NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 29/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	**MILLICENT FORBES**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Richard Small & Mrs. Shawn Wilkinson instructed by Wong Ken & Co., for appellant

Patrick Foster, Ag. Deputy Solicitor General & Miss Carlene Larmond instructed by Director of State Proceedings for respondent

6th, 7th, 8th June & 20th December 2006

HARRISON, P.

This is an appeal from the decision of a majority of the Full Court (Gloria Smith, Dukharan, JJ Jones, J dissenting) on 24th February 2005 refusing certiorari to bring up and quash a verdict of acquittal of the jury on 14th April 2000 at the Portland Circuit Court on 15th March 2004 on an indictment against Rohan Allen for the murder of one Janice Allen.

The relevant facts on the prosecution's case are that on 14th April 2000 a party of policemen was on duty in the Trench Town area in the parish of St.

Andrew. A discharge of firearms resulted in a bullet entering the back of the deceased resulting in her death. The bullet is alleged to have been fired from the firearm of Rohan Allen a member of the police party. As a result of investigations, the Director of Public Prosecutions in May 2001 ordered his arrest. He was indicted for murder.

The preliminary examination into the charge of murder commenced in the Resident Magistrates' Court for the Corporate Area on 26th June 2001 and continued until November 2002 when Rohan Allen was committed to stand his trial at the Home Circuit Court. During the said period several delays occurred, due to the unavailability of witnesses and the interference with a documentary exhibit in the case, that is, the firearms' register kept at the Denham Town police station. Recorded in the register were entries of the particular firearm that had been issued to the accused Rohan Allen. Subsequent ballistics tests disclosed that the bullet which caused the death of Janice Allen had been discharged from that firearm. On 4th July 2002 the preliminary examination was adjourned because of the absence of this register. Supt. Hewitt was requested to produce the said register. On 31st July 2002, the relevant register was produced in Court, by a different police officer. The register contained entries to August 2000, but the pages containing the entries of 14th April 2000 were missing. No explanation for the missing pages was given. Subsequently, the register was reported to have been destroyed by a fire at the Denham Town police station.

The case against Rohan Allen for murder was mentioned in the Home Circuit Court in January 2003. A change of venue was ordered and on 30th June 2003 it was listed in the Circuit Court for the parish of Portland.

On 15th March 2004 in the latter Circuit Court presided over by Hibbert, J., the accused Rohan Allen, on the direction of the learned trial judge was acquitted by the jury of the murder of Janice Allen. On that day the accused was arraigned and pleaded, a jury was empanelled and the prosecuting crown counsel opened his case to the learned judge and jury. Crown counsel offered no evidence against the accused for the reason that:

(a) the firearms register which contained the entries of 14th April 2000, linking –

> "the fragments removed from that body [which] matched perfectly the weapon that the Prosecution is alleging the defendant, Rohan Allen, to have been issued with and to have had at the time of the shooting."

could not be found. It was allegedly –

> "destroyed in a fire at the Denham Town police station ..." and also

(b) a statement given by the accused and recorded by the investigator Det. Sgt. Lynvall Dunchie, attached to the Department of Special Investigations could not be utilized by the prosecution. The maker Sgt. Dunchie,

> "... has since departed the jurisdiction. He is overseas, he is on sick leave and from all indications, based upon my enquiries, there is no likelihood of him returning because the sick leave keeps extending by his submissions of

> medical reports from the Unites States to the Police Headquarters here in Jamaica."

Hibbert, J then addressed the jury explaining to them the absence of evidence against the accused, due to the destruction of the firearms' register, the unreliable mere dock identification instead of the holding of an identification parade, and the absence of Det. Sgt. Dunchie –

> "... who is no longer, apparently, in the Force and no longer in Jamaica and is unlikely to return to Jamaica;..."

He then directed the jury, in the circumstances, to return a formal verdict of not guilty of murder in respect of the charge against the accused Rohan Allen. The jury did so.

Subsequently, it was alleged that Det. Sgt. Lynvall Dunchie, who it had been reported to the Portland Circuit Court, to have been away from Jamaica in March 2004 and unlikely to return, was present at the sitting of the Coroner's Court in Kingston on 26th May 2004 performing his duties as a police officer.

A fixed date claim form supported by an affidavit was filed on 14th June 2004 by Millicent Forbes, the mother of the deceased against the Attorney General of Jamaica, claiming:

> "1. A Writ of Certiorari to quash the acquittal of Rohan Allen, for the murder of Janice Allen;
>
> 2. A declaration that the said trial holden at Port Antonio Circuit Court in the Parish of Portland on the 15th March 2004, before the Honourable Mr. Justice L. Hibbert was a nullity;

> AND TAKE NOTICE that the grounds upon which the relief is sought are:
>
> A. The acquittal of Rohan Allen was obtained by improper means, to wit a fraud upon the Office of the Director of Public Prosecutions and upon the Court,
>
> B. The administration of Justice in relation to Regina v. Rohan Allen was perverted."

On 12th July 2004 an application for leave to apply for judicial review was filed. This application was heard by Wolfe, C.J., and refused on 1st October 2004 for the reason that –

> "... the verdict of the jury, is not amendable to Judicial Review and cannot be quashed by certiorari."

The refusal of application for leave was renewed for hearing before the full court (rule 56.5(1) and (2)) which refused leave. It is from the decision of the full court that this appeal arises.

The grounds of appeal are:

> (a) The learned judges of the majority of the Full Court erred when they failed to appreciate that uncontested affidavit evidence is as good as a confession of the matters alleged in the affidavit.
>
> (b) The learned judges of the majority of the Full Court erred in law when they failed to appreciate that the overriding objective of the C.P.R. 2002 is to deal with cases justly as stated in §1.1(1).
>
> (c) The learned judges of the majority of the Full Court erred in law when they failed to pay any, or sufficient regard to section 1.2 of the C.P.R. which states that "The Court must seek to give

effect to the overriding objective when it: (a) exercises any discretion given by the Rules; or (b) interprets any rules."

(d) The learned judges of the majority of the Full Court erred in law when they decided that they did not have 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.

(e) The learned judges of the majority of the Full Court erred in law when they decided that the claimant did not raise a case sufficient to entitle her to be granted leave to apply for judicial review."

The appellant, in her affidavit dated 14th June 2004 filed in support of her application for leave to apply for Judicial Review recited several events following the shooting of the deceased, described as attempts to "pervert the course of justice." They were the shooting and charging on 14th April 2000, of one Calvin DaCosta, an alleged eye-witness to the event, and his subsequent acquittal, the arrest and detention at a police station of Andre Lindo the appellant's son on 14th May 2001 and subsequent release without being charged, the abuse of her daughter and herself by policemen at police stations when they went to enquire as to the whereabouts of Andre, the visits by men to the appellant's home, also in May 2001, dissuading her from continuing her insistence on legal proceedings and offers of $150,000.00 and $125,000.00 on separate occasions, respectively, in May 2001 "to finish away with the case".

