelope addressed to Constable Lewis was opened she saw only identification parade forms in that envelope.

[53] Additionally, Mr Fletcher argued that the affidavit of appellant Hutchinson, tendered into evidence by the prosecution to prove service, did not prove that service was effected on 6 and 8 September 2010. Instead, he submitted, it showed that service was effected on 12 September 2010 and would provide a lawful justification and excuse as the time period for obeying this section 21 notice was not reasonable, "even by INDECOM's standards". He submitted that he was not sure whether the affidavit evidence of appellant Hutchinson would be admissible against appellants Noble and Dixon, but that to the extent that it was and the affidavit is relied on for its accuracy, it would be potent.

[54] Learned counsel submitted that the learned Parish Court Judge's reliance on the submissions of counsel and the letters signed by counsel, as support for the evidence of service of the section 21 notices was misplaced. Learned counsel argued that these items were not on oath and there was no evidence of the instructions of their respective clients.

[55] Mr Small countered those submissions. His arguments are reflected in the reasoning, which is set out below.

Law and analysis

[56] The information charging the appellants stated that each:

> "without lawful justification or excuse, fail [sic] to comply with a lawful requirement of [INDECOM] pursuant to Section 21 of the Independent Commission of Investigations Act, in that, he[/she] failed to attend at Video Identification Unit…, 2010 September 14th at 9:00 a.m. and report to Isaiah Simms and other officers of [INDECOM] to furnish to them a statement, and to answer questions touching and concerning his[/her] actions, the actions of other members of the JCF and JDF and, all other occurrences he witnessed in the vicinity of Tredegar Park, Lauriston, Brooklyn and Spanish Town, St. Catherine between 8:00 p.m. 12th August, 2010 and 8:00 a.m. 13th August, 2010, including the circumstances that led to the death of Mr. Derrick Bolton and Mr. Rohan Dixon contrary to Section 33 (b)(ii) of the Statute…"

[57] The elements that the prosecution was required to prove in this case are, therefore, that:

(i) section 21 notices were duly prepared for each of the appellants requesting them to attend at the VIU to give a statement and to answer questions surrounding the Tredegar Park incident;

(ii) those notices were served on them;

(iii) the appellants having received the notices failed to comply with the requests contained therein; and

(iv) they had no lawful justification or excuse for so failing to comply with the request.

[58] Mr Fletcher is correct in citing **R v Galbraith** as the iconic authority governing a trial judge's approach to determining whether to uphold a submission of "no case to answer". The principles set out in that case are well known and need not be repeated in this judgment.

[59] Mr Fletcher's submissions, that the prosecution did not prove the requisite elements for the charge, cannot, however, be accepted. The prosecution's case, as outlined above, including the evidence tendered after it reopened its case, was sufficient to prove all the elements of the offence that it was required to prove. The learned Parish Court Judge was entitled to admit into evidence the letters from counsel acting for appellants Hutchinson and Noble, the affidavit of Mr Hutchinson and the submissions made by counsel on behalf of the appellants.

[60] In admitting into evidence the letters from counsel, the learned Parish Court Judge correctly relied on the principles concerning an admission by an agent on behalf of a principal. In **Bryan James Turner and Others v R** (1975) 61 Cr App R 67, the court dealt with, among other things, the issue of whether defence counsel's statements, in a plea in mitigation in one case, could be proved and admitted as evidence in another trial as an admission on behalf of his client, who was the accused in the later trial. It should be noted that these were submissions by counsel and not evidence. It was held that such evidence was admissible because the circumstances, in which counsel had made the statements, constituted *prima facie* evidence that he was

authorised by the accused person to make them. Lawton LJ, at page 82 of the report, in seeking to answer this issue proposed "a few elementary principles" thus:

> (i) "a duly authorised agent can make admissions on behalf of his principal";
>
> (ii) "the party seeking to rely upon the admission must prove that the agent was duly authorised"; and
>
> (iii) "whenever a fact has to be proved, any evidence having probative effect and not excluded by a rule of law is admissible to prove that fact".

