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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. 2002/M-35

CORAM: THE HONOURABLE MR. JUSTICE REID
THE HONOURABLE MR. JUSTICE HARRISON
THE HONOURABLE MR. JUSTICE D.O. MCINTOSH

IN THE MATTER touching and concerning the death of **PATRICK GENIUS**

AND

IN THE MATTER of the Coroner's Act

AND

IN THE MATTER of the Office of the Director of Prosecutions

Richard Small and David Batts for the Applicant
Kent Pantry, Q.C., Director of Public Prosecutions, Miss Tara Reid and Miss Simone Wolfe for the Director of Public Prosecutions Office
Mrs. Nicole Foster-Pusey for the Attorney General of Jamaica

Heard: April 7th, 8th, 9th and May 2nd, 2003

Reid, J :

This is an application for Judicial Review in terms of leave granted by a Full Court (Wolfe CJ, Beckford and Marsh JJ) on 31st October 2002.

On 29th May 2001 a Coroner's Jury in the Corporate Area returned a verdict that a certain Patrick Genius had died in the University Hospital.

"....as a result of gunshot wounds to the head and ...further say person or persons were criminally responsible."

The Coroner thereafter referred the depositions of witnesses to the Director of Public Prosecutions who, perusing same along with other available material ruled that there was insufficient evidence in law to initiate a criminal prosecution for the death of the deceased.

On 10th April 2002, Jones, J (Ag.) in chambers, refused an ex parte application for leave to apply for judicial review. The leave granted by the Full Court was limited to a review of:

"the decision of the Director of Public Prosecutions that no proceedings are to be instituted against the three (3) police officers."

Before this Court the applicant seeks the following reliefs

a. An Order of Mandamus directing the Director of Public Prosecutions to charge the three (3) police officers namely, Det. Cpl. Ronald Francis, Det. Cpl. Claude James and Cpl. Earl Grant with murder.

b. An Order of Certiorari to quash the ruling and/or determination of the Director of Public Prosecutions that no criminal proceedings be brought against any or all of the said three (3) police officers.

c. A Declaration that in all the circumstances of this case the three (3) police officers or any or all of them ought to be charged with murder and their respective guilt or innocence determined at trial.

d. An Injunction to restrain the Director of Public Prosecutions from taking any steps to quash, withdraw and/or terminate any such criminal proceedings.

e. An Order directing the Director of Public Prosecutions to takes such steps as will be necessary to have the body of Patrick Genius exhumed for the purpose of retrieving from his body the bullet or bullets lodged therein.

The grounds for this order are that the Director of Public Prosecutions:

a. erred in law and/or acted unreasonably and/or *ultra vires* when he ruled that the said three (3) police officers not be charged with murder;

b. failed, neglected and/or refused to pay any or any sufficient attention to the medical evidence given at the Coroner's inquiry and/or the oral evidence of the three police officers in relation thereto;

c. abdicated his statutory and/or constitutional duties in that he acted unreasonably and/or failed to act as required by law.

EVIDENCE BEFORE THE CORONER'S COURT

Before the Coroner's Jury three (3) police officers namely Det. Cpl. Claude James, Det. Cpl. Ronald Francis and Cpl. Earl Grant testified and their depositions recorded by the Coroner support each other in the narrative of events. According to Det. Cpl. James on December 13, 1999 he was driving his private motor vehicle along Hope Boulevard when he saw two (2) men astride a moving motorcycle, proceeding from Monterey Drive around the roundabout on Hope Boulevard and continuing towards Old Hope Road. On three (3) previous occasions he had seen the men in the said area. He drove behind at a safe distance and telephoned the Matilda's Corner Police for assistance. From Old Hope Road the men proceeded along Gordon Boulevard then stopped in the vicinity of Buttercup Drive in Mona Heights where they alighted and appeared to be urinating by the side of the road. Grant and Francis arriving in a police unit from Matilda's Corner Police Station

joined James and all three (3) proceeded closer to the men. Alighting from their vehicles, the police officers approached within 35 feet of the men who looked at the police and pulled each a gun from the waist and fired at the police. James dived to the ground and returned fire. One (1) man jumped on the motorcycle and rode off towards Mona Road, the other jumping a fence and running on to the premises of the Mona Primary School. James ran to the police car and drove it along Mona Road and having lost sight of the motorcycle, proceeded to a minor road in a bid to cut off the escape of the second man. He next crossed a fence into bush joining Grant and Francis. There the man again fired at them and in the returned fire the man fell bleeding; beside him a .38 revolver with four (4) spent shells and one (1) unspent. At the University Hospital the man was pronounced dead.