The main issues that arose in this appeal are:

a. Whether or not the full court had the jurisdiction to grant leave to apply for the issue of an order of certiorari to quash the jury's verdict of acquittal.

b. If not, whether the full court had the jurisdiction, in the exercise of its inherent jurisdiction to set aside the said verdict.

The prerogative order of certiorari, traditionally, was the means by which the High Court, in the exercise of its supervisory power of control over inferior court and tribunals, could call up and quash the latter's decision or proceedings. (Administrataive Law by Wade and Forsyth, (1944) 7th Edition, page 626.

The said authors at page 640 further said:

> "The High Court and other superior courts are beyond the scope of these remedies [certiorari and mandamus etc], not being subject to judicial review."

See also ***Re Racal Communications Ltd*** [1980] 2 All ER 634. Lord Diplock, defining the scope of judicial review, at page 640 said:

> "Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all."

It is stated in Halsbury Laws of England Volume 1, 4th Edition, paragraph 148:

> "The order [certiorari] cannot be directed by the High Court to any tribunal which is a branch of the High Court for the purpose of quashing its proceedings."

The Judicature (Supreme Court) Act, section 27 provides that the Supreme Court "shall be a Superior Court of Record" and section 40 provides that a Judge of the Supreme Court, holding a Circuit Court "constitutes a Court of the Supreme Court".

In the instant case the majority of the full court followed the above principles of law, when it correctly found that, the acquittal at the Portland Circuit Court –

> "... is not open to judicial review by a court of equal jurisdiction."

Judicial review in any event, is not concerned with the merits of the decision of the inferior tribunal but the process by or the manner in which the decision was brought about.

Counsel for the appellant, Mr. Small, accepted that the above is a correct statement of the law. It would seem therefore that an application, however couched, for leave to apply for an order of certiorari, simpliciter, in these circumstances is doomed to fail, and in the circumstances may well be seen as an abuse of the process of the court.

However, counsel placed his arguments in the alternative. He maintained that certiorari should go to quash the said verdict because it was obtained "through fraud, perjury or deception" of the Court. In addition, he argued, the full court should have in its discretion exercised its inherent jurisdiction to set aside the verdict of the jury because of the abuse perpetrated upon the court by fraud, perjury and deception.

Undoubtedly, a superior court has always had the inherent jurisdiction, to protect its own procedure. That inherent jurisdiction has never been interpreted to mean that a superior court has an unlimited power to make any order it chooses. Such a power to protect itself from abuse of its process and control its own procedure and practice must be exercised within accepted and permissible judicial ambits. For example, the inherent jurisdiction of the superior court to regulate its own proceedings connotes its power to make rules of court to control its smooth functioning. The statutory rules committee also exercises such a power.

The inherent jurisdiction to prevent abuses of its process was understood as empowering the court by summary process to terminate or stay proceedings which were "otherwise an abuse of the process of the court". Master I.H. Jacob, discussing his topic "The inherent jurisdiction of the Court", in ***Current Legal Problems, 1970,*** gives his understanding of the term "...abuse of process of the court." At page 40 he said:

> "Clearly it is a term which has great significance in relation to the inherent jurisdiction of the court as well as under the Rules of the Supreme Court. It connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice. It follows that where an

> abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexations or groundless litigation.
> Indeed, the typical circumstances in which abuse of process is held to take place are where the proceedings are frivolous or vexatious."

Master Jacob, expressly recognized also, the supervisory power of the High Court "over inferior court systems". Any interfering with the due course of justice in inferior courts was punishable summarily as a contempt of the High Court. Later, this jurisdiction was exercisable "by the prerogative orders."

In response to the comment that such an inherent power if viewed too wide without restraint, could be viewed as arbitrary, Master Jacob said at page 52:

> "The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers, and free from the restraints of their jurisdiction in contempt and the Rules of Court, it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."

Despite its expansive role, the High Court in its inherent jurisdiction has never seemed to claim superintendence over or the control of the accepted sacrosanct functions of the verdict of the jury in a criminal case. This excludes, of course, the appellate function.

The right of appeal is conferred by statute.

Consequently, at common law, the only known and accepted means by which the verdict of a jury, on a trial by indictment, in a criminal case could be controverted was by way of motion in arrest of judgment. The authors of Archbold 1995 paragraph 5-78 at page 670 inter alia, state:

> "At any time between conviction and sentence, the defendant may move the court in arrest of judgment. The motion must be based on some objection arising on the face of the record, such as a fundamental defect in the indictment which cannot be cured by the verdict. The court may of its own motion arrest judgment (see ***R v Waddington*** (1800) 1 East 143, 146). If judgment is arrested, the proceedings are set aside, but this is no bar to a fresh indictment (see Vaux's case (1590) 4 Co. Rep. 44a)."

Arrest of judgment does not apply in the instant case.

There was no irregularity in the proceedings as conducted by Hibbert, J and the jury in the Portland Circuit Court. The fact that inaccurate information was conveyed to the prosecutor, who consequently advised the said Court, is not a circumstance that could cause the verdict of the jury to be described as void or a nullity. A jury's verdict of acquittal or conviction, based even on the perjured evidence of witnesses is still a valid verdict in itself.

Orders made by a court of competent jurisdiction must be obeyed by every person until the order is discharged, even if such a person believes the order to be irregular or void (***Hadkinson v Hadkinson*** [1952] 2 All ER 567, 569 per Romer LJ). This case was cited with approval in ***Isaacs v Robertson*** [1984] 3 all ER 140, the headnote of which reads:

> "Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void,' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside."

Lord Diplock at page 143 said:

> "The contrasting legal concepts of voidness and voidability form part of the English Law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies."

The verdict of the jury in the instant case, cannot be described as, nor declared to be a nullity. The process employed was valid. There was no error of law nor breach of natural justice in the process to give rise to an application for judicial review. Nor was there any fundamental defect or any defect in the proceedings to cause the verdict to be declared a nullity (See ***In Re Pritchard*** [1963] 1 Ch. 502, 503).

Consequently, the inherent jurisdiction of the Supreme Court cannot be employed to grant judicial review for an order of certiorari to quash a valid verdict of a jury and moreso, a verdict of a jury in a court of equal jurisdiction.

In ***R v Gillyard*** [1848] 12 Q.B. 527, certiorari was granted to quash a conviction by justices. The conviction was procured by the collusion of the defendant and his employer, by perjury and fraud, in order to protect the said employer from himself being prosecuted. This was clearly an instance of a superior court, the Queen's Bench, exercising supervisory powers of control over an inferior court, the Magistrates' Court. The judges themselves re-affirmed the said power. Coleridge, J said at page 530:

> "... 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."

Erle, J. said at page 530:

> "This court has authority to correct all irregularities in the proceedings of inferior tribunals, which in this case have been resorted to for the purpose of fraud. In quashing this conviction, we are exercising the most salutary jurisdiction which this Court can exercise."

That decision is therefore unhelpful in the instant case.

Ground (d) is a complaint that the majority of the full court was in error to conclude that they had no jurisdiction to grant leave for an application for judicial review to quash the acquittal by the jury in circumstances "where the information which formed the basis for obtaining the verdict of acquittal was a misrepresentation and a fraud."