[61] Lawton LJ opined that "circumstantial evidence is just as admissible as direct evidence" (page 82 of the report). He stated that the court is entitled to assume and "always does assume" that when counsel appears before the court, robed and in the presence of his client, and indicates that he appears for that client, he has that client's authority to conduct the case. Counsel is also entitled to say on his client's behalf that which his "professional discretion" dictates is in his client's best interest.

[62] It is also noted that, even without an appearance in court, an attorney-at-law is considered an agent for his client for the purposes for which he has been retained. The learned editors of Halsbury's Laws of England Volume 66 (2015), in a footnote to paragraph 584, correctly state, in part:

> "…the relationship of solicitor to client is in general one of agent to principal…and the agent's authority must be limited by his agreement, express or implied, with his principal…."

[63] In this case, the letter to INDECOM from counsel for appellants Hutchinson and Noble advised that she represented them. That letter also stated as follows:

> "...My clients have been served Notices under section 21 of the [INDECOM] Act, to subject themselves to Identification Parades, as well as to be questioned and to furnish Statements in respect of a Shooting at Tradegar [sic] Park, St. Catherine."

It would appear from the letter, that counsel had admitted, on behalf of appellants Hutchinson and Noble, that they had been served with the section 21 notices as charged under the information. Thus, there could be no dispute that section 21 notices had been prepared and served on those appellants, thereby satisfying the first two elements of the offence, in respect of them.

[64] The affidavit of appellant Hutchinson, which had been filed in the Supreme Court and tendered into evidence, also supported admission of service, on him, of the section 21 notice. He exhibited, to that affidavit, a copy of a section 21 notice dated 1 September 2010. This also would infer that, as against him, the first two elements of the charge would have been met.

[65] In the written submissions before the Supreme Court, the appellants, including appellant Dixon, were represented by the same counsel. Learned counsel admitted that the appellants had been "issued" with section 21 notices to attend at the VIU on 14 September 2010 to "provide [INDECOM personnel] with a statement and to answer question [sic]" in respect of the Tredegar Park incident. This acknowledgement by

counsel would appear to satisfy the first two elements of the charge against all the appellants, including appellant Dixon.

[66] As it relates to the element of non-compliance, in proving the charge, it is uncontested that appellants Hutchinson, Noble and Dixon failed to attend at the VIU. Several witnesses for the prosecution, including the Commissioner and Mr Simms, gave evidence that on 14 September 2010, they attended at the VIU and waited until between 10:00 am and 10:30 am, but none of the appellants attended during that time. It will be borne in mind that the notice required attendance at 9:00 am.

[67] On the element of the offence dealing with the absence of a lawful justification or excuse, for having failed to comply with INDECOM's request, the evidence adduced by the prosecution before the learned Parish Court Judge in respect of appellant Hutchinson would appear inconsistent. The prosecution, in one aspect of its case, adduced evidence through DSP Tewarie, that appellant Hutchinson was given adequate notice. That evidence was that she served him on 6 September 2010. In another aspect of its case, however, the prosecution adduced evidence in the form of appellant Hutchinson's affidavit before the Supreme Court, which showed him claiming that service was effected on 12 September 2010.

[68] The resolution of the inconsistency, as to whether service was on or before 12 September 2010, would not have been necessary at the time of the making of the no case submissions. It was an issue to be determined by the learned Parish Court Judge's jury mind, after having heard both the case for the prosecution and the defence.

[69] The prosecution also tendered evidence in the form of counsel's letter as proof that no lawful justification or excuse had been advanced by appellants Hutchinson and Noble. The relevant part of the letter reads:

> "The Notices refer to my clients as 'suspects' and accordingly I wish to advise that my clients will be relying on Section 21 sub-section 5 of the [INDECOM] Act which states that they are not compellable in respect of questioning and statements."

That reasoning is misguided and does not constitute a valid reason for failing to obey INDECOM's notice.

[70] As it pertains to appellant Dixon, there was no evidence that he sought to furnish INDECOM with any justification or excuse for his failure to comply with the requirements of the section 21 notice. However, the prosecution would have established a *prima facie* case against him by demonstrating that he had been served with the section 21 notices and that he failed, without any obvious justification, to comply with the notice.