The Forensic Pathologist, Dr. Murari Prasad Surangi, deposed to five (5) gunshot wounds on the body of the deceased on which he saw no gunpowder deposit. The Forensic Analyst, Marcia Dunbar, deposed to her examination of four (4) swabs from the back and front of the hands of the deceased. Only that from the right palm revealed gunshot residue and at trace level merely. It is the absence of residue on the back of the hands on which reliance is placed that the officers fired at the deceased without lawful justification or in self-defence.

SUBMISSION ON BEHALF OF THE APPLICANT

The request for exhumation, submits Mr. Small, would provide the opportunity for retrieval of a bullet or bullets and microscopic comparison in order to determine from which firearm discharged. Further examination of the body of the deceased would support the applicant's contention that wounds had been inflicted from behind, obliquely or directly.

Conceding that there are significant limits on the extent to which the Court can intervene in respect of the decision by the Director in the exercise of the discretion to prosecute or not to prosecute, Mr. Small submitted that the test remains that of the ordinary judicial review jurisdiction and would pray in aid guidelines enunciated in Regina v. Director of Public Prosecutions, Ex parte Jones [2000] I.R.L.R. at 373 paragraph 26 namely:

(1) has the decision-maker properly understood and applied the law?

(2) Has he explained the reasons for his conclusions in terms that the court can understand and act upon? and

(3) Has he taken into account an irrelevant matter or is there a danger that he may have done so?

Other material which should have fallen to be considered in the instant case, the submitted, was the verdict of the Coroner's Jury which by implication rejected circumstances of the discharge of firearms by the police officers.

Referring to paragraph 12 of the affidavit of the Learned Director of Public Prosecutions, Kent Pantry, Q.C., dated 18th June 2002, he submitted that the bare assertion of insufficient evidence in law on which to ground a charge did not address the cogency of evidence of the dearth of gunshot residue as would negative the issue of the police officers acting in self-defence or under lawful authority.

Inasmuch as leave had been granted by the Full Court, it was open to and expected of the Director, that the reasons for his decision not to prosecute would have been available for this Court. The absence of such explanation warranted an inescapable inference that there was no plausible explanation to put before the Court.

Mr. Pantry Q.C., submitted that the determination of sufficiency of evidence would require this experience skill and learning which the Director would invoke in the exercise of his discretion. For the Court to interfere, the applicant must show that the exercise of that discretion was unreasonable. The applicant has not suggested the manner in which the Respondent might have proceeded to prosecution on the evidence available. Referring to the evidence that the deceased had been removed from location within 3 or 4 minutes, first to the hospital and

from there to the morgue, Mr. Pantry pointed to the possibility of gunpowder residue being either contaminated or obliterated in the course of the succeeding events. For the benefit of the Court, he referred to "**HANDBOOK OF FIREARMS AND BALLISTICS – EXAMINATION AND INTERPRETATION OF FORENSIC EVIDENCE**" by Brian J. Heard and in particular to Chapter 6 - **GUNSHOT RESIDUE EXAMINATION.** Therein it is demonstrated, inter alia, that if the deceased had been sweating heavily at the time of any alleged firing, the examination of his hand could easily yield a negative result. Neither the evidence from the Forensic Pathologist or from the Forensic Analyst purports to assist as to the sequence in which the injuries to the deceased were sustained. The deceased, said the Pathologist, could have sustained the injuries in the course of running and himself firing. Even after receiving injuries to vital organs he may have been able to run for a distance up to 200 yards before collapsing. In the context of the narrative from such witnesses as had been called, the pathologist's evidence might not assist in throwing further light on the matter. The verdict of the Coroner's Jury had not named any person to be charged for murder or manslaughter and by virtue of Section 19(8) of the Coroner's Act the depositions were required only to be sent to the Registrar of the Supreme Court for safe custody. The requirement of establishing all the ingredients of a charge must contemplate the obligation to negative issues such as self-defence, manifest on the

depositions. There is no obligation to offer reasons for declining to prosecute merely because of a challenge by way of application for judicial review. No material had been provided to support a finding that the Director had fallen into error, or had exceeded his authority or had failed to take into account the implication of medical and forensic evidence. Moreover, no useful purpose would be served by exhumation for the purpose specified since any prosecution contemplated would perforce proceed on the doctrine of common design for culpability.

