



Searching for Truth, Striving for Justice

THE INDEPENDENT COMMISSION OF INVESTIGATIONS
(Pursuant 17(9) of the Independent Commission of Investigations Act)

File No. 371/09

Report of
The Independent Commission of Investigations
(INDECOM)
Into the Fatal Shooting of
Robert Hill
At
Ivy Green Mews,
Crossroads, St. Andrew
on
the 8th day of December, 2009

This report must not be reproduced, copied or further disseminated without the written approval of the Commission

TABLE OF CONTENTS

Part 1

Executive Summary.....4-8

Part 2

The Investigation and Inquest10-13

Part 3

Evidence15-20

Part 4

Scientific Evidence.....22-23

Part 5

Findings.....25-52

Part 6

Conclusion.....54

Part 7

Recommendations.....56-57

Part 1

EXECUTIVE SUMMARY

- 1.1 Robert Hill was an entertainer known as “the Kentucky Kid”. He lived at Ivy Green Mews.
- 1.2 On the 8th day of December 2009, Hill was killed in his community by a party of policemen namely, Constable Gary Thomas, Special Corporal Uriel Anderson and Special Constable Norval Warren.
- 1.3 The police party claimed that they had been informed that a man was in the community armed and intent on robbery. They attended there and Hill fired at them. They returned fire and Hill was killed. They claim to have shot him in self-defence.
- 1.4 An investigation was conducted by the Jamaica Constabulary Force’s Bureau of Special Investigations (BSI) and the Police Public Complaints Authority (PPCA). The BSI assessed the file and concluded that the shooting did not occur as described by the officers and was the result of a conspiracy. The file was submitted to the Office of the Director of Public Prosecutions (ODPP).
- 1.5 On the 9th June 2010, the Director of Public Prosecutions (DPP) recommended that the case be referred to the Coroner.
- 1.6 In September of 2010, the Commission took over the PPCA’s investigation to determine whether Hill’s right to life was breached and to appear at the Coroner’s Inquest to determine whether anyone was criminally liable for Hill’s death.
- 1.7 The investigation and inquest uncovered evidence to refute the claim of self-defence particularly that:
 - a. The officers’ account as to how they killed Hill is inconsistent in that Thomas told Inspector Gray, the officer who dispatched them, that the

deceased had pulled a gun but did not fire. However, they told Detective Corporal Gordon, the initial JCF investigator, and the inquest jury that the deceased fired two shots.

- b. Thomas lied to Inspector Gray in telling him that he went to Cross Roads Police Station and waited in vain for 10 minutes for assistance before proceeding to Ivy Green Mews. In statements and depositions, Thomas, Warren and Anderson say they went straight to Ivy Green. Given that Gray's instruction had been for Cross Roads Police to provide operational execution, a jury could find that Thomas, Warren and Anderson deliberately did not involve Cross Roads Police in the operation and lied about it thereafter. A jury could find this indicative of the officers being engaged in a private grouse whilst pretending to be on a police operation.
- c. Thomas, Warren and Anderson were unhurried in responding to the report of an imminent threat and did not advise nearby police. They left Constant Spring over an hour after the information was received.
- d. The finding that the killing was motivated by a private grouse is also made out by the fact that the information for the operation came through Thomas who had, only a few days before, met with the deceased, Marvia Morgan and an Inspector concerning a domestic dispute. Morgan had been allegedly involved in a relationship with Hill and they all met imploring Hill to agree to leave Morgan alone. Thomas claimed to be Morgan's cousin and was reportedly very angry after this meeting. There was also evidence that Morgan had, on another occasion, expressed an intent to get "men" to do ill to Hill. Thomas denied knowing Morgan, Hill and the Inspector.
- e. The gunshot residue analysis does not support an allegation that the deceased had fired. There was no evidence that the deceased's hands were washed or vigorously rubbed. Indeed he was taken to the morgue by the very officers who shot him. It would be unlikely that a jury would be troubled to speculate whether anyone washed or vigorously rubbed the

deceased's hands. A jury might be more convinced that the finding of trace level on one of the deceased's hands was the result of residue on the officers' hands transferring to the deceased's when they handled his body.

- 1.8 On the 24th day of July 2014, the jury directed that Thomas, Warren, Anderson, Brown and Morgan be charged with Hill's murder. They had essentially agreed with the assessment that the BSI made four (4) years earlier.
- 1.9 On the 14th day of October 2014, the DPP offered no evidence after a jury had been empanelled and the defendants were duly acquitted. The manner in which the matter was brought to an end prevents reversal of the DPP's decision. It was open to the DPP to end the matter by entering *nolle prosequi* which would have permitted review and possible reversal by a Judge of the Supreme Court.
- 1.10 Neither the family nor the Commission were aware that this course would be taken.
- 1.11 The DPP felt that it was not possible for self-defence to be negated. The Commission humbly disagrees.
- 1.12 The Commission concludes that:
 1. There is a prima facie case that Robert Hill's right to life was breached in that his life was taken by the unjustified conduct of agents of the State and there was no effective prosecution of these agents of the State.
 2. The Coroner's system in Jamaica is in need of reform.
 3. The private right to bring and conduct prosecutions is not fully observed in practice and somewhat ambiguous in statute.

1.13 The Commission humbly recommends that:

1. Constable Gary Thomas, Warren and Anderson be subjected to an internal disciplinary hearing concerning their use of force that led to the death of Robert Hill.
2. Constable Gary Thomas be subjected to internal disciplinary hearing as regards his alleged false statements to Inspector Gray; his alleged false statements regarding his prior knowledge of the deceased, Marvia Morgan and Detective Inspector Garrick; and his failure to involve the Cross Roads Police in the operation.
3. The Solicitor General consider compensating the estate of Robert Hill for breach of his right to life.
4. The private right to institute and conduct criminal proceedings independent of the DPP but subject to the DPP's constitutional right to intervene be fully recognized in statute.
5. Pursuant to section 30(2) of the INDECOM Act, that this matter be referred to Parliament as, in the Commission's opinion, it requires Parliament's special attention.
6. The **Coroner's Act** be amended to:
 - a. Include INDECOM in the list of persons so named as interested parties to an Inquest into a death, the investigation of which, is or was within the remit of INDECOM;
 - b. Cause all inquests to be conducted by the Coroner, without a jury; and
 - c. Let unjustified failure to answer questions of the Coroner be treated as a serious contempt.
7. Additional Special Coroners be retained.

8. The Commission repeats its recommendation to be named as an “authorized person” under the **Telecommunications Act** and **Interception of Communications Act**.

Part 2

THE INVESTIGATION AND INQUEST

The JCF Investigation

- 2.1 The investigation began shortly after the shooting. It was initially conducted by Detective Corporal Gordon from the Half Way Tree Police Station and then by the Bureau of Special Investigation (BSI).
- 2.2 A member of the JCF Scenes of Crime Unit processed the scene and recovered five spent shells and an expended bullet. He also swabbed the hands of Thomas, Warren, Anderson and Hill. Hill was, at this time, dead.
- 2.3 Later that night it was discovered that the vehicle in which the deceased had been taken to hospital had been cleaned before it could be examined. It was also discovered that Constable Thomas had kept possession of the deceased's mobile phone without informing his supervisors or the initial investigator.
- 2.4 The initial report from the BSI stated:
- “Based on the information at hand, although no eyewitnesses have come forward as yet, there is doubt in how the incident is reported by the policemen. Information was also received that Constable Thomas is no stranger to the now deceased. It is unclear as to what exactly transpired. It is therefore recommended that the policemen involved be removed from frontline duties pending the outcome of the investigation.”*
- 2.5 The investigation continued. Post mortem examination was conducted on the 23rd day of December 2009. Statements, including those showing connections between Hill, Morgan, Thomas and Brown, were collected. Results of ballistic testing were published on the 8th day of April, 2009 and of gunshot residue on the 11th day of February, 2010.
- 2.6 The BSI investigation concluded that the shooting was controversial and that *“it would appear that Robert Hill was set up by Donovan Brown by way of Marvia Morgan in which there seems to be some conspiracy which led to the death of Robert Hill.”*