[71] It would be for the appellants to have demonstrated that they had lawful justification for disobeying INDECOM's notice. The onus of proof shifted to them to satisfy the tribunal of fact that they were entitled to act contrary to the demands of the section 21 notice. In **R v Edwards** [1974] 2 All ER 1085; [1975] 1 QB 27, where the headnote, which accurately reflects the views of the court, stated:

> "Where an enactment made the doing of a particular act an offence, save in specified circumstances, or by persons of specified classes or with special qualifications or with the

> permission or licence of specified authorities, and, on its true construction, the effect of the enactment was to prohibit the doing of the act in question subject to a proviso, exception, excuse or qualification, there was no need for the prosecution to establish a prima facie case that the proviso etc did not apply. In those circumstances, whether or not the matter was peculiarly within the knowledge of the accused, it was sufficient for the prosecution to prove the act in question and the burden, in the sense of the legal or persuasive burden, then lay on the accused to prove that the proviso etc applied...."

That reasoning would also apply where a positive act was required, but had not been performed, as in the present case. Thus, it would, in those circumstances, be open to the learned Parish Court Judge to have called upon appellant Dixon to answer and to have given him an opportunity to challenge the prosecution's claim that he had no lawful justification or excuse for failing to comply with the section 21 notice.

[72] In the light of the above reasoning, Mr Fletcher's submissions cannot be accepted. It was eminently reasonable for the learned Parish Court Judge to have found that there was sufficient evidence adduced by the prosecution to satisfy her that a *prima facie* case had been made out against appellants Hutchinson, Nobel and Dixon. The appellants were properly called upon to answer, separately, to the case against them. Consequently, the grounds in respect of this issue fail.

Issue d): Whether the learned Parish Court Judge made improper use of the evidence adduced in the affidavit of appellant Hutchinson.

Submissions

[73] On this issue, it was submitted on behalf of appellants Noble and Dixon, that the evidence contained in the affidavit of appellant Hutchinson was prejudicial to them and

that the learned Parish Court Judge used that evidence against them, "in a curious and fundamentally prejudicial way". They complained that the learned Parish Court Judge, in her reasons for judgment, made a comment, from which it would be reasonable to assume that she used the evidence contained in that affidavit as a basis to discount appellants Noble and Dixon's assertion of non-service.

[74] Mr Small, in response, submitted that the learned Parish Court Judge's comment was misconstrued given that as a matter of law, the contents of appellant Hutchinson's affidavit could not be used against appellants Noble and Dixon. He submitted that the learned Parish Court Judge's basis for discounting the assertion of non-service, in respect of the appellant Dixon, was the contents of the written submissions of counsel, which had been properly admitted into evidence.

Analysis

[75] The comment of the learned Parish Court Judge, which has been impugned, is recorded at pages 225-226 of the record. The comment reads, in part:

> "I have juxtaposed the [evidence as to the contents of the letters written by the attorneys-at-law for the appellants] with the evidence contained in the affidavit of Mr. Hutchinson…He had filed this affidavit in support of a related matter in the Supreme Court. In his affidavit at paragraph 12 [appellant Hutchinson] testified that he and the other seven Defendants before this court had been belatedly served on 12th September with section 21 notices,...He made further reference to the document and said he had sought legal advice upon it and as a result his attorney had written letter to INDECOM in relation to it on 13th September 2010. There was no complaint at that time of non-service and no indication as to receipt of defective notices during that time period; which bore neither signature, nor stamp and seal…."

[76] The complaint about the learned Parish Court Judge's comment is entirely misguided. There is nothing in the learned Parish Court Judge's reasons for judgment that utilises, or may be construed to have utilised, the contents of the appellant Hutchinson's affidavit to the prejudice of any of the other appellants. The comment cannot be looked at in isolation to the context in which it was made, or without considering the overall approach that the learned Parish Court Judge took to her assessment of the evidence.

[77] In analysing the learned Parish Court Judge's comment, it must be borne in mind that, in her written reasons for judgment, she identified specific issues and ascribed a heading, in those reasons, to each issue. At pages 214–223 of the record, the learned Parish Court Judge dealt with what she identified as the issue of "Non-Service or Short Service of Section 21 Notices by INDECOM". In that section, she set out the position of the prosecution as well as that of each of the appellants in respect to that issue. She noted that Mr Williamson and the appellants Hutchinson and Noble, "have admitted the sealed envelopes they collected; contained Identification parade forms and a notice for them to appear at the [VIU] on 14th September 2010" (page 219 of the record). At page 221, the learned Parish Court Judge noted that appellant Dixon was "saying he was in fact not served at all".