Smith J, with the concurrence of Dukharan, J at page 12 of the record said:

> "I am therefore of the opinion that the acquittal of Rohan Allen at the sitting of the Portland Circuit Court 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."

I agree with this statement. It is a recognition of the jurisdictional bar in existence in these circumstances.

Counsel for the appellant, in seeking to make a distinction as to the status of the challenge before the full court, said:

> "The application sought to invoke the court's power to protect the administration of justice and in particular, the Judge, the jury and the prosecution who had been manipulated. The Appellant was inviting the court to examine the deception on the Judge and jury and was asking the Court to exercise its inherent jurisdiction to prevent an abuse of its own process and the resultant miscarriage of justice. It was therefore not an attempt to ask the Court to exercise supervisory jurisdiction over a court of equal status but was instead seeking to invoke the court's jurisdiction in protection of the court's process."

This submission is less than ingenuous. The assertion that the application is "not to review the actions of the Judge and/or jury" and "... not an attempt to ask the Court to exercise supervisory jurisdiction over a court of equal status ..." is tantamount to a rejection of the request for certiorari. To describe the application, on the contrary, as seeking to "invoke the court's power to protect the administration of justice ..." and "... inviting the court to examine the

deception on the judge and jury ..." and "... to prevent an abuse of its own process ...", are in essence, an application for an order to quash the said verdict of the jury in a court of equal status. Certiorari was being sought. Despite the variation in wording and the commendable purpose stated, the claim remains an application to quash an order of a Supreme Court of equal jurisdiction.

The cases relied on by counsel, including the ***Gillyard*** case, involved certiorari going to quash orders of inferior court for procedural errors.

The mis-information given to crown counsel as well as the series of acts presumably directed to frustrate the prosecution, although properly may be described as fraudulent, cannot by themselves confer on the full court supervisory powers which neither the common law nor any statutory provision grants to such court. The majority of the full court was correct. This ground fails.

Ground (e) seeks to contend that contrary to the views of the majority of the full court, the appellant showed an arguable case sufficient for the grant of leave to apply for judicial review.

Leave is only granted if, the evidence discloses sufficient material which might amount to an arguable case by which the applicant may obtain the relief sought (***Ireland Revenue Commissioners v National Federation of Self-Employed and Small Business*** [1982] AC 617). No basis existed for such an

order to be made by the full court. Judicial review is not concerned with merits. For the reasons given in respect of ground (d), this ground also fails.

Ground (a) complains that the full court failed to accept that the absence of an affidavit by the respondent in challenge to that of the appellant was a confession by the respondent of the allegations made by the appellant.

It is sufficient to state that there is no procedural requirement at the stage that leave is being sought for judicial review to file an affidavit in response. No issue is required to be joined in challenge at this preliminary stage. I agree with Mr. Foster for the respondent, that applications for leave are usually made ex parte. No affidavit in response is therefore usually required. Furthermore, he correctly submitted, if the absence of the affidavit in response amounts to a confession, then the fraud would thereby be proven, and the substantive hearing at judicial review would be a mere formality. The contention of the appellant was never intended, nor is there any supporting authority in existence in support of this view. ***R v Gillyard*** (supra), on which the appellant relies, to support the submission that the absence of the said affidavit was a "confession", as a result of which certiorari should lie, was a substantive hearing in which factual issues were being determined and therefore an omission to joint issue would lead to a finding of a "confession". This is clearly not so in the instant case. Jones, J. despite agreeing that a "confession" existed, was constrained to admit –

> "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."

Part 56 of the Civil Procedure Rules (the Rules) does not require the filing of any affidavit in response to the affidavit in support of the application for leave. Rule 56.12 however does make allowance for "Any evidence filed in answer...")

No finding of fact, whether of "confession" or otherwise is necessary at the leave stage. In the unlikely event that the absence of response could be construed as a "confession," it is irrelevant to the functions of the court when considering whether or not to grant leave. This ground also fails.

The nature of these proceedings attracted a finding of the full court, agreeing with counsel for the respondent, that the Attorney General was not a proper party to these proceedings.

Prerogative orders, such as certiorari cannot be brought against the Crown because, it is at the instance of the Crown that they are initiated. The Attorney-General, therefore, as the representative of the Crown would not be subject to such an order. (Note however, that individual ministers or officials acting under statutory powers would be subject to orders of certiorari – see ***M v Home Office*** [1993] 3 WLR 433.)

Declarations, however, may be granted against the Crown see ***Dyson v Attorney-General*** [1991] 1KB 410. The declaratory judgment merely pronounced the specific legal right or position. It had no coercive force or any

power of enforcement. However, the public authority concerned, usually respects it.

The declaration though utilized in public law, is essentially a private law remedy. Part 8 of the rules, in rule 8.6, it reads:

> "8.6 A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed."

In the instant case, the fixed date claim form filed on 14th June 2004, sought, in addition to the "writ" of certiorari:

> "2. A declaration that the said trial holden at Port Antonio Circuit Court in the Parish of Portland on the 15th March 2004, before the Honourable Mr. Justice L. Hibbert was a nullity."

In essence therefore, in so far as the claimant sought a declaration, against "The Attorney-General of Jamaica" – the latter was a proper party to the proceedings. However, was the declaration properly included as a claim?

Judicial review is defined in rule 56.1 (3) to include the remedies of:

> "(a) certiorari, for quashing unlawful acts;
>
> (b) prohibition, for prohibiting unlawful acts; and
>
> (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case."

Rule 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave.

Rule 56.9(1) that an application for an administrative order must be made by a fixed date claim form, specifically whether the application is for:

(a) judicial review

(b) relief under the constitution

(c) declaration or

(d) some other administrative order."

Under our rules, the declaration is not subject to the procedure that governs judicial review and should not have been joined as a claim. Note however, that rule 56.7 empowers a court to direct how such a claim may proceed.

The Supreme Court Act 1981, section 31 (UK) permits an application to be made for mandamus, prohibition, certiorari or for a declaration or injunction in respect of public law rights by way of an application to the High Court for judicial review sparing the applicant the expense of two distinct set of proceedings. There is no such corresponding statutory provision in Jamaica.

In the instant case the proceedings as filed are misconceived. Certiorari may not be granted by way of subjecting a decision of a Circuit Court to judicial review by a full court, which is of equal jurisdiction. Nor may a declaration, a discretionary remedy, be granted "to quash the verdict". The declaration has no coercive force and therefore could not "quash" a decision of any court.

In so far as Jones, J., dissenting, at page 26 of the record said:

> "... (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."

> 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," (Emphasis added)

he was in error. He was equally in error to order,

> "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."

No such power is granted in relation to the declaration.

Grounds (b) and (c) are both without merit. The overriding objective as pronounced in rule 1 of the CPR was never intended to be used as alternative to a substantive claim or pleading. Where the law is clear and specific, a claimant cannot resort to the general provisions of the overriding objective.

In the instant case, no interpretation of the rules is in issue nor is any power under the rules being exercised, in order to give effect to rules 1.1 and 1.2.

