

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. 2002/M-35

IN CHAMBERS

IN THE MATTER TOUCHING AND concerning the death  
of PATRICK GENIUS

AND IN THE MATTER OF the Coroner's Act

AND THE MATTER OF the Office of the Director of Public  
Prosecutions

Mr. Richard Small, David Batts and Ms. Susan Ridsen -Foster  
instructed by Livingston Alexander and Levy for the applicant

Heard: April 10 and 15, 2002

JONES, J. (Ag.)

Patrick Genius was killed on December 13, 1999. He was thirty two years old. A coroner's inquest into the circumstances surrounding his death was held in or about April 2001. The applicant, Leonie Marshall is the mother of Patrick Genius, and seeks leave to apply for judicial review of:

1. The decision of the Coroner of the parish of Kingston to refer a matter to the Director of Public Prosecutions rather than to charge the three policemen with murder;

- (a) The decision of the Coroner of the parish of Kingston to refer a matter to the Director of Public Prosecutions rather than to charge the three policemen with murder
- (b) The decision of the DPP that no proceedings are to be instituted against the three police officers
- (c) The decision of the DPP not to disclose to the applicant his reasons for not instituting proceedings against the three police officers

2. The grounds on which this judicial review is sought are:

- (a) that the Coroner for Kingston erred in law and or acted unreasonably and or failed to institute prosecution of the three police officers in accordance with the verdict of the jury.
- (b) that the coroner erred in law and or acted in excess of jurisdiction and or unreasonably or arbitrarily and without lawful justification when he directed the jury not to name the individuals they considered to be responsible for the death of the deceased
- (c) that the DPP has erred in law and or acted unreasonably and or ultra vires his powers when he ruled that the said three police officers were not to be charged
- (d) that the DPP failed neglected or refused to pay any or any sufficient attention to the medical evidence given at the coroners inquest and or to the oral evidence of the three policemen

(e) that the DPP and the coroner have abdicated their statutory and or constitutional duties in that they have acted unreasonably and or have failed to act as required by law

3. In addition the applicant has requested an extension of time to apply for judicial review

4. Lord Hailsham of Marylebone LC in *Chief Constable of North Wales Police vs. Evans* [1982] 1 WLR 1155 at pg. 1160 said that judicial review:

*"... is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."*

5. The considerations for granting an application for leave to apply for judicial review were authoritatively stated by Lord Diplock in *IRC vs. National Federation of Self-Employed and Small Business Ltd.* [1981] 2 WLR 722 where he said at pg. 739:

*"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"*

6. Is the decision of the coroner's court and the Director of Public Prosecutions subject to review by this court? Mr. Small for the applicant referred the court to the case of *R vs. Greater Manchester Coroner, ex parte Tal and another* [1984] 3 AllER 240 in which it was held that inferior tribunals and inferior courts (including coroner courts) are subject to the wide supervisory common law powers of the High Court. In relation to the DPP he referred to section 94(6) of the Constitution of Jamaica which provides as follows:

*"In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority"*

7. He then submitted that that section did not preclude the review by the courts as this was provided for by section 1 sub-section 9 of the Constitution in the following terms:

*"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that or authority has performed those functions in accordance with this Constitution or any other law"*

8. These provisions were judicially considered in a judgment of the Constitutional Court of the Supreme Court of Jamaica in *Melanie Tapper and Winston McKenzie vs. Director of Public Prosecutions and Attorney General* M103 and M113 of 1998 (unreported). Panton, J (as he then was) in the course of discussing the powers of the DPP said at pg. 2 of the judgment:

*"He (referring to the DPP) cannot simply do whatever he wishes without regard for the rights of the citizen or the laws of the country. His action is subject to judicial review. In any such review the court is obliged to consider his reasons if he has disclosed them"*

9. That said; is there an arguable case for the remedies sought on the facts presented in the application for leave to apply for judicial review? The applicant wishes judicial review of the decision of the coroner of the parish of Kingston when he (the coroner) referred the matter concerning the death of Patrick Genius to the Director of Public Prosecutions, rather than charging the three policemen involved, with murder. The coroner is not obliged to refer any matter to the DPP, except in accordance with the provisions of section 15 of the Coroners Act, which provides as follows:

