

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2004/HCV - 01386

BEFORE: THE HONOURABLE MISS JUSTICE GLORIA SMITH
THE HONOURABLE MR. JUSTICE MAHADEV DUKHARAN
THE HONOURABLE MR. JUSTICE ROY JONES

BETWEEN MILLICENT FORBES CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

Richard Small and David Wong-Ken instructed by Wong Ken & Co for the Claimant

Mrs. Nicole Foster-Pusey and Miss Carlene Larmond for the Defendant

Heard: February 21 and 24, 2005

G. SMITH, J.

[1] This is a renewed application for leave to apply for Judicial Review.

[2] The facts of this case are well known and documented. Janice Allen a 13 year old girl died as a result of gun shot wounds she suffered on April 14, 2000, in West Kingston. It is alleged by the police that a party of policemen were on operations in West Kingston on April 14, 2000 when they came under fire by gun men. The police returned the fire and it was in those circumstances Janice Allen was fatally shot.

[3] On the other hand, this is denied by Ann-Marie Allen sister of the deceased who stated that Janice was fatally shot after the cessation of the "shoot-out".

[4] Subsequently, Rohan Allen a member of the Jamaica Constabulary Force was arrested and charged for the murder of the said Janice Allen. A preliminary examination was held, and the accused Rohan Allen was committed to stand trial before the Circuit Court.

[5] The matter came up for trial in the Portland Circuit Court, before the Hon. Mr. Justice Lloyd Hibbert. The accused pleaded not guilty and a jury was empanelled to hear his case. The Crown was represented by Mr. Herbert McKenzie of the Office of the Director of Public Prosecutions. He opened the prosecutions case by outlining the allegations and then advised the Court that the prosecution was unable to prove the case against Rohan Allen because of the unavailability of crucial and essential evidence.

[6] As a result the prosecution offered no evidence and the Hon. Mr. Justice Hibbert then directed the jury who had by then been put in charge of the case to return a verdict of not guilty. Having been so instructed by the judge the jury returned a verdict of not guilty and the accused was discharged accordingly.

[7] It is now common knowledge that the information upon which the prosecuting attorney relied when he informed the court as to the unavailability of the crucial and essential evidence was untrue.

[8] The Applicant on her renewed application is seeking Leave to apply for Judicial Review pursuant to the C.P.R 2002 56.5(1) (a).

[9] Mr. Small in support of this application argued that the process of the court had been abused. It was therefore unnecessary to cite authorities to show that the court has inherent jurisdiction to protect itself from abuse. He stated that there were a series of co-

incidences which pointed to one conclusion that there was a conspiracy to interfere with the administration of Justice to ensure that no one should be tried or convicted for the killing of Janice Allen in 2000.

[10] He cited three features of this pattern of co-incidences:

- a) The pattern of harassment and intimidation of the family of Janice Allen by the police
- b) A conspiracy to pervert the course of justice
- c) The pattern of interference or fraud which resulted in the misleading of a Judge of the Supreme Court and a jury empanelled to carry out a trial of Rohan Allen.

[11] Mr. Small further argued that the outcome of the case had questionable validity as what took place in court was knowingly obtained by fraud for an ulterior, improper motive. He submitted that in fact and in law there was no true verdict given as it was void ab initio based as it was on a fraud perpetuated against the administration of justice.

[12] He categorically stated that he was not asking for Judicial Review of anything Justice Hibbert did in the Portland Circuit Court as he recognized that the decision of a Superior Court was not subject to Judicial Review as a court of equal jurisdiction cannot review a court of equal jurisdiction. In addition he was not asking the Court to review the verdict of the jury or to go behind the veil of secrecy which goes behind the functions of a jury. Instead he was asking the Court to examine the surrounding facts to see whether any of those persons used the office of judge and jury to achieve a purpose, which they could not allow the light of day to examine.

[13] Mrs. Nicole Foster-Pusey for the Defendant responded to the submissions by referring to the case of **Max Marshalleck v Inspectors Branch Board of the Police Federation. Supreme Court Case Claim 1796/2004** heard on 28th September and 13th October 2004 where it was stated that "The purpose or requirement for leave is to eliminate cases which were brought for frivolous, hopeless or vexatious reasons". She submitted that the Defendant was not saying that this case was vexatious but that it would be an act in vain as the case was hopeless.