There is an obvious need in our law to deal effectively with the circumstances that arose in this case. The individual who conveyed the faulty information to crown counsel, which information was effective to result in the verdict of acquittal by the jury, must remain the object of the police investigation. The solution to a problem of this nature was found in the enactment in England of the Criminal Procedure and Investigation Act 1996, to which Mr. Foster referred us. Judicial activism is not the answer. Legislation in Jamaica is now a necessity.

For the above reasons, it is my view that the decision of the majority of the full court cannot be faulted. The appeal should be dismissed, with no order as to costs.

COOKE, J.A.

1. The appellant is the mother of Janice Allen. The latter, aged thirteen, died from a gunshot wound. The fatal bullet had entered "on the back of right side of trunk". (Postmortem Examination Report). This was on the 14th April, 2000, in Trench Town, St. Andrew. On that day, a party of policemen was in Trench Town. On their version of the events, these policemen came under fire from gunmen. The party engaged those gunmen and in the cross fire Janice Allen was fatally shot. The family of Janice Allen has vigorously and adamantly refuted the circumstances advanced by the version of the police party. On the 22nd May, 2001 the Director of Public Prosecution ruled that Rohan Allen, a member of the police party should be charged for the murder of Janice Allen – and so he was. A consequential preliminary enquiry was held and Rohan Allen was on the 10th November, 2002 committed to stand his trial in the Home Circuit Court in Kingston. There was a successful application by the defence for a change of venue for the trial of Rohan Allen, and it was transferred to the Portland Circuit Court where the case first came up for hearing

on the 30th June, 2003. There were some five adjournments and finally on the 15th March, 2004 before Hibbert, J. there was the disposition of the case. A jury was empanelled. Rohan Allen was pleaded to which he entered a plea of not guilty. The Crown Counsel after outlining his reasons, the transcript of the proceedings has him saying:

> "In the final analysis, m'Lord the Prosecution is constraint [sic] to offer no evidence against the defendant in this matter. May it please you m'Lord."

Thereafter, the learned trial judge directed the Jury to return a formal verdict of not guilty which was done.

2. The stance of Crown Counsel was based on the following factors - firstly in respect of the evidence of identification, there was only dock identification "which would be inadmissible before this court". Secondly, the only evidence to link Rohan Allen to the shooting of Janice Allen was ballistic in nature. There was potential ballistic evidence which was to the effect that a fragment of the bullet which was taken from the deceased's body was fired from the firearm which Rohan Allen had at the material time. It was critical to the case for the prosecution that this nexus be established. This the Crown Counsel considered himself unable to do. In this regard he addressed the court as follows:

> "Now, to establish that, the Prosecution had proposed two methods. One was the calling of the maker of the entry in the firearm register which was made at the time the firearm was issued to the defendant, Rohan Allen. Now, that firearm register cannot be found, my Lord. My predecessor, Crown Counsel in the previous session, made efforts to find that

> register and the results of which are contained in a statement which is on file. Ever since I was assigned to this circuit I made efforts myself and the result of my efforts coincide with my predecessor's effort and it is to the effect that that firearm register was destroyed in a fire at the Denham Town Police Station subsequent to the shooting incident. So, that proposed approach by the Prosecution has evaporated even before the prosecution starts.
>
> The next approach which the Prosecution had proposed to take was the use of a statement given by the defendant himself to the Bureau of Special Investigations which was requested of him once the Bureau launched its investigation. I have a statement on file, copies were served on the defence, however, the maker of that statement, a Detective Sergeant, Lynvall Dunchie....
>
> HIS LORDSHIP: The recorder.
>
> MR. H. MCKENZIE: I beg you pardon, the recorder, the person who collected it, Detective Sergeant Lynvall Dunchie, as he then is overseas, he is on sick leave and from all indications, based upon my enquiries, there is no likelihood of him returning because the sick leave keeps extending [sic] by his submissions of medical reports from the United States to the Police Headquarters here in Jamaica."

3. The appellant being aggrieved by the acquittal of Rohan Allen sought the aid of the court. The fixed date claim form dated and filed June 14, 2004 was worded as hereunder:

> "The Claimant, **MILLICENT FORBES**, a domestic worker of West Road, Trench Town, Kingston 12 in the parish of St. Andrew, claims against the Defendant **THE ATTORNEY GENERAL OF JAMAICA**:

1. A Writ of Certiorari to quash the acquittal of Rohan Allen, for the murder of Janice Allen;

2. A declaration that the said trial holden at Port Antonio Circuit Court in the Parish of Portland on the 15th March 2004, before the Honourable Mr. Justice L. Hibbert was a nullity;

AND TAKE NOTICE that the grounds upon which the relief is sought are:

A. The acquittal of Rohan Allen was obtained by improper means, to wit a fraud upon the Office of the Director of Public Prosecutions and upon the Court.

B. The administration of Justice in relation to Regina v. Rohan Allen was perverted."

4. In accordance with Rule 56.3 (i) of the Civil Procedure Rules 2002. (The Rules) the appellant sought leave to apply for judicial review. This application was refused by the Court (Wolfe, C.J.) on the 6th October, 2004. This application was pursuant to rule 56.5 (i)(a) renewed before the Full Court, when on the 24th February, 2005 leave was again refused by a majority - Gloria Smith, Dukharan J.J. with Jones, J. dissenting. It is from the decision of the majority that this appeal now lies.

5. Before embarking on a discussion of the issues raised in this appeal I think it is necessary to set out the circumstances which the appellant/claimant regards as the foundation for her profound dissatisfaction. The circumstances

listed below are those which Mr. Small, counsel for the appellant listed as being extracted from the affidavit of the appellant/claimant. They are:

> "(i) the harassment of her family by police officers since the arrest of the accused, including threats to kill the Appellant and her other daughter and the arrest of one of the Appellant's sons by policemen without any reasonable or probable cause;
>
> (ii) the attempt to bribe her by persons acting on behalf of the accused not to continue with the prosecution of the accused. On one occasion two men visited the Appellant and told her that the accused was not responsible for Janice's death but that the accused wanted to help with the cost of Janice's burial and was offering **One Hundred and Fifty Thousand Dollars ($150,000.00)** to make the case against the accused '**dead out**'. On another occasion the Appellant was told that one 'Paul' was offering her **One Hundred and Twenty Thousand Dollars ($120,000.00)** to 'finish away with the case'. After formal complaints were made to the police on behalf of the Appellant, one police officer Paul Whyte was suspended for several days as a result of the investigations carried out in the matter;
>
> (iii) the fact that the relevant pages of the Firearms Register (relating to the date of the incident) presented to the Court at the preliminary enquiry were removed or at the very least inexplicably missing;
>
> (iv) the subsequent mysterious fire at the relevant police station allegedly destroying the said Firearms Register prior to trial;
>
> (v) the failure of the police to hold an identification parade (despite there being at least **two (2)** civilian eyewitnesses to the shooting) which led to the subsequent dock identification of the

accused by the deceased's sister, Ann Marie Allen, which would either have been inadmissible in court or its probative value seriously weakened;

(vi) the failure of the police to get evidence from Calvin Da Costa who was present when Janice Allen was shot;

(vii) the preliminary enquiry was adjourned **fifteen (15)** times due primarily to the following problems with the investigation:-

- January 30, 2002 – the matter was adjourned because the investigating officers had failed to subpoena the witnesses;

- March 28, 2002 – the matter was adjourned because the exhibits were not taken to court although the ballistics expert was present in court;

- June 14, 2002 – the matter was adjourned due to confusion as to whether Calvin Da Costa was subpoenaed to attend court;

- July 4, 2002 – the matter adjourned for, ***inter alia***, Supt. Hewitt to bring the Firearms Register to court, including the entries for the 14th April, 2000;

- July 31, 2002 – a police officer (not Supt. Hewitt) presented the Firearms Register to the court. Although the Register contained entries to August, 2000, the pages for April 14, 2000 were missing and the officer could not account for the missing pages;

- September 27, 2002 – though several policemen attended court none could account to the court for the missing pages of the Firearms Register.