*" In the event of the Coroner abstaining from holding an inquest for the reasons set out in section 14, he shall submit the said medical and police reports, together with a statement of his own views of the case, to the Director of Public Prosecutions, and if-*

*upon such evidence as he considers sufficient the Coroner is satisfied that he can determine the identity of, and the date, place and cause of death of, the deceased person; and*

*no action has been taken by him in that regard pursuant to subsection (1) of section 10, he shall make the determination and send a certificate in the Form D in the Schedule, to the person who is the Registrar under the Registration (Births and Deaths) Act for the district in which, according to his determination, the death occurred.*

*(2) The Director of Public Prosecutions may, on receipt of such reports and statement, direct the Coroner to hold an inquest, and the Coroner shall obey such direction; but if the Director of Public Prosecutions concur with the Coroner in thinking an inquest unnecessary, he shall make a minute to that effect on the papers transmitted to him by the Coroner, and deliver them to the Registrar of the Supreme Court, who shall keep and preserve them in his office along with the inquisitions."*

10. Whether or not the coroner charges someone after the holding of an inquest is dependent on the verdict of the jury. Section 19 subsections (5) (6) and (8) of the Coroners Act are instructive:

*"(5) After hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when and where the deceased came by his death, and, if it appears to the jury that, prima facie, the circumstances of the death indicate that the crime of murder or manslaughter has been committed, the persons, if any, whom the jury charge with murder or manslaughter.*

*(6) They shall also enquire of and find the particulars for the time being required by the Registration (Births and Deaths) Act to be registered concerning the death.*

*(8) Except in the cases hereinafter mentioned the Coroner shall send the inquisition and the depositions to the Registrar of the Supreme Court for safe custody."*

11. The question of whether the coroner had the power to issue his warrant charging the three policemen with murder would also depend upon the verdict of the jury. Section 20 subsections (1) and (3) of the Coroners Acts explains the procedure after a verdict of unlawful killing is given by the jury:

*"(1) When a Coroner's inquisition charges a person with the offence of murder, or of manslaughter, the Coroner shall issue his warrant for arresting or detaining such person, and shall bind by recognizance all such persons examined before him as know or declare anything material touching the said offence to appear at the next Circuit-Court at which the trial is to be, then and there to prosecute or give evidence against the person so charged.*

*(2)*

*(3) The Coroner shall deliver the inquisition, depositions and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the Court in which the trial is to be, before, or at the opening of the Court."*

12. The result of this is that where a coroner's inquisition charges someone for murder or manslaughter it has the same consequences as an indictment, and functions in a similar manner as a committal from a preliminary inquiry.

13. The verdict of the jury is crucial to this application for leave to apply. What then was the verdict of the jury? The applicant says that she was present when the jury returned a verdict that the policemen were criminally responsible for the death of Patrick Genius. With due respect to the parties in this application, the best evidence of the coroner's verdict is given by the production of the inquisition. There was no explanation given by the applicant for the absence of this record. The result of this was that the applicant failed to provide vital support for her application. This record is routinely filed with the Registrar of the Supreme Court, and is easily accessible to the applicant and her legal advisors.

14. In the absence of the inquisition and verdict, the court was unable to say whether there was any arguable case for a review of the coroner's decision based on either error on the face of the record, or *Wednesbury* unreasonableness: see *Associated Provincial Picture Houses Limited vs. Wednesbury Corporation* [1947] 2 AllER 680

15. The submission that the coroner erred in law and or acted in excess of jurisdiction and or unreasonably or arbitrarily and without lawful justification when he directed the jury not to name the individuals they considered to be

responsible for the death of the deceased, may be shortly dealt with. Section 19 (5) of the Coroners Act provides that it is the duty of the coroners jury where the circumstances indicate that death is due to murder or manslaughter to name the parties, if any, who should be charged. If the coroner acted as alleged in the affidavit of Leonie Marshall that would clearly be an error on the face of the record. However, in this case the applicant did not provide the court with the transcript of the coroner's summation to the jury and his comments. This document was essential in establishing a prima facie case, and is easily available on request from the coroner himself, without much difficulty.