The PPCA/INDECOM Investigation

- 2.7 The PPCA investigation started on the 11th day of December, 2009. The PPCA monitored the BSI investigation and later canvassed the area for witnesses. This was unsuccessful.
- 2.8 To refute or confirm links between Hall, Morgan, Thomas and Brown, INDECOM issued a Notice pursuant to Section 21 of the **INDECOM Act**, requesting that the Digicel, a telecommunications carrier, and LIME, another telecommunications carrier, provide call data and subscriber details for numbers attributable to the parties for the period November 2009 to January 2010. The information requested included the numbers from which the calls or text data was sent and received; as well as cell sites from which the calls were transmitted. The notice was dated the 28th day of September 2011.
- 2.9 Digicel challenged the notice on the basis that the Interceptions of Communications Act and the Telecommunications Act do not name INDECOM as an “authorized person”, who, under the scheme of those Acts, can receive telephone data. This challenge caused Digicel and INDECOM to approach the court for certain declarations.
- 2.10 The decision at first instance affirming Digicel’s objection is currently under appeal.
- 2.11 On the 4th day of April, 2014, Brown unexpectedly attended INDECOM’s Headquarters. At this time he had completed his deposition to the Inquest but the Inquest was incomplete. He gave a statement to the Commission. Attempts were made to get Brown to return to the Inquest but he could not be found. INDECOM applied under Section 23B of the **Coroner’s Act** for his statement to be tendered. Thomas’ counsel opposed the application on the basis that insufficient attempts had been made to locate Brown. The application was unsuccessful.

- 2.12 On the 29th day of September, 2014, Brown again unexpectedly attended INDECOM's Headquarters wanting to give information to the Commission. At this time he had been charged with Hill's murder. An investigator advised him that we would not speak to him without his lawyer present. He claimed he had no lawyer. The investigator called the Legal Aid Council whose Executive Director, Hugh Faulkner, esq, attended and consulted privately with him. Faulkner said that he would need to "assess the file" before deciding whether or not Brown would provide a further statement to INDECOM.

The Inquest

- 2.13 On the 9th day of June, 2010 the DPP opined on the file submitted by the BSI and recommended that the matter be referred to the Coroner for the Corporate Area. Importantly, the ruling continues:

"I would also recommend that a departmental enquiry be held and/or other indepth investigation to lay to rest any suggestion that there may have been any sort of conspiracy between persons unknown possibly including one Mr. Donovan Brown, Ms. Marvia Morgan (sic) who had complained of unwanted sexual advances by Mr. Robert Hill and any police officer who was a relative of Ms. Morgan to so provoke circumstances which may have led to Mr. Hill's death.

Of course the narrative of a "shoot out" between the police and Mr. Hill with a gun being recovered from the deceased does militate against any suggestion that Mr. Hill's death was some sort of set up by the police. There is no material on file which contradicts the police narrative of the events which suggests that they were acting in lawful self-defence.

It would therefore be a matter for the Coroner to review and determine whether Mr. Hill died in the manner described by the police witnesses."

- 2.14 On the 5th day of May, 2011 the Coroner named INDECOM an interested party in the inquest.
- 2.15 Ms. Morgan appeared before the Inquest pursuant to a summons. She refused to answer questions and was fined Two Thousand (\$2,000) dollars.
- 2.16 The Inquest started on the 25th day of January, 2011 and concluded on the 12th day of August, 2014. The length of the Inquest was due mainly to adjournments to facilitate

some of the interested parties. Some jurors had to be discharged and a re-start was threatened due to the fact that the jury panel fell close to the minimum requirement. The jurors however must be commended for their attention to the matter in difficult conditions.

Part 3

EVIDENCE

Witnesses

- 3.1 **Gary Thomas** was the leader of the group of policemen who killed Hill. Thomas was a member of the Area 5 Special Squad and based at the Constant Spring Police Station. The Cross Roads community was not normally in his precinct of operation but he stated that his team could assist in other police areas.
- 3.2 On the 8th day of December 2009 at about 7:30 pm an informant called his mobile telephone and told him that an armed man was planning to rob persons coming to buy a vehicle. He relayed the information to Inspector Gray who told him to proceed to Ivy Green Mews. At 8:45 pm he left the station for Ivy Green Mews, Cross Roads, St. Andrew; Warren and Anderson were with him. They went directly to their planned destination arriving there at 9:10 pm. No contact was made with Cross Roads Police Station. In his deposition Thomas testified that Inspector Grey told him that Cross Roads police personnel would meet him at the scene.
- 3.3 On arrival they saw a man who fired at them. Thomas returned fire and the man fell to the ground; his gun was recovered. They took the man to the Kingston Public Hospital and then to the Madden's Funeral Home. He admitted that he handed over the deceased's firearm later the next day because of forgetfulness.
- 3.4 Thomas denied having any conversation with Inspector Garrick. Indeed he denied knowing Garrick and Morgan.
- 3.5 **Norval Warren's** statement and deposition support the contention that the man fired at his party and that Thomas returned fire. Warren further narrates that he himself fired one shot in the direction of the man.

- 3.6 **Uriel Anderson** was the driver of the vehicle. His statement largely corroborates the versions given by Thomas and Warren.
- 3.7 **Donovan Brown** is Hill's cousin and visited him regularly. Brown was the informant who, Thomas claims, gave him the information that caused the operation that led to Hill's killing.
- 3.8 Brown gave a statement to the BSI, testified at the inquest and gave a statement to INDECOM.
- 3.9 Throughout Brown claims to have become aware, in the weeks before Hill's death, that Hill had a firearm and that he made many futile attempts to assist the police in recovering this firearm.
- 3.10 After these failed attempts he got a telephone number for a particular officer (Thomas). In his BSI statement he said he got the number from a female cousin-in-law. At the inquest he said he got the number from a male relative who shared his name. In his statement to INDECOM he said the number was given to him by Morgan.
- 3.11 In his BSI and INDECOM statements he relates calling the number at least three times. At the inquest he said he called the number only once.
- 3.12 In his statement to INDECOM he claims that he recovered the gun and handed it to the police prior to Hill being killed. Indeed in that statement Brown reports that Hill had nothing in his hand and was clad in a merino and pair of shorts. In the BSI statement and at the inquest Brown makes no such claim.
- 3.13 Days after the incident Brown claims that he was threatened by a group of men (sometimes said to be 3 at other times 4) who took him away in a car. In his BSI statement he claims that they were seeking Hill's gun and that they released him at the

seaside. To the inquest he claimed he was released in Barbican or by the Banana Board. In his INDECOM statement he claimed that the purpose of this abduction was to threaten him not to mention Morgan.

- 3.14 Before the inquest Brown admitted that parts of his BSI statement were not true and explained that he was “shielding himself”.
- 3.15 **Inspector Leighton Gray’s** statement and deposition confirm that he did receive information from Thomas after which Gray advised Superintendent Gayle, Crime Officer for Area 5. He further confirms that Thomas, Warren and Anderson were dispatched.
- 3.16 Importantly, Gray states that Thomas, Warren and Anderson were instructed to seek the necessary assistance from the Cross Roads police and that their role should be surveillance. Actual operational execution was to come from Cross Roads police.
- 3.17 Gray had briefed them about twenty-minutes after the initial report and had expected them to leave immediately.
- 3.18 After the incident Thomas called Gray and explained that they had gone to the area alone because when they went to the Cross Roads Police Station the officer on duty said there was no one there to accompany them. Thomas told him they left there after waiting for 10 minutes. Further, Thomas told Gray that they went to the scene with the informant and the deceased had drawn his weapon but did not fire it. Thomas reported that all three police officers had fired their weapons.
- 3.19 Ms. **Marvia Morgan** was Hill’s near neighbour. Ms. Morgan in her statement claims that Hill was continuously trying to seduce her into an intimate relationship but she always refused. She also asserts that she reported his persistent advances to the Cross Roads Police Station. Overcome by his constant harassment and by fear, she started to

speak to him socially, lent him money and took him, in her vehicle, to various places in Kingston.