[14] She submitted further that the surrounding circumstances and issues raised by the applicant were:

- a) Harassment of claimant;
- b) The detention of the claimant's son;
- c) The "Godfather" offering money to drop the case;
- d) The offer by persons to pay funeral expenses;
- e) The Firearm Registry not being available;

[15] These were not things for the Court to enquire into or do anything about. Therefore all that was left was what took place in the Portland Circuit Court. The only possibility which exists to have the decision of that Court quashed is if there is Judicial Review. If as was conceded by the applicant, that the Supreme Court cannot review a decision of a court of the same level, then it follows that Judicial Review is not an available remedy.

[16] Mrs. Foster-Pusey also submitted that the Attorney-General was not a proper party to Judicial Review proceedings. An order for certiorari is a Prerogative Remedy and thus cannot lie against the Crown, since it is at the suit of the Crown that it is sought. See **Wade & Forsyth, Administrative Law, 7th Edition p.637.**

[17] The applicant has alleged that the acquittal was obtained by improper means, namely fraud. Mrs. Foster-Pusey submitted that after the acquittal of Rohan Allen, based on allegations that the prosecutor and the Court were misled, the Bureau of Special Investigation conducted investigations with a view to ascertaining whether there was any basis upon which criminal charges could be preferred. The file was submitted to Mr. Kent Pantry Q.C. D.P.P for his findings. The D.P.P found that there was no evidence to support any criminal charges.

Conclusions:

[18] The circumstances surrounding this case to say the least are sad, tragic, repugnant and repulsive. It emphasizes the need for an independent body to investigate cases against members of the JCF. It is my view, that an arm of the JCF should not be investigating its own officers as it may be perceived as being unfair, biased, and not impartial as is desired. In looking at whether or not to grant leave for Judicial Review the Court must however be guided by certain established principles. The C.P.R 2002 does not assist as to the circumstances in which leave should be granted. Regard must therefore be had to case law which suggests that leave is generally granted unless the case being brought is frivolous, vexatious or hopeless.

[19] **The White Book Service, Civil Procedure 2003, Paragraph 54. 4.2 at Page 1351**

states:

"The purpose of the requirement for permission is to eliminate at an early stage, claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is a case fit for consideration."

[20] What has been urged on this Court on behalf of the Applicant is that the Court ought to exercise its inherent jurisdiction by preventing the abuse of process. It was stated that the outcome of the case against Rohan Allen had a questionable validity, as what took place was obtained by fraud for an ulterior, improper motive and that there was no true verdict given as it was void ab initio based as it was on a fraud perpetuated against the administration of Justice.

[21] In the case of **R v Ashford (Kent) Justices, ex-parte Richley, 1955 3 ALL ER 604 at p.610**, Singleton, L.J. stated:

"I venture to say that I think an order of certiorari to quash proceedings on the ground that they were procured by fraud or perjury should seldom if ever be made unless the facts regarding the alleged fraud or perjury have either been the subject of a conviction in regular criminal proceedings against the person to whom fraud or perjury is imputed, or else have been admitted by something amounting to a confession by such person."

[22] In addition, it should be shown that the perjured evidence was given in collusion with the party who benefited from the perjury or fraud. In my view what Singleton L.J. enunciated in the foregoing case is a condition precedent and not a finding to be made at a Judicial Review hearing.

[23] Based on:

a) What Mr. Pantry Q.C. said in his Affidavit that after investigations were carried out there was no evidence upon which any criminal charge could have been laid against anyone;

b) There has been no confession by anyone as to a fraud or perjury;

it is my considered view that the very basis upon which the applicant was relying to say what took place in the Portland Circuit Court is void ab initio has evaporated.

[24] I am therefore of the opinion that the acquittal of Rohan Allen at the sitting of the Portland Circuit on the 15th day of March 2004 is not open to Judicial Review and cannot be quashed by certiorari, as a decision of a Superior Court is not subject to Judicial Review by a Court of equal jurisdiction.