Judicial Review Of The Decision Of The Director Of Public Prosecutions

Section 94 of the Constitution establishing the Office and functions of the Director of Public Prosecutions by Sub-section 3 confers wide powers

(a) to institute and undertake criminal proceedings……

(b) to take over and continue any such criminal proceedings…… instituted by other person or authority; and

(c) to discontinue at any stage before judgment is delivered (any such criminal proceedings ….)

Sub-section (6) 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."

Section 1 sub-section (9) of the Constitution of Jamaica reads:

"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 person or authority has performed those functions in accordance with this Constitution or any other law."

In a judgment of the Constitutional Court of the Supreme Court of Jamaica *Suits M103 and M113 of 1998 – Melaine Tapper and Winston McKenzie vs. Director of Public Prosecutions and Attorney General (unreported)*, Panton J (as he then was) referring to the powers of the DPP at page 2 said:

"...his action is subject to judicial review. In any such review the Court is obliged to consider his reasons if he had disclosed them."

This was expressly acknowledged by the Learned Director in the course of his submissions.

Likewise it is acknowledged that the Court's power of review should be exercised sparingly.

In R vs. Director of Public Prosecutions, Ex parte Manning and Another [2000] 3 W.L.R. page 463, Lord Bingham of Cornhill C.J. had this to say at p 474:

> *"Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review ... but as the decided cases also make clear, the power to 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..."*

He also said (ibid):

> *"The 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."*

A decision to review the exercise of the Director's decision not to prosecute should be based on one or more of the following grounds:

(1) because of some unlawful policy

(2) failure by the Director to act in accordance with settled policy

(3) because the decision was perverse, that is one at which no reasonable prosecutor could have arrived.

> ***(See R v. Director of Public Prosecutions, ex parte C, [1995] 1 CR. App. R. 137 per Kennedy L.J. at page 141)***

In King's Application (1991) 40 WIR 15, a Coroner in Barbados had ruled that a deceased had been murdered by a police sergeant who, however, was not

committed to stand trial. The Director of Pubic Prosecutions after considering the file, advised that there was insufficient reliable evidence to justify a prosecution for murder. Dismissing the application by the deceased's mother for judicial review of the Director's decision, Sir Denys Williams C.J. said at p. 35:

> *"What the applicant has to show is that the director's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power, in* ***Wednesbury*** *terms, that no Director of Public Prosecutions, properly directing himself, could on the evidence reasonably or regularly or properly have formed a decision not to direct that Sgt. Bowen be charged and prosecuted."*

Remedies of *Mandamus* and *Certiorari*

Without going into detail I do not consider that praying in aid these remedies is appropriate here. An Order of Mandamus would not be granted by the Court except in order to secure the performance of a duty to exercise a discretion when the occasion arises or duty to exercise a genuine discretion or a discretion based on proper legal principles.

In ***'ex parte Manning'***, supra Lord Bingham C.J. in allowing the application for judicial review ended the judgment of the Court thus at page 480:

> *42..... "We accordingly quash the decision. In doing so we must emphasise that the effect of this decision is not to require the Director to prosecute. It is to require reconsideration of the decision whether*

or not to prosecute. On the likely proper outcome of that reconsideration we express no opinion at all.

43.....This is the judgment of the Court."

In my view the Learned Director of Public Prosecutions was not obliged to give reasons for declining to embark on a prosecution. For the Court to so require would not harmonize with the provisions of Section 94 of the Constitution. Helpful may have been a response by way of an affidavit in the light of the judgment of the Full Court granting leave to apply, and the re-iteration therein by the Learned Chief Justice of the formula devised by Lord Bingham CJ., at paragraph 42 of ***Manning*** supra.

I have had the advantage of reading in draft the judgment of my brother Harrison, J and concur in the more detailed manner that he has dealt with the issue arising.

Nothing advanced by the applicant demonstrates that the Learned Director has fallen into error in failing to take into account all the relevant circumstances; in short, the exercise of his decision not to prosecute is not flawed.

I would dismiss this application with costs to the Respondent.

HARRISON J:

Introduction

[1] The Applicant, Leonie Marshall has sought judicial review of the decision of the Director of Public Prosecutions ("DPP") where he ruled that no proceedings are to be instituted against three police officers regarding the death of her son, Patrick Genius.