- 3.20 She relates that in October 2009 Hill told her that he had bought a gun and was going to kill her and, in November 2009, that if he cannot get her no one would.
- 3.21 Ms. Morgan admits attending a counselling session at the Cross Roads Police Station which she describes as uncomfortable as Hill claimed that they had been engaged in an intimate relationship. Morgan claims to have made further reports to the Commissioner's Office and to the Half Way Tree Police Station.
- 3.22 In December 2009 she was told that Hill had fired shots at her gate.
- 3.23 Ms. Morgan was at home when Hill was killed but she saw nothing material.
- 3.24 In the last paragraph of her statement Morgan accuses Hill of raping her but that she did not report it to anyone because Hill apologized.
- 3.25 Ms. Morgan refused to answer questions at the inquest and was fined.
- 3.26 **Detective Inspector Marcia Garrick** was at all material times the Sub-Officer in charge of the Cross Roads Police Station. Her statement covers her attempt to mediate a dispute between Hill, Morgan and, later Thomas.
- 3.27 On November 19, 2009 Hill came to the station about a report that he had threatened Morgan. Hill denied the claim and professed to the Inspector his love for Morgan. Garrick telephoned Morgan and invited her to the station. On her arrival both were spoken to by Garrick and Inspector Ottey. They were warned to keep the peace.

- 3.28 Ms. Morgan was dissatisfied with the resolution and she returned to the station to complain about emails and text messages that Hill had sent to her. Hill attended, again professing his love for Morgan. Inspector Garrick advised Morgan to seek a restraining order. Hill was asked to abide Morgan's wishes.
- 3.29 On Friday December 4, 2009 Hill attended on Garrick to report a call, purportedly from Thomas, to say that Thomas had a warrant for Hill's arrest. Garrick, on Hill's insistence that Morgan must be behind it, called Morgan who handed the phone to a male person who identified himself as Constable Thomas from Area 5. Morgan and this man later attended at the station. At the Coroner's Inquest Garrick identified Constable Gary Thomas as this man.
- 3.30 Thomas identified himself as Morgan's cousin and that he had grown tired of Morgan's complaints concerning Hill. Garrick described Thomas as being "very upset" or "very angry" and remained so even when the conciliation ended.
- 3.31 The conversation with Thomas was in the daytime, at arm's length, and she observed his face for about fifteen minutes. She next saw Thomas at the Inquest.
- 3.32 The various conversations with Morgan were all in daylight and, in aggregate, well over 1 hour. Morgan was next seen at the inquest.
- 3.33 **Conneita Washington** is the mother of the deceased and gave a statement to the BSI investigator on the 20th day of July 2012, she later testified at the Inquest. Her statement describes her knowledge of the deceased's adulterous relationship with Morgan and includes her personal interactions with Morgan. Washington recalled that Morgan expressed her love for Hill.
- 3.34 Particularly, Mrs. Washington relates that, during her January 2009 visit to Jamaica the relationship between her son and Morgan seemed to be souring. Morgan called

beseeching her to advise her son that the relationship was over and warning that “she got men to scare him” and “that if Robert don’t leave her alone something serious is going to happen to him”.

3.35 **Corporal Jason Morgan** was the lead BSI investigator. He among other things, received statements from Thomas, Warren and Anderson. The version of events in these statements are consistent with the report made by Thomas, Warren and Anderson to Detective Corporal Gordon of the Half Way Tree Police Station and is recorded in that station’s diary.

Part 4

SCIENTIFIC EVIDENCE

Ballistics

- 4.1 Mr. Sidney Porteous, was a Government Ballistic Expert.
- 4.2 Thomas had allegedly recovered a .38 Smith and Wesson revolver from the deceased it contained 3 bullets and two spent casings. Porteous found that the spent casings had been fired in that revolver.
- 4.3 From the scene 5 spent casings and a fired bullet were recovered, these were all matched to the firearm issued to Thomas.
- 4.4 Although he opined that all the recovered firearms could have been fired on the 8th day of December, 2009 he explained that “*there is no examination available to determine the exact date and time a firearm was fired*”. Indeed, he opined that Anderson’s firearm could have been fired that night but it is undisputed that he did not fire. This opinion is therefore of no value in this matter.
- 4.5 Further, Porteous opined that he would have expected gun powder residue to be on the hands of a person who fired a revolver as it is not a closed weapon. He admitted to being aware of occasions when police recovered a firearm that had previously been recovered.

Gun Shot Residue

- 4.6 Mrs. Marcia Dunbar, the Government Chemist, analyzed swabs taken of Hill’s hands. One swab revealed trace level residue. None was detected on the others.
- 4.7 Mrs. Dunbar agreed that the science of gunshot residue can be used to refute or confirm whether a firearm was fired by an individual and that if someone fired a gun “*all other things being equal that’s the important part, I would expect a deposit at elevated level*”. She explained that an elevated level of deposit could be reduced if the hand was washed or rubbed after firing. Unaware of how the deceased was handled prior to the swabbing

Mrs. Dunbar felt “unable to totally refute that my findings would indicate that the deceased did not fire a firearm” but agreed that “finding trace level could more likely refute the contention that the individual fired a firearm, the fact that Mr. Hill was dead could strengthen the interpretation of the findings of trace level due to inactivity by the deceased”. She concluded that: “I would say my findings does not tend to support the deceased having fired a firearm”.

- 4.8 The learned DPP extracted a portion from Mrs. Dunbar’s deposition to suggest that her finding of trace level gunshot residue means that the deceased could have fired a firearm. The extract ends in the middle of a sentence. A fuller treatment of the evidence gives a different picture. The full passage is here extracted with the portion relied on by the DPP in bold face, underlined emphasis is ours:

“I would not say that based on my scientific test the results do not suggest that the dead individual did not fire a firearm. He could have fired a firearm based on the results I would not say my scientific test are (sic) not indication (sic) of the deceased firing a firearm. For some if you saw elevated or intermediate levels scientists would be more inclined to conclude that the individual fired but finding trace level of gunshot residue does not eliminate the possibility of the individual having fired a firearm but you are less inclined”.

- 4.9 Later Mrs. Dunbar explained that she would expect to find trace level on the hands of someone who did not fire a gun but whose hands had come into contact with someone who did, for example, a policeman who fired a gun putting the deceased into a car.

- 4.10 She then said:

“If an individual had fired a revolver and that individual was being placed or taken up for the level of gunshot residue detected to be at trace level it would require the person doing the taking up or placing to be vigorously holding the area on which the deposit of gunshot residue was made in a rubbing fashion.”