[25] The Attorney General is not a proper defendant to Judicial Review proceedings, as an order for certiorari is a Prerogative Remedy and thus cannot lie against the Crown.

[26] In keeping with the practice where the purpose of the requirement for leave is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is a case fit for consideration, I find that as regrettable as the surrounding circumstances may have been in this case, to grant Judicial Review would be without merit. The application for leave is refused.

DUKHARAN J.

I have read the Judgment of G. Smith J, and I wish to concur with the reasons set out herein.

JONES J. (Dissenting)

[1] It is with deep regret that I have found myself unable to agree with the conclusions of the majority of the court in this important matter.

[2] The circumstances surrounding this application for leave to apply for judicial review are troubling. When thirteen year old Janice Allen was killed as a result of gunshot wounds suffered on April 14, 2000, in West Kingston it was seen by many as a tragic denouement, an example of young promise, if not betrayed, at least unfulfilled.

[3] The prosecution of this case and the subsequent acquittal of Rohan Allen on March 15, 2004, has given rise to a great deal of cynicism on the one hand, and apathy on the other, regarding the administration of justice in our country. Cynicism and apathy both have a bad name, but they are vital parts of society's immune system. Cynics, it is true, have changed since Antisthenes and his followers barked at the folly and injustices of ancient Greece. The modern cynic, however, is less generous; he has inherited for the most part an intuitive distrust of motives. This application for leave to apply for judicial review is being considered in this context.

[4] After the acquittal of Rohan Allen for murder in the Portland Circuit Court on March 15, 2004, the claimant Millicent Forbes - a domestic worker, and the mother of Janice Allen (deceased) - brought a claim against the Attorney-General of Jamaica for:

a) An Order of Certiorari to quash the acquittal of Rohan Allen, for the murder of Janice Allen;

b) A declaration that the trial of Rohan Allen on March 15, 2004, at the Port Antonio Circuit Court in the parish of Portland before the Honourable Mr. Justice L. Hibbert and a jury was a nullity;

[5] The basis of this request for leave to apply for judicial review is that:

a) The acquittal of Rohan Allen was obtained by a fraud upon the Office of the Director of Public Prosecutions and the court.

b) The administration of justice in relation to the case of Regina v. Rohan Allen was perverted.

c) The principle of *autrefois acquit* precludes her from pursuing any other remedy other than for an administrative order.

[6] On October 1, 2004, the Chief Justice refused leave to apply for judicial review and the claimant now presents to this Full Court a renewed application for leave pursuant to CPR 56.5(a).

[7] The issues to be considered in this case are:

a) Whether or not this court has jurisdiction to set aside the directed verdict of acquittal by the jury at the Portland Circuit Court on March 15, 2004, in circumstances where the information which formed the basis for obtaining the verdict of acquittal was a misrepresentation and a fraud;

- b) Has the claimant raised arguable issues of fraud and misrepresentation of the information provided to the court, which directly led to a verdict of acquittal sufficient to entitle her to a grant of leave to apply for an administrative order?
- c) Is the Attorney-General of Jamaica a proper party to this application?

First Issue: Does this court have jurisdiction to consider this matter?

[8] The defendant's contend that the facts as to what took place at the Circuit Court held at Port Antonio in the parish of Portland on March 15, 2004 are not in dispute. They say that the accused was pleaded; he pleaded not guilty to a charge of murder; and a jury empanelled; the prosecutor then made an opening statement at the end of which he indicated that the prosecution would be offering "no evidence". The Honourable Mr. Justice Hibbert addressed the jury in these terms:

"Now, before you this morning there is no evidence, so, since there is no evidence then there is nothing that the prosecution has put forward to you to make you feel sure that this accused man murdered Janice Allen. In light of those circumstances, I will now instruct you to return a formal verdict of not guilty against this accused man."

[9] The jury then unanimously found the accused "not guilty".