[2] This case as far as I can recollect, is the first of its kind in Jamaica. It is proposed therefore, to commence this judgment by examining the provisions with respect to the creation of the post and powers of the Director of Public Prosecutions in the Constitution of Jamaica (The Constitution). Now, section 94 of the Constitution provides inter alia:

> "94 (1) There shall be a Director of Public Prosecutions whose office shall be a public office.
>
> ....
>
> (3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do:-
>
> (a) to institute and undertake criminal proceedings against any person before any court other than a court – martial in respect of any offence against the law of Jamaica.
>
> ....
>
> (6) 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 person or authority.
>
> ...."

It is against this background therefore, that judicial review of the DPP's decision ought to be examined and determined.

The facts

[3] The facts reveal that the deceased and another man were accosted by police officers whilst they were on duty in the Parish of St. Andrew. The men retaliated by firing shots at the police and one man made good his escape. The deceased was chased and he engaged the police in a shoot out whereupon he was shot and killed. A firearm was retrieved from beside his body.

[4] There are no independent eyewitnesses apart from the police officers who were involved in the incident.

[5] On the 13th day of December 1999, a Coroner's inquest was held touching and concerning the death of Patrick Genius. The jury returned a verdict that the deceased had died as a result of gunshot wounds and that person or persons were criminally responsible.

The decision not to prosecute

[6] The matter was referred from the Coroner to the DPP and Kent Pantry Q.C. Director of Public Prosecutions, deposed in an affidavit dated the 18th day of June 2002 on behalf of the Respondent. At paragraphs 11 and 12 of his affidavit he states as follows:

> "11. That the Director of Public Prosecutions having been made aware of the inquisition and depositions at the inquest touching the death of Patrick Genius sought to exercise his powers to determine, notwithstanding the findings of the jury, whether there was anyone he could pursue charges against in relation to the said death, after a proper examination of the inquisition, depositions, statements and other documents at his disposal.

12. That on a careful examination of all the material available to him including medical and forensic evidence, the Director of Public Prosecutions came to the decision that there was not sufficient evidence in law to charge anyone."

This is the decision that has been challenged.

Application for leave to review the decision

[7] An ex-parte Notice dated the 18th day of March 2002, was filed seeking leave to apply for judicial review of the decision of the Coroner and the Director of Public Prosecutions. On the 10th day of April 2002, Jones J. (Ag.) refused to grant leave.

[8] The applicant thereafter applied to the Full Court for leave pursuant to section 564 (4) of the Judicial Review Rules 1998. Leave was granted on the 31st day of October 2002 and Wolfe C.J in delivering the judgment of the Full Court stated inter alia:

"The Learned Director of Public Prosecutions has said that he considered all relevant evidence available to him in arriving at his decision. However, we are of the view that the absence of gun powder on the hands of the deceased could have the effect of negativing self defence.

Bearing the above in mind we are of the view that leave ought to be granted to apply for Judicial Review.

Having read the documents filed in support of the application and listened to the submission of Mr. Small for the applicant, we are of the view that leave should be limited to paragraph 2 of the Exparte Notice dated 18th March 2002." (emphasis supplied)

The Notice of Motion and Grounds

[9] The Applicant now challenges the decision of the "DPP" and seeks by way of relief any or all of the following:

(a) An order of Mandamus directing the Director of Public Prosecutions to charge the three (3) police officers namely Det. Cpl. Ronald Francis, Det. Cpl. Claude James and Cpl. Earl Grant with murder.

(b) An order of Certiorari to quash the ruling and/or determination of the Director of Public Prosecutions that no criminal proceedings be brought against any or all of the said three (3) police officers.

(c) A Declaration that in all the circumstances of this case the three (3) police officers or any or all of them ought to be charged with murder and their respective guilt or innocence determined at trial.

(d) An Injunction to restrain the Director of Public Prosecutions from taking any steps to quash, withdraw and/or terminate any such criminal proceedings.

(e) An Order directing the Director of Public Prosecutions to take such steps as will be necessary to have the body of Patrick Genius exhumed for the purpose of retrieving from his body the bullet or bullets lodged therein.

[10] The statement served on behalf of the applicant has adumbrated the following relevant grounds in respect of this Notice of Motion:

"....