Part 5

FINDINGS

Introduction and Approach

- 5.1 The legal test for the sufficiency of evidence to charge is whether a prima facie case has been made out. A prima facie case exists where, on one possible view of the case, a reasonable jury could convict without irrationality. The DPP's view was that the case did not pass this test. In cases where circumstantial evidence is being considered the assessment of a prima facie case must assume that all inferences reasonably open to be drawn in favour of the prosecution, are drawn. A judge must resist the temptation of usurping the jury's fact finding remit¹.
- 5.2 Modern prosecuting authorities, in deciding whether to charge, have adopted the higher standard of whether there is a realistic prospect of conviction. By this measure the credibility of potentially admissible evidence will be considered and put against the likely defence(s) to conclude whether it is more likely than not that a properly directed jury would convict. The Commission's considered opinion is that the evidence in this case passes this higher test.
- 5.3 The view of the Commission that there was sufficient evidence to charge is therefore an indication that there was a case fit to be tried and not a finding of guilt. Deciding the issue of guilt or innocence is the ultimate and sole remit of the jury.
- 5.4 Is it more likely than not that an objective, reasonable and properly directed jury would convict? The authorities say that the prosecutor must consider whether there are reasons to question the reliability of the evidence and whether the putative defendant's explanation may be thought credible in light of the evidence as a whole. Does any witness have any motive or interest that might undermine his account?² Indeed, in a case of self-defence asking whether the defendant's assertion may be thought credible would be lower than that prescribed by law as the Crown has the burden to negative self-

¹ DPP v Varlack [2008] UKPC 56

² The Decision to Prosecute: A Jamaican Protocol Part 9A, The CPS: Code for Crown Prosecutors

defence. Thus the question would be whether a jury is likely to reject that the defendant was so acting.

5.5 Lord Bingham of Cornhill, CJ put it this way:

*“... a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial...In most cases the decision will turn not on an analysis of the relevant legal principles but on an exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare..”*³

5.6 The English High Court has considered the compatibility of this approach as against the right to life principles enshrined at Article 2 of the **European Convention of Human Rights**. The case was **R (on the application of Patricia da Silva) v DPP and IPCC** [2006] EWHC 3204 and concerned the failure of the Crown Prosecution Service (CPS) to direct charges against police officers who had shot a man who they mistakenly thought was a suicide bomber. The applicant argued that the State’s substantive and procedural right to life obligations required a public trial whenever there was any chance that an agent of the State could be convicted. Putting it another way, the argument was that public interest in a public enquiry as to the appropriateness of the use of force should trump the traditional evidential test.

5.7 The Court was not convinced, holding that there was no requirement to disregard the strength of the evidence so that a public airing of the issues could be conducted⁴. Further, that it was unfair to bring a prosecution where there is insufficient evidence to provide a realistic prospect of conviction and that the applicant’s arguments were incompatible with a consistent application of justice⁵. The CPS Code was found to be

³ R V DPP ex parte Manning [2000] 1 QB 330 at paragraph 23

⁴ [20]

⁵ [21] and [22]

compatible with the right to life obligations as part of a regime of criminal laws to deter offending. The House of Lords refused leave to appeal in this matter.

5.8 Richards, LJ, in delivering the unanimous decision of the Court ruled that:

32. We need no persuading of the importance of article 2. It lays down essential safeguards for the protection of human life and has been repeatedly described as one of the most fundamental provisions in the Convention. Subject to the exceptions contained within article 2 itself, the obligations imposed by it are absolute; though it should be noted that one of those exceptions is highly material in the present case, namely that there is no violation where "deprivation of life ... results from the use of force which is no more than absolutely necessary ... in defence of any person from unlawful violence ..." (article 2(2)(a)).

*33. Article 2 imposes both substantive and procedural obligations on member states. The substantive obligations include the obligation not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. The procedural obligations include an obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, implicated. For those propositions and a fuller summary of this extensive and well-trodden territory, we refer to the judgments of Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at paras 18-20 and *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at paras 1-2. It is within that broad framework that the cases relied on by Mr. Mansfield fall to be considered.*

...

41. *It is certainly relevant to ask whether the evidential test in the Code is compatible with the obligation under article 2 to "put in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions" (the formulation in Osman v United Kingdom (2000) 29 EHRR 245, as quoted in Edwards v United Kingdom(2002) 35 EHHR 19, para 54). In our judgment it is. We do not think that the effectiveness of the system of criminal law in England and Wales or of the machinery for its enforcement would be enhanced by bringing prosecutions that were assessed to be likely to fail even if they could get past a dismissal application and a submission of no case to answer, let alone by differentiating in that respect between cases falling within article 2 and 3 and other cases. On the contrary, such an approach would be liable to undermine public confidence in the system, for the reasons previously discussed.*

42. *We cannot see any other reason why the evidential test in the Code should be held to contravene article 2. Its application involves a judgment but it is very far from arbitrary, since the judgment must be made by reference to a clearly defined, objective criterion. The test has stood the test of time and the rationale for it remains as valid in the context of article 2 as it does generally." (Emphasis ours).*

5.9 The Commission therefore agrees that a prosecution should not commence, or continue, where there is no reasonable likelihood of conviction.

5.10 For issues beyond criminal culpability the Commission will consider whether a prima facie case has been made out.

Direct and Circumstantial Evidence

5.11 Evidence may be classified as direct or circumstantial. Direct evidence comes from witnesses who claim to have personal knowledge of the facts in issue. Thus the three

police officers Thomas, Warren and Anderson are perhaps the only ones who can give direct evidence as to the circumstances of the shooting⁶. They claim that it was done in self-defence. This claim could be refuted by circumstantial evidence of motive and inconsistent explanations. This evidence would arise from the statements and depositions, particularly of Inspector Grey, Inspector Garrick, Donovan Brown and Mrs. Marcia Dunbar.

5.12 Circumstantial evidence speaks to the fact in issue by an indirect route. Witnesses relate relevant facts from which inferences may be drawn as to the facts in issue. It is trite law that neither form of evidence is superior to the other⁷.

5.13 Circumstantial evidence is often deployed to prove motive.

*“Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, **and this is evidence not merely of the malicious mind with which he killed the deceased, but of the fact he killed him...it is more probable that men are killed by those who have some motive for killing them than by those who have not.**”⁸ (Emphasis ours).*

5.14 Where a defendant has told a lie this may be supportive of guilt. A criminal case cannot be made up solely on evidence of lies but, by way of showing consciousness of guilt, may support other incriminating evidence. This is possible where the lie is deliberate, relates to a material issue and there is no innocent motive for the lie⁹.

⁶ Technically Gray and Gordon could give direct evidence as to what the police officers told them.

⁷ Blackstone's F1.16

⁸ Ball [1911] AC 47 affirmed in Williams (1986) 84 Cr App R 299

⁹ Goodway [1993] 4 All ER 894

Admissibility issues

- 5.15 The rules of the Law of Evidence circumscribe what information may be accepted in court as evidence. The first issue that arises is the admissibility of the police officers' reports.
- 5.16 There is a view often expressed at the defence bar that whatever a policeman reports after an incident cannot be used as evidence against him as he would have been compelled to make the report. Reliance is often placed on the ruling of the trial judge in the 2007 criminal trial surrounding the killing of four persons at Kraal. In the Kraal case, the request for the report came at a time when the police officers could have been considered suspects and no caution was administered to them.
- 5.17 When Thomas called Inspector Gray, Gray had no ground for suspicion. Similarly, when Detective Corporal Gordon spoke to the officers there was no suspicion. Neither Gray nor Gordon needed to have cautioned the officers¹⁰. Further, Thomas called Gray and spoke to him freely. What was actually said to Gray and Gordon admits killing Hill but justifies it as being done in self-defence. The report therefore contains exculpatory statements and admissions. Interestingly the reports to Gray and Gordon are, in some material respects, inconsistent.
- 5.18 An admission is always admissible as a declaration against interest and is evidence of the facts admitted. Statements that are not admissions are admissible to show the attitude of the defendant when it was made. It is open to the prosecution to draw attention to inconsistent denials as many convictions have resulted from inconsistency between two denials¹¹.
- 5.19 At the close of the prosecution's case when a judge is considering whether there is a case to answer, the judge cannot take into account these self-serving statements¹².