[78] The identification of the position of each appellant, in the context of each issue that she analysed, is consistent throughout the learned Parish Court Judge's written

reasons. It is important to note, in the analysis of this ground, that she reminded herself that each appellant's case had to be individually considered. She said at page 208 of the record:

> "Proceedings [sic] that they are severally charged. Therefore the evidence is to be carefully examined and must establish the guilt of each individual if I am to find any or all of them guilty."

[79] The learned Parish Court Judge concluded the section, under that heading, with a reference to letters that had been written, by attorneys-at-law, on behalf of some of the appellants. She then stated:

> "8. From the totality of the foregoing evidence, and particularly the evidence of Deputy Superintendent Tewarie; it is my understanding that the [appellants] after the 14th September were saying that they were not served with exhibits 1-8. This is however in stark contrast with the contents of the letters in Exhibits 12 and 13."

[80] The next heading, with which the learned Parish Court Judge dealt, was "The Late Exhibits". Those exhibits were the letters that had been written, by attorneys-at-law, on behalf of some of the appellants and the affidavit to which appellant Hutchinson swore. She considered this issue at pages 223-226 of the record.

[81] The learned Parish Court Judge identified the import of the contents of the affidavit and the letters. It is in contrasting those contents that the learned Parish Court Judge made the comments that have been criticised. In the very next paragraph, she

then went on to examine the position of each appellant in the context of their expressed defence of honest belief.

[82] Although the impugned comment initially referred to appellant Hutchinson's assertion of late service on all the appellants, the learned Parish Court Judge concentrated on appellant Hutchinson's reaction to that service. She addressed his indication that he had sought legal advice. There is nothing in the paragraph that shows that the learned Parish Court Judge relied on appellant Hutchinson's affidavit to the prejudice of the other appellants. The grounds in respect to this issue fail completely.

Issue e): Whether the learned Parish Court Judge failed to adequately and accurately direct herself on the case for the appellants, Hutchinson, Noble and Dixon, thereby denying them of a fair trial.

Submissions

[83] As regards this issue, it was submitted, on behalf of appellants Hutchinson, Noble and Dixon, that their defence was contained in:

(i) submissions made on behalf of the appellants;

(ii) suggestions made to the prosecution witnesses during cross-examination;

(iii) their respective unsworn statements; and

(iv) the contents of the affidavit of appellant Hutchinson.

[84] Mrs Neita-Robertson outlined in detail, what, she submitted, may be considered the main planks of the appellants' defence. These were:

a. uncertainty as to the contents of the envelopes that were served on the appellants;

b. the short service of the section 21 notices that the appellants Hutchinson and Noble said they received on 12 September 2010, such "service" being short service based on the standard set by INDECOM; and

c. the service of identification parade forms, which led to them honestly believing that they were being called to attend identification parades.

[85] Learned counsel argued that the learned Parish Court Judge did not sufficiently take into account these essential aspects of the defence and also that the learned Parish Court Judge also misconstrued the letters written by attorneys-at-law on behalf of the appellants.

[86] Learned counsel submitted that the learned Parish Court Judge erred when she opined that the letter, dated 14 September 2010, from attorneys-at-law, on behalf of appellants Hutchinson and Noble, gave reasons for their non-attendance at the VIU. She argued that the letter did not make any reference to non-attendance. The letter, she submitted, among other things, sought to advise INDECOM that they were not compelled to answer questions as they were designated as suspects by the identification parade forms. The issue of compellability, she submitted, did not involve

non-attendance because in order for one to exercise his right not to be compelled, he must appear.

[87] Learned counsel further argued that the failure by counsel to indicate, in the letter, that the section 21 notices were short served was of "no moment", given that the INDECOM Act was new and there was no identifiable time for service of the notice under the INDECOM Act. As a result, the issue of short service would only have arisen when the case was examined as a whole. She also submitted that the learned Parish Court Judge misinterpreted the appellants' case when she found that the letter written by counsel was in "stark contrast" with the defence, which asserted that the appellants had not been served with section 21 notices.