3. That the Director of Public Prosecutions has erred in law and/or acted unreasonably and/or ultra vires when he ruled that the said three police officers were not to be charged.

4. That the Director of Public Prosecutions failed, neglected and/or refused to pay any or any sufficient attention to the forensic evidence given at the Coroner's Inquiry and/or to the oral evidence of the three police officers in relation thereto.

5. That the Director of Public Prosecutions and/or 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 and this Honourable Court in the interest of justice ought to order them so to act.

....."

The Submissions

Mr. Small

[11] Mr. Richard Small, Counsel for the applicant, made a number of submissions.

[12] Firstly, he submitted that despite what the officers said that they were acting in self defence and pursuing someone who had shot at them, there was material in the depositions that was capable of proving that it was not true that the deceased was firing at the police officers. He argued that it was also not true when they stated that they were acting in self defence.

[13] Secondly, he submitted that the testimony of the officers either proved that they fired at the deceased or proved that each was acting in concert with the other in firing at the deceased and the irresistible inference is that it was the firing by the police at the deceased that caused the death as described by the forensic pathologist. He argued that when this evidence is combined with the forensic observations concerning the absence of gunpowder residue on the back of Patrick Genius' hands, there was material capable of negativing the story given by the policemen and upon which a prima facie case could be established.

[14] Thirdly, he submitted that there was additional evidence capable of supporting a prosecution albeit by itself, it was not conclusive in proving that the account given by the policemen is untrue. However, he argued that it is material which a jury could consider and use to assist it in determining the issue of guilt. That evidence he said, related to the forensic pathologist's observation with respect to the entry wounds as well as the relative positions of the exit wounds in the body of the deceased. He argued that the position of the wounds was important because they are able to show that they were inflicted from behind or "towards behind" the body of the deceased. When asked to explain the term "towards behind" he said obliquely.

[15] Fourthly, he submitted that the Director's decision was irrational and constituted an error in law. It also demonstrated he said, that the Director had failed, neglected and/or refused to address the evidence presented and to apply the correct legal principles.

[16] Fifthly, Mr. Small submitted that since the Full Court has granted leave for judicial review it was open to the Director of Public Prosecutions to explain his decision not to prosecute to this Court. He further argued that in the absence of an explanation the only inference to draw is that there was no explanation to put before the Court. He submitted that having regards to the principles of law derived from **Regina v Director of Public Prosecutions, Exparte Manning and Anor**. (2000) WLR 463, **Re Kings Application** 40 WIR 15, and **R v Lancashire County Council exparte Huddleston** (1986) 2 All E.R 941, the DPP ought to have given reasons after leave had been granted.

[17] Sixthly, he submitted that it was important if the Crown were to establish which particular firearm discharged the bullet that is lodged in the head of the deceased it would have been necessary to have the body exhumed. He argued that the failure to pursue this area of investigation is another instance of error on the part of the record.

[18] Mr. Small argued that the Court may intervene in a decision by the Director on a variety of bases including the following:

1. Unlawful policy.
2. Failure to act in accordance with policy.
3. Perversity.
4. Has the decision maker properly understood and applied the law?
5. Has he explained his reasons for his conclusions in terms that the court can understand and act upon?
6. Has he taken into account an irrelevant matter or is there a danger that he may have done so?

[19] He further argued that three (3) other factors are relevant although not decisive in the instant case. They are as follows:

1. The Coroner's jury heard the evidence (and it is presumed that they were given sound directions in law) and returned a verdict which by necessary implication must have rejected the account given by the policemen as to the circumstances they say they shot and killed the deceased.
2. Although the Director of Public Prosecutions is not bound by the verdict of a Coroner's jury either to initiate a prosecution or to bar him from bringing a prosecution, it was not an irrelevant factor that a jury which has heard the evidence have been able to assess it in the manner so described.
3. Jones J (Ag.) in hearing the application for leave to obtain Judicial Review had stated in his judgment that there was room for serious argument by the applicant in respect to the decision of the Director.

Mr. Pantry

[20] Mr. Kent Pantry Q.C, Director of Public Prosecutions, made submissions on behalf of the respondent.

[21] Firstly, he submitted that for this Court to interfere with the DPP's decision the applicant would have to show inter alia, that the decision was unreasonable in all the circumstances.