¹⁰ R v Osborn and Virtue (1973) 57 Cr App R 297

¹¹ Archbold 2009 paragraph 15-404

¹² R v Storey 52 Cr App R 334

- 5.20 At the close of the defence case the jury is entitled to consider the whole statement, incriminating parts and excuses, to determine where the truth lies¹³. A jury is not bound to accept the defendant's explanation.
- 5.21 The second admissibility point concerns Inspector Garrick's identification of Morgan and Thomas. During the BSI investigation no identification parade was conducted for Garrick to formally point out Thomas and Morgan. The DPP did not instruct that a parade be held when the BSI investigation was ruled on. This would be the norm when the identification is disputed. As it transpired, the fact that Thomas was disputing the identification was not apparent until the Inquest had commenced. In the circumstances the first time Garrick pointed out Morgan and Thomas was at the inquest. It was not a dock identification but an in court confrontation.
- 5.22 The highest courts have held that failure to conduct an identification parade does not per se make a confrontation or a dock identification inadmissible. Rather it is for the trial judge to direct the jury as to the possible ramifications of the absence of the parade in the whole circumstances of the case¹⁴.
- 5.23 In this case Garrick's sightings of Morgan and Thomas were under very good physical conditions and lengthy. Most importantly, the sightings were in comfortable circumstances and, unlike most occasions when this issue arises, without the distracting tension of a crime being committed. A jury would likely give it due regard despite the absence of a parade.

Joint Enterprise

- 5.24 If someone (call him A) is present aiding and abetting another (call him B) to commit an offence, then A is guilty of the offence B has committed even if there is no plot or

¹³ Archbold 2009 15-401 and 402

¹⁴ Tido v R [2011]UKPC 16, 79 WIR 1, Young v State [2009] UKPC 80,Forbes v R [2001] AC 473

prearranged plan between them¹⁵. What is needed is that this assistance be given with contemplation that force might be used with the intent to kill or cause grievous bodily harm, and that force was in fact used with either intent, causing death¹⁶.

5.25 In **Porter v Williams**¹⁷ the Jamaica Court of Appeal considered an incident where two police officers had been attempting to apprehend a suspect; one of them shot the suspect during this attempt. The Court noted that it was important for the jury to consider the conduct of the officer who did not shoot to see whether they were sure that he was aiding and abetting the shooter rather than attempting to perform his lawful duties.

5.26 Nevertheless, a jury may infer from someone's voluntary presence at a crime that he was aiding and abetting particularly when that person voluntarily continues in the company of principal offender¹⁸.

5.27 Therefore there is no need to prove which of the officers' shots actually caused Hill's death and the officer who did not fire is equally liable due to his supportive conduct and continued presence.

Self-Defence

5.28 Any person may use force to repel an attack or an imminent attack. A police officer is in a unique position as he is bound by his duty to detect crime and apprehend perpetrators¹⁹. For the police officer and ordinary citizen the response must be proportionate to the force threatened or being experienced. In **Palmer v R**²⁰ the approved direction called for the jury to be advised of the need for this proportionality

¹⁵ Mohan v R [1967] 2 AC 187

¹⁶ Rahman [2008] 3 WLR 264

¹⁷ (1965) 9 WIR 1

¹⁸ Clarkson [1971] 1 WLR 1402, Chaplin et al JM (1990) CA 59

¹⁹ Constabulary Force Act s. 13

²⁰ Palmer v R; Irving v R 1971] A.C. 814

"

but with common sense recognition that the degree of response cannot be perfectly measured in the heat of the moment.

“A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable grounds he believes is necessary to prevent and resist the attack. And if in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional. And in deciding in a particular case whether it was reasonably necessary to have used such force as in fact was used regard must be had to all the circumstances of the case including the possibility of retreating without danger or yielding anything that he is entitled to protect.”

5.29 Whether self-defence can be negated in this case will depend on the credibility of the witnesses and the scientific evidence.

Right to Life

5.30 The Constitution

“13. (1) Whereas

(a) the state has an obligation to promote universal respect for and observance of, human rights and freedoms;

.....

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society

(a) this Chapter guarantees the rights and freedoms set out in subsections

(3) and (6) of this section and in sections 14, 15, 16 and 17; and

*(b) Parliament shall pass no law and **no organ of the State shall take any action which abrogates, abridges or infringes those rights.***

(3) The rights and freedoms referred to in subsection (2) are as follows

(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted; ”

5.31 This is a fundamental human right and permits no derogation, even during periods of national emergency. The provision must be strictly construed and may prevail over other rights.

5.32 The right to life involves:

1. A substantive obligation not to take life,
2. Another substantive obligation to safeguard and protect life, and
3. A procedural obligation for independent, adequate and effective investigation of the taking of a life. Such investigations must be accessible to the relatives of the deceased and have public scrutiny.

5.33 The taking of a life must always be subjected to scrutiny and particularly so where the loss of life was the result of a deliberate act of agents of the State. All the surrounding circumstances must be considered including the planning of the operation and the control of forces on the ground.

5.34 Where the use of force is permitted it must be shown that the taking of life was proportionate having regard to:

1. The nature of the aim pursued.
2. The dangers to life and limb inherent in the situation.
3. The degree of risk to life in the use of force employed.

5.35 The implications of the right to life on an investigation of a state agent taking a life is now well settled by Jamaican, Strasbourg, English and Inter American Commission of Human Rights (IACHR) jurisprudence.

5.36 For investigations to be adequate, effective and independent:

1. The investigators must not have institutional or hierarchical connection with the State agents under investigation.
2. The investigation must be reasonably prompt and expeditious.
3. Efforts must be made to reduce the possibility of collusion between state agents before they give their initial reports to the independent investigator.
4. The investigation must have the means to determine whether the use of force was justified and to identify and punish anyone implicated.
5. There must be reasonable public scrutiny and involve the next of kin

5.37 Essentially, Jamaica must conduct its affairs to comply with this constitutional dictate through an effective system of laws, investigations and prosecutions to ensure that breaches are detected and wrongdoers punished.

*54. “The court recalls that the first sentence of art 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see LCB v UK (1998) 4 BHRC 447 at para 36). This involves **a primary duty on the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.** It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see Osman v UK (1998) 5 BHRC 293 at para 115)”²¹.(Emphasis ours)*

²¹ Edwards [2002] 12 BHRC 190

Murder

- 5.38 The offence of murder is committed by the unlawful taking of someone's life with intent to kill that person or to cause him grievous bodily harm. Killing is lawful and justified in self-defence or in the execution of a lawful sentence of a court.²² A member of the security forces enjoys no special exceptions regarding liability for his actions that cause death²³.
- 5.39 Along with the person whose actions caused death, the principal, any other person who participated in the unlawful joint venture that led to the killing realizing that the principal might use force with intent to kill, would also be exposed to criminal liability²⁴. It is important when dealing with homicides by members of the Security Forces to distinguish between participation in a lawful venture (e.g. apprehending a suspect) and participation in an unlawful venture (e.g. an execution).