16. For these reasons, there was no proper basis on which any of the orders sought in relation to the coroner for Kingston could be made. To decide otherwise, would simply be to allow an applicant a right, in every case, in which unsupported information is submitted, access to the judicial review court.

17. It remains to consider the applicant's complaint regarding the DPP. The DPP has discretion whether or not he should institute criminal proceedings against the three police officers; he is not bound by the decision of a coroner's jury. By virtue of Section 94(3) (a) the DPP has power to:

*"To institute and undertake criminal proceedings against any person before any court other than a court marshal in respect of any offence against the law of Jamaica."*

18. In addition, the Criminal Justice Administration Act section 2 provides as follows:

*" No indictment for any offence shall be preferred unless the prosecutor or other person preferring such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction of, or with the consent in writing of a Judge of any of the Courts of this Island, or by the direction or with the consent of the Director of Public Prosecutions, or of the Deputy Director of Public Prosecutions, or of any person authorized in that behalf by the Director of Public Prosecutions."*

19. The applicant's challenge to the DPP is that he erred in law or acted unreasonably when he ruled that the three police officers should not be charged; failed, neglected or refused to pay any attention to the medical evidence given at the coroner's inquest, and have acted unreasonably. As a general proposition a decision of a public authority is liable to be dealt with in a judicial review proceeding where the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

20. In *Associated Provincial Picture Houses Limited vs. Wednesbury Corporation (supra)* it was held:

*"The court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, and in such a case the court can interfere. The power of a court, however, to interfere in any case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in it."*

21. Greene MR observed at pg. 681:

*"... a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'"*

22. The applicant submitted a transcript of a taped interview with the Director of Public Prosecutions Kent Pantry, Ruth Ann Wynter and Patrick Bailey recorded on January 9, 2002. The applicant also submitted a letter dated February 1, 2002, requesting a copy of the DPP's ruling and or opinion or decision in relation to the Patrick Genius matter as well as the reasons for ruling or not ruling as the case may be. It appears from the papers submitted that the Director of Public Prosecutions chose not to reply to that letter. A recent case involving similar facts is *R vs. Director of Public Prosecutions ex parte Manning* [2000] 3 WLR 463. The facts are taken from the head note:

*"The applicants' brother, who had been remanded in prison custody awaiting trial for an offence of violence, died of asphyxia while under restraint following an altercation with two officers. His death was investigated by the police and the papers were referred to the Crown Prosecution Service. At a coroner's inquest the evidence indicated that death had resulted from the manner in which one of the officers had held the deceased's head during the incident and the jury returned a lawful verdict of unlawful killing. A specialist senior caseworker in the Crown Prosecution Service undertook a detailed examination of all the available evidence, including that adduced at the inquest and in his review note recorded his investigations, his conclusion and the reasoning on which it was based. Having referred to the weaknesses and inconsistencies of the prison officers' evidence he rejected alternative potential charges and considered, in respect of unlawful act manslaughter, that it was only the fatal force to the deceased's neck which could be characterised as excessive so that the only potential defendant was the officer identified as holding the head. He concluded that there was a prima facie case against that officer but no realistic prospect of the prosecution being able to establish that excessive force had been used deliberately, rather than as the result*

of an attempt to effect proper restraint which had been frustrated by the struggle with the deceased. In communicating his decision not to prosecute the caseworker stated that there was insufficient evidence to justify any criminal prosecution and that he was not satisfied the available evidence would provide a realistic prospect of convicting any of the officers of any offence arising out of the deceased's death. The applicants, having unsuccessfully requested full reasons for that decision, sought permission to apply for judicial review to challenge the lawfulness of the decision. Following the grant of permission to apply for judicial review the caseworker's review note setting out his full reasoning was served on the applicants in the proceedings.