[10] Mrs Foster-Pusey argued that there is a knock out point in her case. It is on the issue of jurisdiction. She argued that this court has no jurisdiction to deal with this matter, as the Circuit Court is a superior court of record and not amenable to judicial review. She referred the court to Section 27 of the **Judicature (Supreme Court) Act**, which provides that the Supreme Court shall be a superior court of record. She then pointed to Section 40 of

the Act, which provides that a judge of the Supreme Court holding a Circuit Court constitutes a court of the Supreme Court.

[11] She supported this with a reference to the case of **Re Racal Communications Ltd** where Lord Scarman said:

"It is a superior court of record. It was not, in the past, subject to control by prerogative writ or order, nor today is it subject to the judicial review which has taken their place"¹

[12] She contended that it is not possible to ask for an order of the Circuit Court to be quashed, without at the same time, having a review of the Circuit Court. On this basis, she asks this court to conclude that the acquittal of Rohan Allen in the Portland Circuit Court on March 15, 2004, is not amenable to judicial review.

[13] Mr Small for the claimant, contends that the facts as outlined by Mrs Foster-Pusey are incomplete. Millicent Forbes has said in sworn affidavit evidence that there was a pattern of harassment and intimidation of her family by the police or by persons acting on their behalf. She has also said that the persons who intimidated her family have been identified and statements were taken by persons in authority.

[14] By sworn affidavit evidence, Millicent Forbes has also said that on May 18, 2001, two men visited her home and did not identify themselves. She said that they spoke to her about the autopsy and tried to convince her that Rohan Allen was not the one that shot Janice Allen. They asked her about the funeral expenses and said that Rohan Allen wanted to help with the expenses. One of the men then counted out one hundred and fifty

¹ [1980] 2 All E.R. 634

thousand dollars. She said that he told her to take it and let the case "dead out". Two days later two more men came to her house and said to her "mother me know a yuh daughter dead and yuh can do nutten to bring her back because she done dead already, but is Tuesday is Mr Allen court".

[15] By sworn affidavit evidence, Millicent Forbes has said that at the preliminary enquiry the judge instructed that the firearms register be produced. This was important to identify who signed for the lethal gun that was used to shoot Janice Allen. On July 31, 2002, when the register was produced to the court, the relevant pages covering April 14, 2002, the day of the shooting were missing. The relevant officers were asked to present the missing pages by the Resident Magistrate. Scant regard was given to the request; the pages were never produced and no explanation for the missing pages was ever given. She says that this suggested a conspiracy to pervert the course of justice or prejudice the administration of justice

[16] Millicent Forbes gave sworn affidavit evidence that after the accused Rohan Allen was placed before the jury the court was told that the only witness that could link the accused with the firearm was unavailable and not returning to Jamaica. The witness, Inspector Dunchie, who was said to be unavailable, was in fact available and it was not true that he would not return to Jamaica and was still a serving member of the Jamaica Constabulary Force and was in fact in Jamaica carrying out his duty as a member of the force. She said that there was no evidence put forward to suggest that Inspector Dunchie was abroad at the time of the trial. She said that constituted a pattern of interference or fraud, which resulted in the misleading of a judge of the Supreme Court and a jury empanelled to carry out the trial of Rohan Allen.

[17] Mr Small argued that Millicent Forbes has put before this court unchallenged evidence that the investigating officer, Inspector Dunchie, was not helpful in preserving the evidence critical to establish whether or not Rohan Allen was responsible for the killing of Janice Allen.

[18] At the end of the day, it emerged that the Portland Circuit Court was misled. There cannot be any doubt that had the prosecutor and the court been aware that the witness was available they would not have empanelled the jury and the judge would not have given instructions for them to return a verdict of acquittal in the absence of evidence. It is well to bear in mind the words of Lord Bridge of Harwich in **Al-Mehdawi v Secretary of State for the Home Department**: "fraud unravels everything"²

[19] I find it easy to dismiss the argument that this court can order judicial review of the decision of the judge and jury in the Portland Circuit Court. Easy, and more or less accurate. Nevertheless, the inherent jurisdiction of this court remains unfettered to prevent an abuse of its process. An aggrieved party can, therefore, apply to this court for this jurisdiction to be exercised. To try to invalidate a trial after the acquittal by a jury requires fortitude; the claimant in this case has asked for leave to make such an application. She intends to ask for a declaration that the verdict of the jury, which has been procured by a fraud, be declared a nullity.