[88] Mrs Neita-Robertson also complained that the learned Parish Court Judge fell into error when she found that appellants Hutchinson and Noble did not have any honest belief that they were being invited to stand on an identification parade.

[89] In response, Mr Small submitted that the learned Parish Court Judge adequately and accurately directed herself with regard to the case for appellants Hutchinson, Noble and Dixon. He argued that the appellants were afforded a fair trial, as the requirements of a fair trial, as stated by Lord Diplock in **R v Sang** [1979] 2 All ER 1222, page 1230, were met. Learned counsel argued that the learned Parish Court Judge considered every aspect of the case put forward by the appellants.

Analysis

[90] The complaints in respect of this ground are also completely without foundation. It may well be that the appellants disagree with the learned Parish Court Judge's findings in respect of each plank of their defence, but it cannot properly be said that she did not carefully consider each plank.

[91] The learned Parish Court Judge, having indicated that she had carefully read and reviewed the evidence of the prosecution witnesses, the unsworn statements of the appellants, as well as the several submissions by counsel, reminded herself of the offence for which the appellants were severally charged. She opined that the case concerned the appellants' failure to attend at the VIU on 14 September 2010 and to comply with the directives contained in the section 21 notice. She recognised that the burden of proof lay with the prosecution and that the standard of proof required the prosecution to make her feel sure of the guilt of each of the appellants. She noted that there had been no issue joined as regards the fact that the appellants had not complied with the request under the section 21 notice, that is, that they failed to attend at the VIU on 14 September 2010.

[92] The learned Parish Court Judge dealt with the issues of service and of lawful justification or excuse. She found that:

a. the section 21 notices had been prepared for each of the appellants (page 239 of the record);

b. DSP Tewarie and Corporal Fyffe-Taffe, respectively, had served sealed envelopes on the appellants on either 6 or 8 September 2010 (page 239 of the record) and were unchallenged on this evidence when they each testified as to the service and the date of that service (pages 216-217 of the record);

c. the sealed envelopes contained section 21 notices which were similar to the ones that were admitted into evidence as exhibits 1-8 (page 239 of the record);

d. the allegation by some of the appellants that it was only on 12 September 2010, that they received envelopes with section 21 notices was untrue and the assertion of non-service or short service was rejected as a defence (page 222 of the record);

e. the section 21 notices required each of the appellants to attend at the VIU on 14 September 2010 and there to furnish a statement and to submit to questioning (page 239 of the record);

f. the requirements contained in the section 21 notices were lawful (pages 212 and 231 of the record);

g. the letters written by attorneys-at-law on behalf of the appellants, other than appellant Dixon, not only supported the service of the section 21 notices, but demonstrated that they were clear on what the notices required of them and provided the reason for their non-attendance, namely that they were not compellable to answer questions (page 230 of the record);

h. the reason proffered for non-attendance, namely that those appellants were taking the view that they could not be compelled to answer questions was not a lawful excuse for not complying with the notice (page 230 of the record);

i. the appellants did not fail to attend as required because they were of the honest but mistaken belief that they were to have been placed on an id parade and they would not have wished to participate without their respective counsel notice (page 240 of the record);

j. the appellants' reason for failing to comply with the section 21 notices was not as a result of a mistake of fact (pages 236 and 240 of the record);

k. the reason suggested during cross-examination, in submissions and also in the unsworn statements of at least three of the appellants, that the appellants honestly believed that their attendance was required for the purpose of identification parades was rejected as being untrue (page 236 of the record);

l. the good character of the appellants did not assist them in this matter (page 239 of the record).

[93] Mrs Neita-Robertson submitted that the learned Parish Court Judge, in examining counsel's letter written on behalf of appellants Hutchinson and Noble, rightly observed that the letter had admitted that they had been served with section 21 notices and that no mention was made of late service. Learned counsel submitted that the learned Parish Court Judge could not have reasonably inferred from this observation that the appellants had not been short served. Mrs Neita-Robertson submitted that the affidavit evidence of appellant Hutchinson was consistent with the case that was advanced on his behalf, through cross-examination and his unsworn statement. Learned counsel argued that the learned Parish Court Judge erred in using that inference to reject Mr Hutchinson's case.