Analysis of the evidence

- 5.40 It is not disputed that Thomas, Warren and Anderson were responsible for the death of Hill. The contentious issue is whether the killing was justified for self-defence. The Commission humbly opines that, on the evidence, there was a prima facie case with a reasonable likelihood of conviction that Thomas, Warren and Anderson murdered Hill. The killing was therefore unjustified and the first obligation of the right to life breached.
- 5.41 In the circumstances the Commission will not comment on the liability of the non-state agents.
- 5.42 A jury could reject self-defence and be sure that the killing was premeditated to settle a personal grouse for these reasons:

²² Archbold 19-1 et seq

²³ R v Clegg [1995] 1 AC 482

²⁴ Chan Wing Sui v R [1985] AC 168

1. The officers' account is inconsistent. In that although Thomas told Gray that the deceased had pulled a gun but did not fire, the officers told Detective Corporal Gordon and the inquest jury that the deceased fired two shots. Further, Thomas told Gray that all three officers returned fire but told Gordon that only two did.
2. Thomas lied to Inspector Gray in telling him that he went to Cross Roads Police Station and waited in vain for 10 minutes for assistance before proceeding to Ivy Green Mews with the informant. In statements and depositions Thomas, Warren and Anderson say they went straight to Ivy Green. Given that Gray's instruction had been for Cross Roads to provide operational execution, a jury could find that Thomas, Warren and Anderson deliberately did not involve Cross Roads police in the operation and lied about it thereafter. A jury could find this indicative of the officers being engaged in settling a private grudge whilst pretending to be on a police operation.
3. The fact that Thomas, Warren and Anderson were unhurried in responding to the report of an imminent threat and did not advise nearby police. After being briefed by Gray it took them almost an hour to leave. Gray expected them to leave immediately.
4. The finding that the killing was motivated by a private grudge is also made out by the fact that the information for the operation came through Thomas who had only a few days before met with the deceased, Morgan and an Inspector concerning a domestic dispute. Thomas was reportedly very angry after this meeting. If a jury is convinced that this meeting took place they would inexorably find that Thomas lied in denying knowing Morgan, Hill and the Inspector.
5. The issue of motive and premeditation is further shown by the evidence that Morgan expressed an intent to get "men" to do ill to Hill.

6. The gunshot residue analysis does not support an allegation that the deceased had fired. There was no evidence that the deceased's hands were washed or vigorously rubbed. Indeed he was taken to the morgue by the very officers who shot him and a jury would be unlikely to be troubled to speculate whether anyone washed or vigorously rubbed the deceased's hands. A jury might be more convinced that the finding of trace level on one of the deceased's hands was the result of residue on the officers' hands transferring to the deceased's when they handled his body.

THE DPP'S DECISIONS

To terminate the prosecution

- 5.43 The DPP indicted Thomas, Warren, Anderson, Morgan and Brown with murder following the verdict of the Coroner's jury. The case was thrice mentioned before the Home Circuit Court. The third occasion was the 14th of October 2014, and a jury was empanelled to try the case but the DPP offered no evidence and the jury was directed to enter a formal verdict of not guilty.
- 5.44 It is significant to note that the DPP made two decisions. First, to end the prosecution and, secondly, to end the matter by way of a formal verdict. INDECOM had no indication that the DPP was minded to so act. There was no consultation. It seems that the family of the deceased was similarly in the dark.
- 5.45 The DPP's reasons for discontinuing the case are set out at paragraph 18 of their media release.
- 5.46 First, the DPP claims that the only witness as to fact would have been the defendants and that self-defence cannot be negated. The DPP must mean by this that the former defendants, and of them Thomas, Warren and Anderson, are the only eyewitnesses.

- 5.47 Eyewitness evidence is not superior to other evidence. It is open to a jury to reject this evidence by relying on circumstantial evidence and the direct evidence summarised at paragraph 5.42 above.
- 5.48 Secondly, the DPP opines that the scientific evidence supported the police officer's version. For the reasons set out at paragraphs 4.1 to 4.10 above this is plainly not so.
- 5.49 Thirdly, the DPP urges that the inquest did not reveal any new material to support a case of murder. This is not so as, for example, the full text of Thomas' report to Gray was not provided until the inquest, Morgan's threat, and the unreliability of Brown were all revealed at the inquest. This new material added to the circumstances that suggest that the killing was premeditated and not at all in self-defence.
- 5.50 Fourthly, the DPP asserts there was no material arising above suspicion of a conspiracy to murder. It seems that the DPP is referring to the evidence of motive but fails to consider the impact of such evidence in rejecting self-defence and explaining why the shooting in fact took place. It would be an over cautious jury that would, on these facts, conclude that it is a mere coincidence that Thomas killed a man with whom he had, just days before, been involved in a dispute.
- 5.51 It is the Commission's view that the reasons given reveal a failure to consider all of the facts (note that the ODPP's reasons make no reference to Inspectors Gray and Garrick) and, on a full assessment of the evidence, self-defence could be rebutted.
- 5.52 The Privy Council's opinion in **Leonie Marshall v. DPP [2007] UKPC 4** may be distinguished. LM's son was killed by the police and the Coroner's jury ruled murder by "person or persons unknown". The DPP refused to indict without giving reasons and LM applied for Judicial Review of the DPP's decision.

5.53 The Board held that as the DPP's decision was based on the assessment of evidence, regard ought to be given to the views of an experienced prosecutor, and given that self-defence was a live issue, the DPP was justified not to bring charges.

5.54 However, **Leonie Marshall** had none of the evidence of personal motive and inconsistent police explanations as are seen in this case.

Manner in which case was disposed

5.55 A lay person may ponder why the DPP would have indicted and then decided not to proceed in a matter of weeks. The DPP explains that she was obligated to indict following the inquest verdict²⁵.

5.56 By the **Coroners Act**, a jury, after hearing the evidence, may issue their inquisition and charge for murder or manslaughter²⁶. At common law, this inquisition directs the filing of an indictment²⁷. The common law power is retained unless expressly removed and, in any event, the statute expressly retains previous practices²⁸.

5.57 The practice in Jamaica is for the DPP, or a prosecutor from that chambers, to sign all indictments. In some jurisdictions the indictment is signed by an officer of the court. The DPP obviously felt that her office was compelled to sign the indictment as the sole authority that could do so.

5.58 The Constitution provides that the DPP has the power to institute and undertake criminal proceedings, to take over proceedings, and to terminate proceedings. The latter two powers being exclusive to that office.

²⁵ Paragraph 4 DPP's Media Release

²⁶ S. 19(5)

²⁷ Re King's Application [1988] 40 WIR 15

²⁸ S 3 Coroners Act

- 5.59 It was therefore open to the DPP to end the prosecution by her own act. At common law this would be achieved by entering a *nolle prosequi*. If the DPP had done so, Judicial Review would be available to seek to quash the decision to terminate the proceedings. A *nolle prosequi* is not an acquittal and *autrefois acquit* (double jeopardy) would not bar renewed proceedings.
- 5.60 In **Forbes v AG (2009) 75 WIR 406**, the deceased's estate's attempt to quash an acquittal of a policeman by way of a directed verdict after no evidence was offered failed as the Board opined that the acquittal, even if procured by a mistake, was a bar to any future proceedings.
- 5.61 The DPP, by adopting an approach that led to a directed verdict, chose to end the prosecution without using her constitutional power. In so doing an acquittal was handed down that will bar any renewed proceedings. In this regard, it does not matter whether consensus is reached that the DPP's assessment of the case was erroneous or whether additional evidence is later procured. The former defendants will enjoy a bar to future proceedings without any adjudication on the evidence.
- 5.62 The procedure adopted prevents any reversal of the DPP's decision, rendering that Office's accountability illusory.
- 5.63 Previous office holders have either declined to indict or entered a *nolle prosequi* to terminate a prosecution. Another example of a jury being empanelled in this way was in October 2010 when soldiers were acquitted by directed verdict at the behest of the DPP²⁹. These soldiers had also been indicted by a Coroner's jury. The matter was not investigated by the Commission, nor the PPCA. The Commission has not reviewed the evidence in that case.

²⁹ In the killing of Omar Palmer et al.