[20] Mrs Foster-Pusey was critical of the claimant's request for a declaration that the proceedings at the Portland Circuit Court were a nullity. She said that it would have the same effect as the Supreme Court exercising a supervisory jurisdiction over criminal proceedings

² [1990] 1 AC 876 at 895-896, HL

in the Circuit Court. There is no basis for that criticism as any court of unlimited jurisdiction has the power to set aside an irregular order on application being made to the court either under rules of court dealing expressly with setting aside orders for irregularity or as of right if the circumstances warrant: see **Isaacs v Robertson**³

[21] This court, as a superior court of record, has exercised "from the earliest of times" a power which has come to be called an "inherent power". It is said that the inherent jurisdiction of the court is a "virile and viable doctrine" and is defined in an article by Master I.H. Jacob "The Inherent Jurisdiction of the Court"⁴ as:

"...being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."⁵

[22] This definition was judicially approved and applied by the Court of Appeal of New Zealand in **Taylor v Attorney-General**⁶. It is suggested by Master Jacob that one of the categories in which the court would be prepared to use this inherent power are "proceedings, which involve a deception on the court, or are fictitious or are a mere sham"⁷.

[23] When the integrity of the administration of justice is at stake, as it is now, this court has a duty to unleash its inherent powers; to maintain its authority; to prevent its process from abuse, and keep the "stream of justice" pure.

³ [1984] 3 All ER

⁴ [1970] 23 Current Legal Problems page 23

⁵ In the same article at page 51

⁶ [1975] 2 NZLR 675 at pg. 682

⁷ [1970] 23 Current Legal Problems page 43

Second Issue: Has The Claimant Raised An Arguable Case Sufficient To Entitle Her To Apply For Judicial Review?

[24] Mrs Foster-Pusey argued that although the claimant alleges that the acquittal of Rohan Allen was obtained by a fraud on the Director of Public Prosecutions and the court, there is no evidence of this. She was, however, not prepared to dispute:

a) The fact that on March 15, 2004, Crown Counsel Mr. Herbert McKenzie advised the Circuit Court that the firearm register was destroyed in a fire at the Denham Town Police Station subsequent to the shooting incident.

b) That Mr. McKenzie advised the court that the investigating officer, Inspector Dunchie, departed the jurisdiction; was overseas; was on sick leave and from all indications, based upon Mr. McKenzie's inquiries, there was no likelihood of him returning to the jurisdiction as the sick leave was being extended by submissions of medical reports from the United States to the Police Headquarters in Jamaica.

c) That after the acquittal of Rohan Allen, and based on allegations that the Prosecutor and the court were misled, the Bureau of Special Investigations conducted investigations with a view to ascertaining whether there was any basis upon which any criminal charges could be preferred. The Bureau of Special Investigations thereafter submitted the file to Mr. Kent Pantry, Q.C., and Director of Public Prosecutions for his findings.

d) That the Director of Public Prosecutions found that there was no evidence to support criminal charges.

[25] Mrs Foster-Pusey contended that even if certiorari may issue to quash orders obtained by fraud, perjury or collusion, any such fraud must be clear and manifest in terms of a conviction for the fraudulent offence or a confession as to the offence. She says that what the applicant is asking the judicial review court to do is to weigh the facts to determine if a fraud was committed. She referred the court to **R v Ashford (Kent) Justices ex parte Richley**⁸ where it was held that an order for certiorari should not be granted:

- a) merely because a witness had committed perjury, particularly when the witness was not shown to be in collusion with the party who had invoked the jurisdiction in the proceedings (**R v Gillyard (1848) (12 QB 527)** considered and distinguished) or
- b) when granting the order would involve the court in weighing one set of alleged facts against another (**R v Leicester Recorder ([1947] 1 All ER 928)** considered)