[22] Secondly, he submitted that the Doctor's evidence had supported the evidence of the three police officers when they stated that they had acted in lawful self defence based on their lawful authority to apprehend persons with illegal firearms and also persons who at the time of firing at them had placed their lives in danger.

[23] Thirdly, he submitted that the medical and forensic evidence must be analysed. He argued that the evidence of the Doctor establishes that the deceased could have received the injuries while running and firing. He further argued that there were other factors for consideration, namely: (a) the evidence that the deceased could have received injury # 5

and run up to five (5) minutes after receiving it. (b) the evidence of the Doctor that even after receiving injuries to vital organs such as the brain, heart and lungs the deceased could have ran up to two (2) hundred yards before collapsing. He said that this supported the evidence of the three police officers even if injuries # 4 and #5 were early injuries. (c) the evidence of the Doctor that a person receiving injuries 4 and 5 as he describes them could have continued performing normally for a while. (d) the evidence of Marcia Dunbar, the forensic analyst who had deposed that levels of gunshot residue may vary particularly in what is done after the gun was fired. There was also evidence coming from her that the residue can be removed in various ways.

[24] Mr. Pantry Q.C referred to and relied upon materials contained in the text book "Handbook of Firearms and Ballistics Examination and Interpretation of Forensic Evidence" by Brian J. Heard. The learned author states inter alia, at pages 190-191:

> "....for all practical purposes all GSR particles will be removed from the hands by everyday activities within three hours of a weapon being fired.
>
> Washing the hands will immediately remove all the GSR particles.....
>
> If it is raining or the suspect is sweating heavily at the time of firing the result will once again be negative.
>
> In the case of a deceased person, the problem of removal of GSR particles by everyday activities is not relevant. Assuming the GSR particles are not removed by some external means they should remain on the hands of the deceased indefinitely. If, however, the body had been placed in the mortuary refrigerator the skin does become clammy and it is very difficult to take samples. If possible, it is preferable to take the GSR tapings from the body at the scene."

[25] Mr. Pantry Q. C argued that in a situation where the deceased was chased by the police this could have caused him to sweat. Furthermore, the handling of the deceased at

the scene until he was finally taken to the morgue are other factors that could cause the absence of gunpowder residue on the back of the hand.

[26] Fourthly, he submitted that self-defence was a live issue and that the burden was on the prosecution to prove all elements of the case and to negative any defence if found to exist. He argued that the only witnesses to this incident were the three police officers so it would have been difficult in the circumstances for the prosecution to negative self defence.

[27] Fifthly, he submitted that since the police officers had testified that they all fired at the deceased they were part of a common design. The act of one would therefore be the act of all so, there would be no need to have the body exhumed in order to determine from whose firearm the bullet was discharged. He submitted that in law it would not take the matter any further.

[28] Finally, he submitted that the applicant has not presented any material to establish that the DPP fell into error or exceeded his authority. Neither was there any proof that he did not consider the necessary law and evidence or that he applied the law improperly. In the circumstances, he submitted that the Crown would have been hard pressed to prove murder or manslaughter or any criminal charge.

Mrs. Foster-Pusey

[29] Mrs. Foster-Pusey, Divisional Director in the Chambers of the Attorney General was allowed to assist the Court. No objections were raised by the Applicant's Attorneys although it was expressed that the proper course of action would have been for the Attorney General to have intervened.

[30] She submitted inter alia, that it was only where the DPP's decision was considered irrational in the Wednesbury sense that the decision could be reviewed. She handed up the following cases to the court:

1. **General Council Bar ex parte Percival** [1991] 1 QB 212
2. **R v Director of Public Prosecutions, ex parte C** [1995] 1 Cr. App. R 136
3. **R v Inland Revenue Commissioners, ex parte Mead and Anor.** [1993] 1 All E.R 772

[31] Mr. Small was given an opportunity to respond to the additional cases cited in Mrs. Pusey's written submissions. He argued that each case had illustrated that the prosecuting authority whose decision is being reviewed had set out in full the reasons for arriving at its decision which was under review.