[94] The short answer in rejecting those submissions is that the learned Parish Court Judge made it clear that she rejected the assertions of non-service and short service based on "the totality of the evidence before" her. That evidence included the

testimony of DSP Tewarie and Corporal Fyffe-Taffe. The learned Parish Court Judge listed, at pages 222-223 of the record, eight factors, which led her to her conclusion on that point. She expressly accepted, at page 239 of the record, the evidence of DSP Tewarie and Corporal Fyffe-Taffe that they served the appellants with sealed envelopes on either the 6th or 8th September.

[95] In the light of the foregoing, the grounds in respect of this issue also fail.

Issue f): Whether the verdict of the learned Parish Court Judge was unreasonable in the light of the evidence adduced.

Submissions

[96] Mr Champagnie, on behalf of appellants Williams, Green, Daley and Rennalls, submitted that there was so much uncertainty surrounding the service of the section 21 notices that there was no basis for the learned Parish Court Judge to have found that the appellants were served with such notices on 6 and 8 September 2010. Accordingly, he submitted, the verdict is unreasonable.

[97] Mr Fletcher, on behalf of appellants Hutchinson, Noble and Dixon, submitted the learned Parish Court Judge failed to fully consider the issues which were live on the evidence before her. He also pointed to the uncertainty concerning the service of the section 21 notices and that the learned Parish Court Judge's finding that the notices were personally served on 6 and 8 September 2010 by DSP Tewarie and Corporal Fyffe-Taffe on the appellants, was inconsistent with the evidence.

[98] Both counsel argued that the learned Parish Court Judge failed to fully consider the issues concerning service and that that failure rendered the conviction of each of the appellants unsafe.

[99] In written submissions, filed on behalf of appellants Hutchinson and Noble, Mrs Neita-Robertson submitted that the learned Parish Court Judge failed to take into account the corroboration of the appellants' case, in material ways, by the evidence of the witnesses for the prosecution. Learned counsel also submitted that the affidavit of appellant Hutchinson, which formed a part of the prosecution's case, provided a full and clear narrative of the events as well as of his view of the effect of the section 21 notice that was served on him. The learned Parish Court Judge, Mrs Neita-Robertson submitted, erred in not accepting the defence of lawful justification or excuse, which was based on those premises.

[100] In response, Mr Small submitted that the verdict of the learned Parish Court Judge was reasonable and supported by the evidence adduced at the trial. He submitted that the established authorities show that an appellant who seeks to challenge the verdict of a trial court on the ground that it is unreasonable and against the weight of the evidence must demonstrate that the verdict was "obviously and palpably wrong". Further, he submitted in reliance on **Daley v R** [1993] 4 All ER 86, that for the appellate court to interfere on the basis of a "palpable error", the appellant was required to show that there was no evidence on which a properly directed jury could convict him. He also submitted, according to **R v Bernard DaCosta and Others**

(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 65, 67 and 72/2003, judgment delivered 20 December 2007, that once the verdict could be supported by evidence, the court of appeal would affirm the conviction.

[101] In respect of the learned Parish Court Judge's finding on the issue of service, Mr Small argued that there were no palpable errors in her acceptance of the evidence, in that regard, of DSP Tewarie and Corporal Fyffe-Taffe, despite the fact that the service was of sealed envelopes. There was ample evidence, he submitted, from which the learned Parish Court Judge could have inferred that the sealed envelopes contained notices that were similar to the notices that those two witnesses endorsed, and which were admitted into evidence. Such evidence, Mr Small submitted, could be found in the admissions contained in:

(i) the letters written by counsel on behalf of the appellants, except appellant Dixon; and

(ii) counsel's written submissions, in the related constitutional matter, on behalf of all the appellants.

Law and analysis

[102] It is well-established that an appellate court will not interfere with a verdict of guilt as regards a question of fact unless it has been demonstrated that the trial judge was palpably wrong (see **R v Joseph Lao** (1973) 12 JLR 1238).