(viii) the misinformation given to Crown Counsel, Mr. Herbert McKenzie by the police as to the unavailability of the crucial police witness;

(ix) Crown Counsel acting on the misrepresentation advised the court that the prosecution would offer no evidence;

(x) The Judge acting on the misrepresented facts directed the jury to return a verdict of acquittal on the basis of the said misrepresentation;

(xi) The said witness, Sgt. Linvall Dunchie who was allegedly indefinitely out of the jurisdiction of this Honourable Court was seen in the Coroner's Court for Kingston and St. Andrew on the 26th May, 2004, **two (2)** months after the trial;

(xii) The police High Command has since conceded that the court was misled as to the indefinite unavailability of the key prosecution witness, and

(xiii) The Director of Public Prosecutions ordered the Commissioner of Police to conduct investigations into the misinformation given to the prosecutor and criticized the prosecutor's failure to take further steps to verify the whereabouts of the said key witness."

I make no comment on the proffered circumstances save to say that it is all agreed that as stated in par. 7 of the majority judgment delivered by Gloria Smith, J.:

> "...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."

I should also add that in respect of (xiii) (supra) the Director of Public Prosecutions, after the investigations ordered was of the view:

> "... that there was no evidence to support criminal charges."

(See par. 5 of the affidavit of Kent S. Pantry dated 26th November 2004.) Circumstances (i) – (xi) were put forward to demonstrate that, in the view of the appellant, there was a calculated and in the end successful course of conduct to "pervert the course of justice".

6. The majority *inter alia* expressed itself as follows:

> (i) "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...."

(ii) In dealing with the issue of 'inherent jurisdiction" the majority had this to say:

> [20] "What has been urged on this Court on behalf of the Appellant 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, 1953 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 pe-ury [sic] have either been the subject of a conviction in regular criminal proceedings against the person to whom fraud or pe-ury [sic] 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."

(iii) This judgment concluded as follows:

> "[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."

7. In his dissenting judgment:-

(i) Jones, J. said in par. 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."

(ii) At par. 27 he said:

"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."

(iii) He would:

> "...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."

(iv) Jones, J. was of the view that the Attorney General was not a proper party to the proceedings. However, in par. 43(b) he granted leave:

> "... 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."

8. I now reproduce the grounds of Appeal as amended:

> "(a) The learned judges of the majority of the Full Court erred when they failed to appreciate that uncontested affidavit evidence is as good as a confession of the matters alleged in the affidavit.
>
> (b) The learned judges of the majority of the Full Court erred in law when they failed to appreciate that the overriding objective of the CPR 2002 is to deal with cases justly as stated in 81.1 (1).
>
> (c) The learned judges of the majority of the Full Court erred in law when they failed to pay any or sufficient regard to section 1.2 of the CPR which states that "The Court must seek to give effect to the overriding objective when it: (a) exercises any discretion given by the Rules; or (b) interprets any rules."
>
> (d) The learned judges of the majority of the Full Court erred in law when they decided that they did not have 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.
>
> (e) The learned judges of the majority of the Full Court erred in law when they decided that the claimant did not raise an arguable case sufficient to entitle her to be granted leave to apply for judicial review."

Ground (a) speaks to the "threshold test" which must be applied in the consideration of whether or not leave should be granted to apply for Judicial Review. Grounds (b) and (c) are concerned with the implications of Rules 1.1 and 1.2 of the Rules. Grounds (d) and (e) pertain to the issue of jurisdiction – which goes to the heart of this debate. It is the correct appreciation of this issue which will be determinative of the outcome of this appeal.

9. I will first address grounds (d) and (e). I begin by quoting from the work – **Administrative Law (Wade and Forsyth) 7th Edition** at pages 623 – 624:

> "Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it.
>
> The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. This is the concern of the Crown, for the sake of orderly administration of justice, but it is a private complaint which sets the Crown in motion. The Crown is the nominal plaintiff but is expressed to act on behalf of the applicant, so that an application by Smith to

> quash an order of (for instance) a rent tribunal would be entitled R. v. The – Rent Tribunal, ex parte Smith. The court will then decide whether the tribunal's order was within its powers. There are normal rights of appeal both for the applicant and the tribunal."

In **Re Racal Communications Ltd.,** [1980] 2 All E.R. 634 a decision of the House of Lords, Lord Scarman in his speech at p. 646 (e) said:

> "But the High Court is not an inferior tribunal. It is one of Her Majesty's courts of law. 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. It has inherited the jurisdiction of the superior common law courts of first instance. The Court of Appeal has no original supervisory jurisdiction over the High Court comparable with the High Court's long- established supervisory jurisdiction over inferior tribunals. Indeed, the Court of Appeal's jurisdiction over the High Court is itself the creature of statute."

Lord Diplock said at 640 (e):

> " Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only."

In **R. v. Gillyard** [1848] 12 Q.B.D. 905, (a case on which reliance was placed by the Jones, J. and the appellant to support the contention that the court could quash a conviction for fraud) Coleridge J. said at p. 966:

> "The case involves the jurisdiction of this Court as a Court of control over all Inferior Courts."

It is indisputable that the Circuit Court which heard this matter was part of the Supreme Court of Jamaica. See Section 40 of the Judicature (Supreme Court) Act.

9. The appellant fully appreciated the incontrovertible principles contained in the previous paragraph. However, in an effort to bypass that hurdle it was submitted as follows:

> "A factor which would have no doubt weighed on the Full Court in the instant proceedings in considering whether it had jurisdiction was whether there can be judicial review of the decision of a court of equal jurisdiction. As was submitted by Counsel for the Applicant before the Full Court, the application was not to review the actions of the Judges and/or jury in R. v. Rohan Allen. The application sought to invoke the court's power to protect the administration of justice and in particular, the Judge, the jury and the prosecution who had been manipulated. The Appellant was inviting the court to examine the deception on the Judge and jury and was asking the Court to exercise its inherent jurisdiction to prevent an abuse of its own process and the resultant miscarriage of justice. It was therefore not an attempt to ask the Court to exercise supervisory jurisdiction over a court of equal status but was instead seeking to invoke the court's jurisdiction in protection of the court's process."