On the substantive application:-

Held, (1) that there was no absolute obligation imposed on the Director to give reasons for a decision not to prosecute;... since the death of a person in the state's custody which resulted from violence inflicted by its agents necessarily aroused concern, the Director would be expected, in the absence of compelling grounds to the contrary, to give reasons for such a decision where it related to a death in custody in respect of which an inquest jury had returned a lawful verdict of unlawful killing implicating an identifiable person against whom there was prima facie evidence, in order to meet the expectation that, if a prosecution did not follow, a plausible explanation would be provided, and to vindicate the decision by showing the existence of solid grounds to support it; that skill and care would be required to draft such reasons in order to protect public and third party interests; but that in any event a citizen should not be obliged to challenge the lawfulness of the decision in order to seek, in judicial review proceedings, the response which good administrative practice ordinarily required (post, pp. 475B-C, 477F-478D).

(2) Granting relief and quashing the decision, that, although the court would exercise its power of review sparingly, the standard should not be set so high as to deprive an aggrieved citizen of his only effective remedy; that, since the caseworker had not addressed and resolved specific matters which the officer would have to overcome to defeat the prima facie case judged to lie against him, and since an objective appraisal of the prospects of a successful prosecution required those matters to be taken into account, the caseworker's failure to do so vitiated the Director's decision (post, pp. 474C, 480B-G)."

23. In delivering the judgment of the court Lord Bingham of Cornhill said at pg. 474:

"Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, Reg. v. Director of Public Prosecutions, Ex parte C. [1995] 1 Cr.App.R. 136. But as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted

*by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney-General in his role as guardian of the public interest, and to no one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by senior Treasury counsel who will exercise an independent professional judgment. The Director and his officials (and senior Treasury counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.*

24. I adopt the views expressed in the forgoing passage by Lord Bingham of Cornhill, and accept them as conclusive of this issue. Undoubtedly, there is room for serious argument by the applicant with respect to the decisions of the Director of Public Prosecutions in this case.

25. The matter, however, does not end here. The applicant applied to the court for an extension of time to apply for judicial review. Section 564(c) of the Judicature Civil Procedure Code, which governs the granting of leave, provides as follows:

*"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than one month after the date of the proceeding or such shorter period as may be prescribed by any enactment; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired"*

26. This application for leave to apply for judicial review is dated March 18, 2002. The interview with Mr Pantry was done on January 9, 2002, and therefore it can be inferred that the applicant would have knowledge of the DPP's decision not to charge the three policemen on that date. This is some sixty-seven days after the decision complained of. With regard to the refusal of the DPP to disclose the reasons for not charging the three policemen, the letter to the DPP was dated February 1, 2002, requesting that he respond with the documentation requested and reasons within seven days of the date of the letter. The date after the expiration of the seven days would be February 8, 2002, and it can be inferred that that is the date of the DPP's refusal to comply. This, therefore, would be thirty-seven days between the date the decision complained of and the date of the application.

27. The court may extend the time for the applicant to present the application. The Civil Procedure Code at section 676 which provides that:

*"The Court shall have power to enlarge or abridge the time appointed by this Law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."*

28. There is authority for the proposition that an applicant who wishes to enlarge time must give notice to the other party or parties to be affected by the order. In *R vs. Ashford Kent Justices ex parte Richley*[1955] 2 AllER 327 Lord Goddard C.J said:

*"Thus an applicant for extension of the time limited by RSC Ord 59, r 4(2), [which is similar to JCPC 564(c)] must give notice to the person who in the ordinary way would be made respondent to the motion in order that he may be heard on the question whether or not it is a fit case in which to extend the time."*

29. In this case, there was no evidence that the applicant had given notice to either, the coroner for Kingston, or the DPP, requesting them to attend if they had any objections to the application to extend time. This was an essential step for the applicant, so as to assist the court in deciding on the merits of the application for extension of time. This procedural irregularity went to the heart of this application. The court has no alternative but to make the following order. The court orders that the application to extend time for this application, and for leave to apply for judicial review as set out in the notice of application dated March 18, 2002, be denied.