[26] I make two comments on this decision. First, in **R(Burns) v County Court Judge of Tyrone**⁹ McDermott LCJ did not apply the strict test used in **R v Ashford (Kent) Justices ex parte Richley**. Second, the decision in **The Queen v Gillyard**¹⁰ was never overruled and is still good law. The facts in that case were that affidavit evidence alleged fraud and collusion, and although an opportunity was given to answer the charge made on affidavit, the respondent failed to do so. It was held in effect that uncontested affidavit evidence is as good as a confession of the matters alleged, particularly, where the other party has an opportunity to respond and has not done so. It was a unanimous judgment of the court in

⁸ [1955] 3 All ER 604

⁹ [1961] NI 167 at page 172

¹⁰ [1848] 12 Q.B 527

which Lord Denman CJ held that the court had jurisdiction. The following passage is taken from the judgment of Coleridge J:

"This is a rule for quashing a conviction: and we make the rule absolute on the ground that this conviction has been a fraud and mockery, the result of conspiracy and subornation of perjury. When the court observes such dishonest practices, it will interfere, although judgment has been given. The case involves the jurisdiction of this court as a court of control over all inferior courts. It is said that conspiracy is charged, and that the party charged ought not to be expected to answer upon affidavit. I think no honest man ought to think it beneath him, or a hardship upon him, to answer upon affidavit a charge of dishonesty made upon affidavit against him. If a man, when such a serious accusation is preferred against him, will not deny it, he must not complain if the case is taken pro confesso."¹¹

[27] The facts in the application before us show unchallenged affidavit evidence, charging by implication, collusion involving Rohan Allen together with others in a pattern of fraud and deceit directed at perverting the course of justice, and ultimately, to obtain a verdict of acquittal at the Portland Circuit Court on March 15, 2004. As the defendant has chosen not to file responses from the persons about which complaint is made in the affidavit evidence alleging fraud and collusion - on the authority of the **Queen v Gillyard** - those persons must be taken to have confessed to it. The rule in **R v Ashford (Kent) Justices ex parte Richley** is also applicable to this case, as the defendant's failure to have the parties respond to the charges in the sworn affidavits amounts to a confession.

[28] It is not without significance that all the issues raised by Millicent Forbes have been supported by sworn affidavit evidence. Mrs Foster-Pusey explanation for the failure of the

¹¹ In the same place at page 529

defendant to file affidavits in response to the grave charges made by the applicant is that the main thrust of their opposition to the application is lack of jurisdiction.

[29] Mrs Foster-Pusey did not raise jurisdiction as a preliminary point; it was considered with all the other evidence. As a result, there is no evidence presented from the defendant's side to contradict the accounts of Millicent Forbes, Ann Marie Allen, and Kent Panty.

[30] In sum then, I find that the effect of the sworn uncontested affidavit evidence of Millicent Forbes - taken together, and if not rebutted - is conclusive of a pattern of collusion, conspiracy and fraud including Constable Rohan Allen to pervert the administration of justice in general, and in particular, to give false information to the prosecutor Mr McKenzie in order to affect the decision of the judge and jury at the Portland Circuit Court on March 15, 2004.

[31] In **Inspector Max Marshalleck v The Inspectors Branch Board of the Police Federation et al**, Mangatal J. in dealing with an application to apply for leave to apply for judicial review said:

"The CPR does not give guidance as to the circumstances in which leave should be given. It is therefore to the case law that one must look to determine when and whether leave should be granted. In that regard it would appear that leave is generally granted unless the case being brought is frivolous, hopeless or vexatious. The White Book Service, Civil Procedure 2003, paragraph 54.4.2 page 1351 states:

'The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hear-

ing if the court is satisfied that there is a case fit for further consideration"¹².

[32] The rules, however, provide that the court must seek to give effect to the overriding objective in the CPR 2002 when it exercises any discretion given to it by the Rules; or interprets any rule. This overriding objective is to enable the court to deal with cases justly.