Jones, J. accepted this approach as he felt moved to say in par. 23 of his judgment that:

> "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."

11. I now turn my attention to the ambit of the "the inherent jurisdiction of the court". Jones, J. quoted with approval a passage at p. 51 of an article by

Master I. H. Jacob in [1970 Current Legal Problems page 23] where the author regarded the "inherent jurisdiction" of the court 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."

Besides relying on this passage Mr. Small cited a passage from the judgment of Baron Alderson **in Cocker v. Tempest** [1840 – 41] 7 M & W 501 which stated:

> "The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior, were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice."

He submitted that the principle enunciated by Baron Alderson was restated in **Connelly v. D.P.P.** [1964] A.C. 1254 where Lord Morris in his speech said:

> "there can be no doubt that a court which endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

Mr. Small felt confident that the principle was further emphasized by the words of Lord Diplock where in **Hunter v. Chief Constable of the West Midlands Police** [1982] A.C. 529, 536 he opined that:

> "this is a case about the abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right – thinking people."

12. I endorse, without even a hint of qualification the approach of Master Jacob and the three eminent jurists. However, what Jones, J. and the appellant and possibly the majority in the court below, did not appreciate is that the "inherent jurisdiction of the court" is peculiar to that court which has jurisdiction over the litigation which is there and then being conducted before it. The "inherent jurisdiction" "inheres" within the court that has conduct of the case which is being presented. No other, than that court can employ its "inherent jurisdiction". Hence, it is not without significance that Baron Alderson said in **Cocker v. Tempest** "The power of each court over its process in unlimited". (Emphasis mine). In that case the issue was whether the court having jurisdiction, so to do, could despite "the mere lapse of time" set aside an order. In **Connelly** two indictments were preferred against the appellant (Charles Connelly). In the first he along with three others was charged with the murder of H. In the second there was a charge of robbery with aggravation. These indictments arose from an armed raid in Mitcham. Charles Connelly was convicted on the first indictment for murder but was subsequently acquitted by

the Court of Criminal Appeal because the learned, trial judge had misdirected the jury on his defence of alibi. The prosecution next proceeded with the second indictment which charged robbery with aggravation. Connelly objected. He appealed to the Criminal Court of Appeal on grounds among others that the pleas of *autrefois acquit* should succeed that the crown were estopped from proceeding with the second indictment because the issue whether he took part in the robbery had been decided in his favour by the Court of Criminal Appeal and that the trial judge had a discretion to stay the second indictment and should have exercised it. The Court of Criminal Appeal dismissed the appeal. Connelly then appealed to the House of Lords where he was again unsuccessful. The House of Lords held that there had been no abuse of process of the court in proceeding on the second indictment according to the practice prevailing at the time it was tired. Further that the plea of *autrefois acquit* was inapplicable in the circumstances. The excerpted passage of Lord Morris speech (supra) relied on by the appellant speaks to the inherent jurisdiction of the trial court to "act effectively" within the jurisdiction of that court. The next sentence following the cited passage was this:

> "The preferment in this case of the second indictment could not, however, in my view be characterised as an abuse of the process of the court."

Lord Morris' views were relevant to the appellant's contention that the trial court should have exercised its discretion founded on its "inherent jurisdiction" to stay the second indictment. In **Hunter** the appellant and five others were convicted

of 21 counts of murder arising from bomb explosions in two Birmingham public houses. One essential part of case for the prosecution was incriminatory statements made by the persons charged. At the trial court Bridge, J. ruled that these statements were voluntary and admissible in evidence. The six (6) men had contended that the statements had been induced by violence upon them by the police. These men after their convictions issued a writ against the Lancashire police and the Home Office claiming damages for injuries for the same assaults which they had put forward at their trial as the inducement for their statements. The Court of Appeal struck out their statement of claim and the House of Lords granted leave to appeal. Their appeal was dismissed. The passage cited by the appellant is from the introductory paragraph of the speech of Lord Diplock at page 541 B Lord Diplock said:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

These cases do not support the stance of the appellant. Indeed, they make it abundantly clear that the inherent jurisdiction of the court is confined to the trial court. To suggest that in the instant case the Full Court could exercise its inherent jurisdiction in the manner submitted by the appellant is quite fallacious.

13. I now address ground (a) of this appeal. This ground is posited on the incorrect premise that the Full Court had jurisdiction to do what was sought. It is sufficient for me to say that all the cases cited by the appellant concerned a court exercising supervisory jurisdiction over an inferior court. This was the position in **Gillyard** as it was in **R. v. West Quarter Sessions ex parte Albert and Maud Johnson and Others** [1974] 1 Q.B. 24, **R v. Hendon Justices ex parte Director of Public Prosecutions** [1973] 96L. App. Rep. 227; to mention some of the cases cited. The Full Court had no jurisdiction to adjudicate on the issue before it. Therefore whether or not they failed to appreciate that uncontested affidavit evidence is as good as a confession of the matter alleged in the affidavit is not relevant. Here the appellant is grounding its position on the fact that there was no response to the assertions contained in the supporting affidavit of Millicent Forbes. The consideration of whether or not the appellant had passed the threshold test for the granting of leave to apply for Judicial Review does not arise. Jones, J. was in error when he so found. He adopted the pronouncement of Lord Diplock in **Island Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd.** [1982] A.C. 617 at 642F – 644 that:

> "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

> 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."

I too would adopt this formulation. However, for reasons already stated there was a jurisdictional bar to the granting of leave. This discussion is also pertinent to ground (e) of the appeal.

14. Grounds (b) and (c) can be readily disposed of shortly. These two grounds seek to find aid in Rules 1.1 (i) and 1.2. Rule 1.1 (i) states:

> "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."

Thus the Rules being entirely procedural in scope and effect cannot and did not intend to impinge or in any way disturb the substantive law. The principles guiding the exercise of Judicial Review are in the province of substantive law as it has developed and is developing. Rule 1.2 states:

> "The court must seek to give effect to the overriding objective when it -
>
> (a) exercises any discretion given to it by the Rules; or
>
> (b) Interprets any rule."

Here again Rule 1.2 is not concerned with the substantive law. As Saunders, J. A. correctly said in **The Treasure Island Company & Anor v.**

Audubon Holding Limited & Ors. [C.A. No. 22 of 2003 British Virgin Islands]

when commenting on a similar permission as our rule 1.2:

> "it is a statement of the principle to which the court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the court must be found not in the overriding objective but in the specific provisions itself."

These two grounds like the other two grounds previously addressed fail. The judgment of the majority should be affirmed.

15. All three judges in the Full Court were of the view that as framed the Attorney General was not a proper party to the proceedings. Nonetheless the Full Court considered the substance of the application. The appellant, it is to be noted, did not file any ground of appeal challenging this aspect of the judgment of the Full Court. I agree with the view of the Full Court in this regard. I did not consider this error as a bar to hearing this appeal particularly because of the important issues that fell for determination.