[103] In order to sustain the complaint under this issue, the appellants have to satisfy this court that the learned Parish Court Judge:

(i) was wrong in her assessment of the evidence;

(ii) misconstrued the evidence, considered matters that she ought not to have considered, or failed to consider relevant matters; and

(iii) was wrong in her conclusions drawn from the evidence and the relevant factors for her consideration.

[104] It is accepted that, because they were said to be in sealed envelopes, there is no direct evidence that the section 21 notices were served on the appellants on 6 and 8 September 2010. It is also true that a gap existed in the prosecution's evidence concerning what was done with the notices between the times that they were prepared and signed, and when DSP Tewarie and Corporal Fyffe-Taffe removed copies from sealed envelopes. It was left to the learned Parish Court Judge to determine whether it could be inferred that section 21 notices were in the sealed envelopes.

[105] In convicting the appellants, the learned Parish Court Judge stated that she was able to draw certain inferences from the evidence presented and facts proven by the prosecution so that she felt sure that all the elements of the offence for which they were charged had been satisfied. She stated, at page 239 of the record, that she accepted the evidence of the prosecution's witnesses as being "credible and truthful" and rejected the statements made by the appellants in their respective denials of the allegations against them.

[106] There was ample basis for her drawing the inferences that she did.

[107] It was the learned Parish Court Judge's finding that the section 21 notices dated 1 September 2010 were prepared by Mr Simms, signed by the Commissioner, dispatched for service on the appellants and personally served on them on 6 and 8 September 2010.

[108] There was evidence, adduced through prosecution witnesses, to support those findings. The evidence was that the section 21 notices were:

a. prepared and dated 1 September 2010;

b. signed by the Commissioner; and,

c. the only notices prepared or served in September.

There was admittedly a break in the chain concerning the handling of the notices. The focus then became the sealed envelopes. The evidence was that they were:

a. delivered to the Spanish Town Police Station;

b. served personally on 6 and 8 September 2010, on each of the appellants; and

c. the only envelopes served in September.

This evidence affected all of the appellants.

[109] The prosecution's case, concerning the contents of the envelopes, was supported in part, by evidence emanating from, at least some of, the appellants. An affidavit of Mr Peter Champagnie, filed in the related constitutional proceedings, exhibited four section

21 notices. These were addressed to appellants Williams, Green, Daley and Rennalls. The notices were signed and dated 1 September 2010. Mr Champagnie's letter, dated 14 September 2010, which was also exhibited to his affidavit, confirmed the existence and service of the notices.

[110] The letter of counsel for appellants Hutchinson and Noble, and appellant Hutchinson's affidavit, also spoke to the existence and service of the section 21 notices. The written submissions filed on behalf of all the appellants including appellant Dixon, in the constitutional proceedings, also spoke to the issuance of, and receipt by, the appellants, of the section 21 notices.

[111] The evidence adduced through these documents differed from the other prosecution evidence in respect of the date of service. Appellant Hutchinson's affidavit asserted that he was served with the section 21 notice on 12 September 2010. The submissions on behalf of the appellants in the related constitutional case, contended, however, that the notices were dated 12 September 2010.

[112] The learned Parish Court Judge was entitled, as she did, to have accepted the witnesses for the prosecution as "credible and truthful", and to have drawn the inferences that she did. It was open to her to reject, as she did:

a. appellant Hutchinson's assertion as to the date of service; and

b. the contention, in counsel's submissions, that the notices were dated 12 September 2010.

It cannot be said that her findings on the aspect of service, was "obviously and palpably wrong". Those findings would have dealt with the aspects of the defence's case asserting non-service and short-service.

[113] The learned Parish Court Judge's findings in this area also concluded the issue of the requirement made of the appellants. Some of the appellants contended that they had been issued with identification parade forms. The learned Parish Court Judge found that the section 21 notices did not contain any mention of an identification parade. She also noted that the documents, in respect of the holding of an identification parade, did not specify a date for the holding of any parade. The processes of the appearance in obedience to the section 21 notices and that of the holding of an identification parade, she found, were separate processes. She said at page 230 of the record:

> "The reasonable inference that I draw in the circumstances is that the issue of statement and interview were clearly separated from that of the identification parade issue as the tenor of the letter [from the attorneys-at-law] indicates; and a choice was made as to how the [Appellants] would treat with the several processes. In relation to furnishing statement and submitting to questioning there was a clear and unambiguous refusal. For them to now seek to construe these several processes as one process is disingenuous. The process of identification parade was not rejected out of hand and a rescheduling of a more convenient date was requested by both Counsel in that regard; which demonstrates that this was appreciated and regarded as a separate process."