- 5.64 Typically no evidence would be offered in an indictable matter where the prosecuting counsel commenced the trial fully intending for a full trial to proceed but some unforeseen circumstance (e.g. witness unavailability) embarrasses counsel and he or she is forced to throw in the towel.
- 5.65 If the family or the investigators had been consulted prior to taking this course the DPP's decision could have been reviewed by a Judge. When the DPP decided to offer no evidence the Judge in court, following **Farquharson Committee 1968 (UK)** principles, could not have intervened to prevent it.
- 5.66 The **Farquharson Committee** recommended that:
- a. It is for prosecuting counsel to decide whether to offer no evidence.
 - b. If the prosecutor invites the Judge's approval then the prosecutor must abide by the Judge's decision.
 - c. If the prosecutor does not seek approval the Judge may express his dissent and ask for reconsideration.
 - d. In extreme cases a Judge may decline to proceed until prosecutor consults with the DPP.
- 5.67 The DPP having herself appeared, made it quite unlikely that a Judge would scrutinize the decision to offer no evidence.
- 5.68 The DPP's powers and independence are of high constitutional importance. Accountability for these powers is with the Courts, but the procedure adopted by the DPP effectively removed this accountability.
- 5.69 In **Lloyd Brooks v DPP**³⁰ the Privy Council had occasion to commend the DPP's exercise of restraint. Brooks had been discharged by the examining Resident Magistrate after a preliminary inquiry. The DPP did not agree with the decision. Under Jamaican

³⁰ (1994) 44 WIR 332

law the DPP could have nevertheless put the case before the Circuit Court by his own hand or by seeking to convince a Judge of the Supreme Court. The DPP chose the latter.

5.70 Before the Board the question was raised: Why did the DPP seek permission from a Judge to do that which he could have done of his own accord? Lord Woolf put it this way:

*“It was in the interests of the appellant and it demonstrates a proper respect for a decision by a member of the judiciary if, before such an exceptional course is taken, the Director of Public Prosecutions seeks the approval of a more senior judge than the resident magistrate to the course which he was proposing to take.”*³¹

5.71 Similarly, deference for the decision of the Coroner’s Inquest ought to have encouraged the DPP to adopt an approach that facilitated judicial review rather than one that practically denied it.

5.72 The DPP’s powers are a measured intervention on the tradition of private individuals bringing and conducting prosecutions. Although the police and government counsel are responsible for the vast majority of prosecutions, the tradition of the private right is maintained as:

‘The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains, a

³¹ At page 341

*valuable constitutional safeguard against inertia or partiality on the part of authority.*¹³²

5.73 The power to institute and conduct private prosecution may be exercised by state agencies³³ and their employees³⁴.

5.74 In the matter of the death of **Michael Gayle**, a Coroner's jury directed that the police officers and soldiers present at the killing should be charged with his death. The DPP thought the evidence insufficient and asked the investigators to make further enquiries. These proved futile and no charges were laid. A petition was laid before the Inter American Commission of Human Rights (IACHR). At the petition hearing it was argued, by Jamaica, that it was open for a private prosecution to be brought.

“26. With regard to the specific mechanisms mentioned by the Petitioners in their observations, the State asserts that they constitute available remedies and that the Petitioners have failed to pursue them. In particular, the State claims that the remedy of private prosecutions exists as an established procedure that has its genesis in the common law and is provided for implicitly in Section 94 of the Constitution of Jamaica. The State further contends that the Petitioners have failed to offer any evidence to support their argument that it is highly likely that the Director of Public Prosecutions would intervene in order to prevent a private prosecution in this case and therefore that it is implicit in the Petitioners' submissions that this remedy has not been exhausted under domestic law.”³⁵(Emphasis ours)

³² *Gouriet v Union of Post Office Workers* [1977] 3 AllER 70 at 79 per Lord Wilberforce

³³ Where that agency has legal personality

³⁴ *R v Rollins* [2010] UKSC 39, [2010] 4 All ER 880, [2010] 1 WLR 1922.

³⁵ *Michael Gayle v. Jamaica, Case 191/02, Report No. 8/03*, <http://www1.umn.edu/humanrts/cases/8-03.html>

- 5.75 The IACHR would conclude that the State's obligation to effectively investigate and prosecute could not be satisfied by a citizen bringing a private prosecution³⁶. Nevertheless, it is important to note that Jamaica has accepted the possible relief of a private prosecution where the DPP has declined to prosecute.
- 5.76 In this particular case the avenue of private prosecution has been closed as the DPP chose to decline to prosecute in a manner that caused double jeopardy to attach. In the circumstances of this case the state has not only failed in its constitutional obligation, but it has also prevented the private safeguard.
- 5.77 Generally, the Commission has noted that in practice, this "valuable constitutional safeguard", is being threatened. Although it is quite clear that a private person may commence an indictable case by laying an information putting the matter before the Resident Magistrate³⁷, there is no clear provision as to how the indictment will be filed absent the DPP³⁸.
- 5.78 Once the indictment is signed who will appear for the prosecution? Some courts deny a party who has brought a prosecution from having counsel of his choice appear in such proceedings ruling that this complainant must have the DPP's permission to do so. This is often and confidently asserted even by the DPP although it has no basis in statute or common law. Indeed there are a number of provisions in the **Judicature (Resident Magistrates) Act**³⁹ and the **Justices of the Peace (Jurisdiction) Act**⁴⁰ that say otherwise.
- 5.79 In these circumstances the complainant is forced to apply to the DPP for permission to have his counsel appear. The effect of such permission, if granted, is that the DPP has

³⁶ Paragraph 43

³⁷ S. 29 Justice of the Peace (Jurisdiction Act)

³⁸ S. 2 Criminal Justice (Administration) Act

³⁹ S. 289

⁴⁰ S. 11

intervened in the proceedings. The complainant's counsel would be the DPP's agent and subject to the DPP, counsel from the ODPP or to the Clerk of the Courts. Thus, the practical application of this valuable safeguard against the DPP's inertia or partiality will fall back in the hands of the DPP. The safeguard is therefore an illusion.

- 5.80 In England it is rare, but not unknown, for private prosecutions to be brought in indictable matters where the Crown Prosecution Service has declined to prosecute. The most well-known example may be the first prosecution of the alleged killers of Stephen Lawrence. Although the same common law right described in **Gouriet** is enjoyed by Jamaicans, the absence of clear statutory provisions and an aversion to the unusual militates against its enjoyment.

The Coroner's System

- 5.81 INDECOM had to apply to the learned Coroner to be deemed an interested party in these proceedings. This was not automatic.

- 5.82 Section 22C(1) of the **Coroners Act** states thus:

“Subject to subsections (2) and (3) and without prejudice to any other entitlement which any person may have to examine witnesses at an inquest, any person who satisfies the Coroner that such person is an interested party may be permitted by the Coroner to examine any witness at an inquest, either in person or by an attorney-at-law.

- 5.83 Section 21(3) states:

In this Act, “interested party” means-

- a) *“A parent, child or spouse of the deceased or, if there are no such persons, the deceased’s next of kin;*
- b) *A personal representative of the deceased;*
- c) *Any beneficiary under a policy of insurance issued on the life of the deceased;*
- d) *The insurer who insured such a policy of insurance;*
- e) *Any person whose act or omission, or that of the person’s agent or employee acting in the course of duty, may in the opinion of the appropriate Coroner have caused or contributed to the death of the deceased;*
- f) *Any person appointed by a trade union to which the deceased belonged at the time of his death, if the death may have been caused by-*
 - i. *An injury received by the deceased in the course of the deceased’s employment; or*
 - ii. *A disease to which he is exposed specifically by the nature of his duty;*
- g) *Any person appointed by a government department to attend the inquest;*
- h) *The Commissioner of Police;*
- i) *Any other person who, in the opinion of the Coroner, is a properly interested person”*

- 5.84 A Coroner's Inquest is a judicial inquiry with the aim at determining *inter alia* how the deceased came to his death⁴¹. In deciding "how", one must examine "by what means"⁴² and under what circumstances the person died. The Coroner has an overriding duty to ensure that the circumstances surrounding the death are properly investigated and that the relevant facts are "fully, fairly and fearlessly" presented⁴³.
- 5.85 By virtue of the **Independent Commission of Investigations Act**, INDECOM has been charged with the responsibility to undertake investigations concerning actions of members of the Security Forces and other agents of the State that result in, among other things, the death of a person and for connected matters.
- 5.86 Given the general mandate of INDECOM and the specific role of investigating circumstances surrounding the death of an individual at the hands of a member of the Security Force, INDECOM ought to be deemed a properly interested person/party for the purpose of these proceedings, pursuant to section 21(3)(i) of the **Coroners Act**.
- 5.87 In the case of **R v HM Coroner for Derby and South Derbyshire ex parte Hart**⁴⁴, Newman J examined the meaning of the phrase "properly interested person" as stated under the UK Coroners Act. He cited Kennedy LJ in **ex parte Driscoll**⁴⁵ stating that:

... a properly interested person must establish more than idle curiosity...What must be shown is that the person has a genuine desire to participate more than by the mere giving of relevant evidence in the determination of how, when and where the deceased came to his death. He or she may well have a view he wants to put to the witnesses, but there is no

⁴¹ Section 19 Coroner's Act.