[33] In a pre-CPR ruling, Lord Diplock gave some useful advice on how judges were to approach applications for leave to apply for judicial review. This was in the case of **R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Limited**. He said:

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."¹³

[34] In a more recent case (although not one with the same pedigree of a House of Lords decision); that of **Michael Gordon v DPP** (a Full Court of Ireland decision), Fennely J, stated the test for granting leave to apply for judicial review in this way:

"Leave to apply for judicial review can be obtained by demonstrating that if the facts alleged are proved the applicant has an arguable case in law to seek the relief he seeks"¹⁴

¹² Suit No. 1796 of 2004 page 14 [Delivered October 13, 2004] (Unreported)

¹³ [1982] A.C 643

¹⁴ [2002] 1 ESC 47 (Delivered June 7, 2002)

[35] So then, what is an arguable case? It means, no more and no less, than there are issues, which are capable of being argued.

[36] In giving consideration to this matter, I take into account the fact that the claimant has not had an opportunity to present a full case, nor did the defendant have a full opportunity to respond, as this is not a substantive hearing. At that time, the claimant will no doubt avail herself of the opportunity to present witness statements and to cross examine witnesses. The defendant would then be able to respond to the charges made by the claimant. Any other person with a sufficient interest in the subject matter of the application may then apply to make submissions at that hearing.

[37] For my part I accepted:

- a) That as there is no dispute in relation to the evidence presented by Millicent Forbes, there is sufficient evidence showing reasonable grounds for believing that there was a pattern of collusion, fraud or behaviour analogous to fraud, perpetrated against the administration of justice at the Portland Circuit Court which caused Rohan Allen to be acquitted of murder;
- b) That from the evidence presented there is a clear inference that Rohan Allen was not only a beneficiary, but also a conspirator in the scheme designed to pervert the course of justice.
- c) The fact that the Director of Public Prosecutions has ruled that no one can be charged for fraud arising from his investigations cannot be conclusive of the matter before this court in the absence of a response to the charges in Millicent Forbes' affidavit.

d) That there is no other effective remedy other than this application for declaratory relief to quash the verdict of not guilty as a nullity

[38] Taken together, this is sufficient for me to grant leave to apply for a declaration that the trial of Rohan Allen at the Portland Circuit be declared a nullity based on a fraud perpetrated on the court.

Third Issue: Is the Attorney-General a proper party to these proceedings?

[39] Mrs Foster-Pusey contended that the Attorney-General is not a proper party to these proceedings. In essence, her argument is that an application for an order of certiorari is a prerogative remedy, and cannot lay against the Crown, as it is brought at the instance of the Crown. In other words, the Attorney General cannot be the respondent. In support of this, she cited the case of **Kool Temp Co. v. The Comptroller of Customs & Excise & the Attorney General**¹⁵ where the High Court in Trinidad ordered that the Attorney General be removed as party to judicial review for certiorari as he was not a proper party.

[40] Mr. Small concedes the point but says that by virtue of CPR 19.2(4) the court may make an order for the Attorney-General to cease to be a party if it considers that it is not desirable that he be a party to the proceedings. He submitted that the determination of who are the proper parties is within the jurisdiction of the court. On this basis, he argues that this should not be fatal to her application.

[41] I take the view that in administrative law matters, substance and not form is what matters. However, I would respectfully decline Mr. Small's invitation, as the substitution of the

¹⁵ [1992] T.L.R. 523

Attorney-General for another party is not the function of this court. By virtue of Section 56 (13) of the CPR 2002 at the first hearing of the substantive application, the judge must give any directions to ensure the expeditious and just trial of the claim. In addition, the court has all the powers of case management to ensure the efficient progress of the matter, and so Mr. Small should add or substitute parties at that time.

[42] So then, I hold that in these proceedings the fact that the Attorney General of Jamaica is not a proper party to this application, at this stage, is not fatal to the application for leave to apply for an administrative order.

Conclusion

[43] In conclusion, I would make the following orders:

- a) Leave granted to the claimant to apply for an administrative order as set out in paragraph 2 of Fixed Date Claim Form dated June 14, 2004.
- b) Leave granted to the claimant to substitute the Attorney-General of Jamaica for a relevant party or parties, or add another party in Fixed Date Claim Form dated June 14, 2004;
- c) The dates for the first and substantive hearings of this matter are to be set in consultation with the Registrar of the Supreme Court;
- d) No order as to cost.