The nature of Judicial review

[32] It is trite law that an application for judicial review is not an appeal. In particular it is not an appeal against the merits of the decision being challenged. In general that means that conclusions of fact, judgment and discretion are undisturbable. However, the Court will review the way in which a decision has been made to determine whether there has been unlawfulness, unreasonableness or unfairness. In **Reid v Secretary of State for Scotland** (1999) 1 All E.R 506 Lord Clyde stated:

> " Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own opinion about substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal efficiency, as for example, through the absence of evidence or of sufficient evidence to support it or through account being taken of an irrelevant matter or through a failure for any reason to take account of a relevant matter or through some mis-construction of the terms of the statutory provision which the decision

maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence." (emphasis supplied)

[33] The dictum of Lord Brightman in **R v The Chief Constable of North Wales Police, exparte Evans** [1982] 1 WLR 1155 at page 1160 is quite instructive where he states:

"Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power....Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

The function of the DPP and review of his decision

[34] It was conceded by Mr. Pantry Q.C. that his decision not to prosecute is subject to review by the Court.

[35] The function of the DPP is indeed a complex one. It is not that of an adjudicator between two parties. He has to consider and weigh a number of disparate and at times even competing interests for example, the general public interest at any particular time, the interest of a putative accused, the victim, the supplier of information such as an informant, and the various disinterested and interested witnesses. It is therefore a complex and almost unique function. By virtue of the powers granted to him under the Constitution he is therefore expected to weigh up those often competing interests and then to make a decision. It is therefore a reflection of this complex function that has led to the conclusion in a number of authorities that judicial review should be sparingly exercised when dealing with the office of the Director of Public Prosecutions. The position is well summarized in the judgment of Kennedy L.J in **R v Director of Public**

Prosecutions, ex parte C [1995] 1 Cr. App. R 136. Having reviewed all the authorities, Kennedy L.J said inter alia, at page 141:

> "From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:
>
> 1) because of some unlawful policy....
> 2) because the Director failed to act in accordance with his own settled policy.....
> 3) because the decision was perverse. It was a decision in which no reasonable prosecutor could have arrived.

[36] In **R v Director of Public Prosecutions and Others Exparte Jones** [2000] IRLR 373 it was stated that:

> "Although, as was properly agreed, the test remains that of the ordinary judicial review jurisdiction, clear guidance has been given in earlier cases as to the way the court should approach that jurisdiction. In particular, we were taken, amongst other cases to R v Director of Public Prosecutions exparte C [1995] 1 Crim. App. R and the observations at p 139G of that report. Intervention should be 'sparing' and only on grounds of (a) unlawful policy, (b) failure to act in accordance with policy and (c) perversity."

The principle of intervention was re-stated by Lord Bingham C.J in exparte Manning (supra) when he said:

> "the power of review is one to be sparingly exercised".

[37] In dealing with a review of the exercise of the Director's discretion Lord Bingham of Cornhill in **R v Director of Public Prosecutions exparte Manning** [2000] 3 WLR 463 stated at page 474:

> " In most cases the decision will not turn 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 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 stigmatize 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."

[38] In **Re King's Application** (1991) 40 WIR 15. Sir Denys Williams CJ in dealing with the exercise of the discretion of the DPP said at page 35:

> "What the applicant has to show is that the director's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power, in Wednesbury terms, that no Director of Public Prosecutions, properly directing himself, could on the evidence reasonably or regularly or properly have formed a decision not to direct that Sgt. Bowen be charged."

The significance of the verdict at the Coroner's inquest

[39] The holding of an inquest by a Coroner with or without a jury has been a feature of our law for many years. In its modern form there are two features of particular relevance. First, it is a purely inquisitorial procedure. As Lane LCJ puts it in **R v South London Coroner, ex parte Thompson** (1982) 126 S.J 625:

> "...it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. 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 the facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the Prosecutor accuses and the accused defends, the Judge holding the balance or the ring, whichever metaphor one chooses to use."

Secondly, the verdict resulting from an inquest cannot impose civil or criminal liability of any sort on any person.

Explanation of the DPP's decision to the Judicial Review Court

[40] Mr. Small argued that there was a distinction between the DPP's failure to explain his decision to this Court and the explanation given to the applicant for his reasons where he declines to institute proceedings. He submitted that the principles derived from **Regina v Director of Public Prosecutions, Exparte Manning and Anor**. (2000) WLR 463, **Re Kings Application** 40 WIR 15, **R v Lancashire County Council exparte Huddleston** (1986) 2 All E.R 941 are relevant and do support his submission.

[41] Now the Full Court in granting leave for Judicial Review did not order a review of the DPP's failure to give reasons for not prosecuting. In the circumstances, the absence of reasons is not a matter for consideration by this Court.