[114] The next aspect of the defence was that of the reason for disobedience of the section 21 notice. The learned Parish Court Judge found that the appellants "contended

various reasons for their non attendance [sic]" and that they included (i) non-compellability under section 21(5) of the INDECOM Act and (ii) honest but mistaken belief of the facts.

[115] In respect of the issue of non-compellability, the learned Parish Court Judge conducted a careful assessment of the law regarding the powers of the Commissioner of INDECOM and the bases on which persons appearing before the Commissioner could properly refuse to answer questions posed by the Commissioner. She noted that, based on the ruling by the Full Court in **Gerville Williams and Others v The Commissioner of The Independent Commission of Investigations and Others** [2012] JMFC Full 1, the appellants, in refusing to obey the section 21 notice, could not properly claim that they were relying on their right against self-incrimination.

[116] She also rejected the assertion that the appellants were operating under a mistake of fact, as to the nature of the occasion. This was a finding open to her as the tribunal of fact. She had seen the appellants during the course of the trial and observed their demeanour throughout, including the time that they made their respective unsworn statements. She said at page 236 of the record:

> "…It is clear to me that the refusal to attend was in relation to the statement and questioning and I have already indicated my reasons for this finding. I accordingly reject that their non-attendance was because of any honest belief that they would be standing on an ID parade and I say so based on the following aspects of the evidence:"

The learned Parish Court Judge then went on to enumerate several reasons that she found, supported her position. None of those reasons may be said to have been irrelevant to the decision-making process.

[117] Based on that analysis, the appellants have failed to clear the hurdle of showing that the learned Parish Court Judge was palpably wrong in her reasoning and conclusion. Consequently, the complaint under this issue must fail.

Issue g): Whether the sentence imposed by the learned Parish Court Judge against appellants Hutchinson, Noble and Dixon was manifestly excessive

Submissions

[118] Mrs Neita-Robertson made the submissions on behalf of appellants Noble and Hutchinson complaining about the sentence that the learned Parish Court Judge imposed on the appellants. She argued that the sentence imposed on each of the appellants was manifestly excessive for the following reasons:

a. the appellants were of good character with no previous conviction;
b. the appellants attended a re-scheduled interview with INDECOM, before they were charged, respectively with the offence;
c. before they were charged, they complied fully with all of INDECOM's requirements;
d. the stipulated maximum is skewed against public officers such as these, when one considers that the

maximum fine that may be imposed on parliamentarians for breaches of the integrity statutes is very much less;

e. as police officers they earn only modest salaries; and

f. the matter which brought them in contact with INDECOM was an execution of their duties.

[119] Messrs Fletcher and Champagnie, on behalf of the other appellants, adopted those submissions.

Law and analysis

[120] It is accepted that as this is a relatively new statute and there have not been many, if any, convictions for breaches of section 33(b)(ii) of the INDECOM Act. In **Albert Diah v R** [2018] JMCA Crim 14, this court in overturning the convictions of Mr Diah for breaches of section 33, relieved him of two sentences, each of which was for a fine of $400,000.00 or six months imprisonment at hard labour in default of payment. It was, therefore, unnecessary in that case to analyse the appropriateness of the sentence. It may be noted, however that, by contrast, these appellants have only been convicted for one offence each.

[121] Another factor to be noted is that the maximum fine that has been stipulated in the statute is $3,000,000.00.

[122] In that context, it cannot be said that the sentence imposed is manifestly excessive. These grounds also fail.

Disposal

[123] The learned Parish Court Judge conducted a careful analysis of the evidence and the issues involved in the case. She arrived at a conclusion that was consistent with the evidence. Her verdict should not be disturbed. The sentence imposed on each of the appellants cannot be said to be manifestly excessive. The court extends its sincere apologies for the delay in the delivery of this judgment.

[124] In light of the foregoing the court makes the following orders:

1. The appeals are dismissed.
2. The conviction and sentence of each of the appellants are affirmed.