⁴² R v Northumbria and Scunthorpe Coroner, ex p Jamieson (1994) 3 All ER, 972 at 988.

⁴³ Ibid.

⁴⁴ (2000) 164 JP 429.

⁴⁵ (1995) 159 JP 45 at 56F.

harm in that. Properly controlled, it could assist inquisitorial function. [Emphasis ours]

5.88 Pill J added⁴⁶:

It remains to consider the significance to be attached to the word "properly" in paragraph (h). In the context it imports not only the notion that the interest must be reasonable and substantial, and not trivial or contrived, but in my judgment also the notion that the Coroner may need to be satisfied that the concern of the person seeking to intervene is one genuinely directed to the scope of an inquest as defined in r 36. It must be accepted that r 20(2)(h) does permit and require the Coroner to form an opinion as to whether a person is properly interested.

[Emphasis ours]

5.89 It is noteworthy that the provisions under the UK Act and that of Jamaica are similar. INDECOM, being clothed by an Act of Parliament with a particular mandate, has sufficient and substantial interest at an inquest; and given the purpose of an inquest, ought to be allowed to express those interests; without having to rely solely on the Coroner's discretion.

5.90 Pill J in **R v HM Coroner for Portsmouth, ex parte John Keane**⁴⁷ cited Lord Lane, CJ in **R v South London Coroner, ex parte Thompson**⁴⁸:

In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an

⁴⁶ Ibid at page 9.

⁴⁷ (1989) 153 JP 658.

⁴⁸ reported in The Times, July 9, 1982 (Jarvis on Coroners, 10th edn p 6) on Page 5 ibid.

inquisitorial process, a process of investigation quite unlike a trial... The function of an inquest is to seek out and record as many of the facts concerning the death as public interest requires.

5.91 We therefore humbly recommend that given the purpose and scope of an inquest, consideration be given to add INDECOM to the persons so named under section 21(3) of the Act as being interested parties to an inquest.

5.92 The Coroner has the discretion to summon anyone whom he believes is likely to give material evidence at an inquest⁴⁹.

5.93 Section 23(3) of the **Coroner's Act** states:

Where a person duly summoned to give evidence at an inquest-

- a) Does not appear to such summons; or
 - b) Appearing, refuses to be sworn or to affirm, having affirmed or been sworn, refuses without reasonable excuse to answer any questions put to him,
- the appropriate Coroner may impose upon such person a fine not exceeding four thousand dollars and in default of payment thereof commit such person to prison for a term not exceeding one month unless he consents to be examined and gives evidence as aforesaid or unless the fine shall sooner be paid.

5.94 In this case, witness Marvia Morgan refused to give evidence upon being sworn. She was fined Two Thousand Dollars by the Coroner upon such refusal. Given the circumstances of the case, and the assertions made by other witnesses, Miss Morgan's

⁴⁹ Section 22A(1) of the Coroner's Act.

evidence may have added some probative value to the case and may have assisted the jury to understand the case as a whole.

5.95 It appears too easy for any person so summoned, to not give evidence which may result in the court understanding in full, the circumstances by which a person died. This defeats the inquisitorial nature of the proceedings.

5.96 The Commission hereby recommends that this provision be amended to visit higher penalties on a person who refuses to give evidence without any lawful justification.

5.97 Section 11(1) of the Act states:

Upon receipt of the medical and police reports the appropriate Coroner shall, except under the circumstances hereinafter mentioned, as soon as practicable, issue his warrant for summoning not less than five nor more than thirty persons, selected indiscriminately from among the persons whose names appear on the jury list certified under Section 13 of the Jury Act, to appear before him at a specified time and place, there to enquire as jurors touching the death of such person as aforesaid.

5.98 Section 16, however, provides that the Coroner may under specific circumstances, hold an inquest without summoning a jury. It must be noted that there is a very heavy workload on our Coroners. In 2010 the office of Special Coroner was established to conduct inquests of deaths allegedly caused by state agents. Despite the fact that Jamaica's Security Forces have caused, on average, two hundred (200) deaths per year and up to eighty percent of these will require an inquest, only one Special Coroner has been appointed.

5.99 Summoning and finding jurors have been a long-standing issue at Inquests. Not only is it difficult for persons to attend, there is more often than not for those in attendance, a

difficulty to serve. This creates considerable delays in commencing and continuing an inquest. For this inquest, the jurors, though very diligent, could not continue on mention dates due to illness, personal issues and travel commitments. Delays were also caused by the fact that counsel for some interested parties did not have dates available that would have seen a prompt completion of the Inquest.

5.100 It is the Commission's humble view that the Act ought to be revised to abolish the need for a jury at the Inquest and the issues be ventilated and decided upon by the Coroner or Special Coroner, as the case may be. This recommendation does not intend to be critical of the important civic contribution by jurors but seeks to bring greater efficiency to this important proceedings.

5.101 The Coroner, in deciding on a verdict, would apply a familiar test to that of the examining Magistrate in a preliminary inquiry.

Part 6

CONCLUSION

1. There is a prima facie case that Robert Hill's right to life was breached in that his life was taken by the unjustified conduct of agents of the State and there was no effective prosecution of these agents of the State.
2. The Coroner's system in Jamaica is in need of reform.
3. The private right to bring and conduct prosecutions is not fully observed in practice and somewhat ambiguous in statute.

Part 7

RECOMMENDATIONS

6.1 The Commission humbly recommends that:

1. Constable Gary Thomas, Special Constable Norval Warren and Special Corporal Uriel Anderson be subjected to an internal disciplinary hearing concerning their use of force that led to the death of Robert Hill.
2. Constable Gary Thomas be subjected to internal disciplinary hearing as regards his alleged false statements to Inspector Leighton Gray; his alleged false statements regarding his prior knowledge of the deceased, Marvia Morgan and Detective Inspector Marcia Garrick; and his failure to involve the Cross Roads Police in the operation.
3. The Solicitor General consider compensating the estate of Robert Hill for breach of his right to life.
4. The private right to institute and conduct criminal proceedings independent of the DPP but subject to the DPP's constitutional right to intervene be fully recognized in statute.
5. Pursuant to section 30(2) of the INDECOM Act, that this matter be referred to Parliament as, in the Commission's opinion, it requires Parliament's special attention.
6. The Coroner's Act be amended to:
 - a. Include INDECOM in the list of persons so named as interested parties to an Inquest into a death, the investigation of which, is or was within the remit of INDECOM;

- b. Cause all inquests to be conducted by the Coroner, without a jury; and
 - c. Let unjustified failure to answer questions of the Coroner be treated as a serious contempt.
7. Additional Special Coroners be appointed.
8. The Commission repeats its recommendation to be named as an “authorized person” under the **Telecommunications Act** and **Interception of Communications Act**.

DATED THIS 22nd DAY OF OCTOBER 2014

Rhona Morgan
Senior Legal Officer

Courtney Foster
Legal Officer

Terrence F. Williams
Commissioner