16. I am somewhat curious as to whether the prosecution (not least because of the wide public interest which this case generated) had given sufficient consideration or at all to Section 4 of the Criminal Justice (Administration) Act. This section empowers the Director of Public prosecutions or Deputy Director of Public Prosecutions by direction in writing to enter a Nolle *Prosequi* "in any

criminal proceedings whatever". Perhaps, if this power had been exercised the eventual disposition of the trial proceedings in this case may have been different.

17. Mr. Foster, whose presentation on behalf of the respondent was characterised by commendable objectivity as befits a law officer of the Crown, was not oblivious to the distressing circumstances of this case. He was concerned that in the present state of the law an aggrieved person such as Millicent Forbes was in the circumstances of this case denied an avenue to seek redress. In what be described as "the way forward" he suggested that there could be legislation comparable to the English Criminal Procedure and Investigation Act 1996 which deals with "tainted acquittals". It is not necessary for me, as Mr. Foster did, set out the salient provisions of that Act. Obviously any such legislation would have to be tailored to meet our situation. Suffice it to say that it was Mr. Foster's view that such:

> "...statutory provision, in our submission, provides a complete alternative to any application to quash by means of judicial review, the decision of a superior court as the Circuit Court. For, the jurisdiction that the High Court is exercising is pursuant to statute and is indeed a statutory remedy which defeats the *autrefois acquit* principle. This has been our general recommendation, with necessary adjustments, to the Minister of Justice who is currently taking advice on the matter."

This is a matter which calls for the most urgent attention.

18. Millicent Forbes, although unsuccessful in her efforts, should be applauded for embarking and pursuing her legal struggle. She has brought into poignant focus an area in the administration of justice which demands immediate attention. No costs should be awarded against her. Mr. Small demonstrated that there was no want of industry as he advocated her cause with undisguised passion. Before I conclude I must commend Hibbert, J. who at the conclusion of the trial in Portland took pains to explain fully to the public there assembled and in particular to Millicent Forbes and the other relatives of the deceased the reasons, for the decision of the court. It is of critical importance that courts explain either orally or in writing as the case demands why any particular decision is reached. This is essential in the maintenance of confidence in the administration of justice.

19. I would dismiss the appeal. Further, I would not make an order for costs.

HARRIS, J.A:

In this appeal, the appellant seeks to set aside an order of the Full Court comprising Smith, J., Dukharan, J. and Jones, J. (dissenting), refusing her application for leave for judicial review of a verdict of the acquittal of an accused in the Circuit Court for the parish of Portland.

On April 14, 2000 Janice Allen, a thirteen year old, was fatally shot. Rohan Allen, a policeman was arrested and charged for her murder, consequent on a ruling of the Director of Public Prosecutions.

Following the conclusion of the Preliminary Inquiry in November 2002, Allen was committed to stand trial in the Home Circuit Court. The venue of the trial was subsequently changed to the Portland Circuit Court on the defence's application.

On March 15, 2004 the matter came on for trial. A jury was empanelled. Allen pleaded not guilty. Counsel for the Crown informed the Court that the main witness for the prosecution, Sergeant Lynvall Dunchie, the investigating officer, was absent from the island and was unlikely to return. He offered no evidence against Allen. The learned trial judge accordingly directed the jury to return a formal verdict of not guilty in Allen's favour. A verdict of acquittal was accordingly entered.

There is evidence from the appellant that on May 26, 2004 Dunchie appeared in the Coroner's Court for the Corporate Area in the capacity of a police officer. In addition, it is a well known fact that the prosecutor was misled as to the availability of the witness.

On June 14, 2004 a Fixed Date Claim Form was filed by the appellant seeking the following relief:

> "1. A Writ of Certiorari to quash the acquittal of Rohan Allen, for the murder of Janice Allen;
>
> 2. A declaration that the said trial holden at Port Antonio Circuit Court in the Parish of Portland on the 15th March 2004, before the Honourable Mr. Justice L. Hibbert was a nullity."

The relief was sought on the following grounds:

> "A. The acquittal of Rohan Allen was obtained by improper means, to wit a fraud upon the Office of the Director of Public Prosecutions and upon the Court.
>
> B. The administration of Justice in relation to ***Regina v Rohan Allen*** was perverted."

Affidavits filed in support of the claim outlined various allegations of misconduct and misdeeds on the part of the police from the death of Janice leading up to Allen's acquittal.

On July 12, 2004 the appellant, by way of a Notice of Application for Court Orders sought leave to apply for Judicial Review, with the object of securing an Order of Certiorari and also a declaration that the

trial was a nullity. This application first came on for hearing before the learned Chief Justice and was refused by his order of October 8, 2004.

A renewed application filed, was heard by the Full Court on February 21, 2004. On February 24, 2004 the court by a majority, in dismissing the application, held that:

(a) There was no evidence upon which a criminal charge could be laid against any person.

(b) There was no confession by anyone in relation to perjury.

(c) Allen's acquittal was not amendable to judicial review, as, the decision of a superior court is not susceptible to judicial review by a court of concurrent jurisdiction.

(d) The Attorney General was not a proper party to the proceedings.

Before embarking on the grounds of appeal, it is necessary to allude to the *locus standi* of the Attorney General, as the majority ruled that he is not a proper party to these proceedings. The claim is one for judicial review. A claim for judicial review is instituted at the instance of the Crown against an authority, the decision of which is challenged. The Attorney General can be a party as a claimant in an application for judicial review but not a respondent. See ***Kool Temp.***

Co. v Controller of Customs and Excise and The Attorney General (1992) T.L.R. 523. The remedy sought by way of a declaration is essentially for an order for *certiorari.* It follows therefore that the Attorney has been improperly cited as a respondent.

Five grounds of appeal were filed by the appellants, namely: (a), (b), (c), (d) and (e). Grounds (a) and (e) are closely linked and will be considered simultaneously.

Grounds (a) and (e)

> "(a) The learned judges of the majority of the Full Court erred when they failed to appreciate that uncontested affidavit evidence is as good as a confession of the matters alleged in the affidavit.
>
> (e) The learned judges of the majority of the Full Court erred in law when they decided that the claimant did not raise an arguable case sufficient to entitle her to be granted leave to apply for judicial review."

Mr. Small submitted that the majority, in finding that there was no evidence of confession of fraud or perjury by anyone, misunderstood the nature of the application in that they sought to restrict the complaint to fraud or perjury. He argued that failure to challenge the appellant's evidence contained in her affidavit amounts to an admission of the allegations therein.

In support of this contention, he cited the case of ***R v Gillyard*** (1848) 12 QBD 527. ***Gillyard*** was convicted for an offence under the

Excise Law. The Attorney General obtained a rule nisi to quash the conviction. The affidavit in support of the rule, disclosed that the conviction was procured by fraud by reason of collusion between ***Gillyard*** and his employer one Thomas Haigh. No response to the allegations having been filed, it was held that the uncontested affidavit was in effect a confession. Certiorari was granted and the conviction quashed.

Gillyard's case is distinguishable from the present case. In ***Gillyard's*** case the proceedings before the court was a substantive hearing for the prerogative order and clearly not an interlocutory hearing. The instant case was an interlocutory hearing for leave to apply for the prerogative order. The fact that no response was made to the appellant' affidavit cannot be interpreted as a confession of the allegations raised by her.