[42] Recent cases on judicial review have shown that a trend has developed towards an increasing insistence on greater openness in matters of government and administration. However, I disagree with Mr. Small when he stated that it was open to the DPP to explain his decision for the benefit of this Court. To hold so would create a general duty to give reasons in the face of a common law principle which establishes that there is no such general duty. I am further of the view that the Judicial Review itself cannot create the need for reasons. On the other hand, it is for the Court to determine whether or not reasons ought to be given.

Findings

[43] Having considered the issues, the authorities and the submissions made by Counsel in this matter I find as follows:

1. There is nothing unlawful in the policy of the DPP in this case. It has not been shown either that his decision not to prosecute was unfair.

2. It has not been established that the Director failed to act in accordance with any policy.

3. There is no evidence to support the proposition that the DPP must have failed to consider relevant material or that he had irrelevant considerations in mind.

4. The fact that the forensic test did not reveal any gunshot residue on the back of the deceased's man hand is a matter that requires some consideration. In my view however, a reasonable prosecutor would also have to consider the other aspects of the forensic evidence. The forensic analyst had found that there was a trace level of gunshot residue in the palm of the right hand of the deceased. She had also testified inter alia, that the level of gunshot residue might vary depending on what is done after the weapon was fired. According to her, if any attempt is made to clean the hands there may be little or no trace of gunpowder residue. Furthermore, she testified that the time aspect could also affect the level of gunpowder residue.

5. . There was evidence that the deceased was not shot at close range. The forensic pathologist who had performed the postmortem examination on the body of the deceased found inter alia, that there was no evidence of gunpowder deposits on the body and he was of the opinion that the wounds were indicative of "far range firing".

6. There is no need to have the remains of the deceased exhumed in order to determine from whose firearm the fatal bullet was discharged. Under the principle

of common design and where persons are acting in concert. the act of one becomes the act of all.

7. The burden of proof rests entirely on the Crown and that duty can only be discharged by eliciting evidence which satisfies a jury beyond reasonable doubt that an offence is committed. The exercise of the DPP's judgment therefore involves an assessment of the strength by the end of the trial of the evidence against a defendant and of likely defences. In this instance. self defence would indeed be a live issue.

8. It is therefore my view that this is not a case fit for further investigation.

9. It is further my view. that the decision not to prosecute is not perverse and neither is it a decision which no reasonable prosecutor could have arrived at.

Conclusion

[44] I am therefore not persuaded that the applicant has succeeded in discharging the burden that is necessary to condemn a decision as Wednesbury unreasonable. I am not persuaded either. that the DPP should be compelled to charge the police officers. Accordingly. I have concluded that the application in this matter must be refused.

McINTOSH J.

I agree with the Judgments of my brothers, Reid and Harrison JJ. I would merely add that it seems to me that this application is wholly without merit and or sincerity.

The applicants attorney set out to show that on the material before the Director of Public Prosecution there was sufficient evidence to prove homicide, and that the deceased died at the hands of the police.

These issues were not in dispute. and the use of the word Homicide was significant as that word embraces the killing of any Human, whether intentional, accidental, in the course of a duty or in self-defence.

While he carefully outlined the possible reasons why a court could order the DPP to reconsider his own decision (which in this matter was a decision not to prosecute) he did so in very general terms and never pointed out any particular failing on the part of the DPP.

He frankly admitted that before this application was made he had received all the material then available to the DPP. When asked if he himself would have prosecuted given the said material he did say 'yes'; then sought to qualify his answer by saying:

> He would have needed to have the body of Patrick Genius exhumed to recover the bullet lodged in the head of the deceased as the forensic evidence established that that injury was fatal. This bullet could establish the particular firearm that discharged the bullet.

Here counsel must be clutching at straws. The bullet, if it reposed in the skull of the deceased must be badly damaged and may not be identifiable. The pathologist who did the post-mortem and on whose evidence counsel would be seeking to rely, had said he could not recover that bullet. In any event it must be clear that knowing which particular firearm had discharged that bullet could not enhance a prosecution in the given scenario.

This was patently demonstrated by the DPP in his response which was short and precise.

The DPP illustrated that which should have been obvious to the applicant upon the receipt of the available material. That to have engaged in a prosecution on the basis of that material would have been an exercise in futility.

In these circumstances I too will dismiss the application.

REID J

This court orders that the motion is hereby dismissed.

Cost to the Respondent to be taxed or agreed.