Failure to give a response to allegations raised in an affidavit, may be treated as an admission only in circumstances where a full hearing has been conducted. At such time, a court is entitled to hold that an uncontested affidavit is tantamount to an admission and Certiorari will lie. In the case under review, a full hearing had not materialized, therefore, it would not have been open to the court to treat the appellant's affidavit as a confession. It is of significance to

note that a finding of an admission would eradicate the necessity for a substantive hearing.

Jones, J erroneously found that the affidavit of the appellant amounted to a confession of fraud for want of an affidavit in response. Notwithstanding this conclusion, he had expressly taken into consideration, the fact that the application before them was not a substantive hearing at which hearing, the respondent would be afforded full opportunity to respond. His view that the application was not a substantive hearing is clearly inconsistent with his finding.

It was Mr. Small's further submission that the application for leave has a low threshold and the appellant had raised a proper case for the grant of leave for judicial review. This, he argued, the majority court failed to consider.

It is indisputable that an application for leave to proceed to judicial review carries a low threshold. This proposition had been eminently enunciated by Lord Diplock in ***R v I.R.C. ex parte National Federation of Self-Employed and Small Businesses Ltd.*** [1982] AC 617 at 643-644 when he said:

> "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."

In determining whether an applicant ought to be granted liberty to proceed to judicial review, the court is not required to embark on a circumspect examination of the evidence. The court on a cursory evaluation of the evidentiary material before it, decides whether or not a claim for judicial review is warranted. It must be satisfied that, on the information before it, an arguable case is evident.

In the instant case, the majority appears to have given consideration to such material before them as they perceived relevant and concluded that no arguable case was disclosed. It is my view, however, that the affidavit of the appellant reveals evidence which suggests an arguable case. Such evidence includes: The matter of the destruction of a sheet from the Firearms Register for April 2004, containing entries with respect to the firearm issued to Allen which would render it unavailable for the trial, and the misleading of the court as to securing Dunchie's attendance at the trial. These could point to culpability on the part of certain police officers.

However, even if there is an arguable case, a court would have to be concerned with a manifestly essential pre-requisite for an application for judicial review namely, its jurisdictional competence to hear and determine the claim. This is a feature which was critical to the application and in my judgment, in the circumstances of this case, a court of judicial review would lack the jurisdictional capacity to hear

and determine the matter. In considering ground (d), the question of the court's jurisdiction in matters of this nature will be examined fully. Grounds b and c:

> "(b) The learned judges of the majority of the Full Court erred in law when they failed to appreciate that the overriding objective of the CPR 2002 is to deal with cases justly as stated in s.1.1(1).
>
> (c) The learned judges of the majority of the Full Court erred in law when they failed to pay any or sufficient regard to section 1.2 of the CPR which states that "The Court must seek to give effect to the overriding objective when it: (a) exercises any discretion given by the rules; or (b) interprets any rules"."

It was submitted by Mr. Small, that the majority failed to have any or sufficient regard for rules 1.1 and 1.2 of the Civil Procedure Rules 2002 (CPR) and as a consequence, failed to deal with the case justly in light of the finding that the circumstances of the case were repugnant and repulsive.

The appellant's reliance on rules 1.1 and 1.2 of the C.P.R., Mr. Foster submitted, is misconceived. He argued that the overriding objective of the rules would only be apposite in the event of the exercise of a discretion permitted by the rules themselves, or, in the interpretation of a rule.

Rule 1.1 of the C.P.R. provides:

> "1.1 (1) These Rules are a new procedural code with the overriding objective

of enabling the court to deal with cases justly.

(2) Dealing justly with a case includes –
(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;
(b) saving expense;
(c) dealing with it in ways which take into consideration –
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Rule 1.2 states:

> "The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules."

The overriding objective in rule 1.1 must be construed as governing matters in which the court in the exercise of its powers under the rules, or, in which a particular construction is sought to be placed on a rule as ordained by rule 1.2.

Part 56 of the C.P.R. details the scope of an application in respect of an administrative claim. The rules under this Part are clear and unambiguous and do not lend themselves to interpretation. In ***Vinos v Marks & Spencer*** [2001] 3 All ER 784 at page 789, Lord May, in treating with the interpretation of the CPR against the background of the overriding objective said:

> "Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored".

So for as the exercise of the court's powers are concerned, rule 56.6(2) empowers the court to extend time. The general words of rule 1.2 cannot extend to allow a court to do what rule 56 does not permit it to do.

Rule 56 does not outline the factors which ought to be taken into account in the grant or refusal of an application for leave to move for a prerogative order. On an application for such order, the court, in determining the order which should be made, is obliged to consider the evidence before it and may be guided by authoritative judicial decisions and not by the CPR. The court on review of the evidence before it would thereby decide whether an arguable case for judicial review is raised.

The court's exercise of its authority under rules 1.1 and 1.2, in relation to rule 56, is restricted only to that which is permissible under rule 56.6 (2). Save and except for the provision of rule 56 (2), rule 56, does not bestow on the court any additional power.

The majority was correct in holding that the C.P.R. was of no assistance in the determination of the circumstances under which leave ought to be granted.

Ground (d):

> "The learned judges of the majority of the Full Court erred in law when they decided that they did not have 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."

It was submitted by Mr. Small that in exceptional circumstances, as in the instant case, the court, in the exercise of its inherent jurisdiction, is clothed with the authority to protect its process from abuse and to reverse any decision made as a consequence of fraud or misconduct perpetuated against the administration of justice.

Mr. Foster submitted that, where the court's jurisdiction is statutory, as in cases concerning prerogative orders, the concept of inherent jurisdiction is rendered inapplicable. He argued that in the circumstances of this case, the grant of any of the reliefs sought by the appellant is not permissible by way of judicial review.

The jurisdiction of a validly constituted court designates the confines within which it is empowered to hear and determine matters before it. The Supreme Court derives its jurisdiction from the Judicature (Supreme Court) Act. Section 27 of the Act expressly categorizes it as a superior court of record.

Section 40 of the Act specifies the sittings of the Court which falls within the purview of section 27. Section 40 provides:

> "A judge Court of the Supreme Court –
> (a) holding a Circuit Court; or
> (b) sitting as an Election Court
> constitutes a Court of the Supreme Court."

It is an irrefutable principle of law that a court is empowered with an inherent jurisdiction to control and supervise its proceedings to obviate any abuse of its process. The learned authors of Halsbury's Laws of England 4th Edition volume 37 at page 22 paragraph 14 recognise the principle in the following context:

> "The jurisdiction of the court which comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to

> exercise (1) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process, (2) control over persons, as for example over minors and mental patients, and officers of the court, and (3) control over the powers of inferior courts and tribunals.
>
> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined 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."

The court's empowerment in the control of its proceedings which are wanting in *bona fides* can only be exercised within the parameters in which the court is authorized to operate. In a proper case, a court will pronounce a claim to be an abuse of its process. This can only be done if jurisdictionally, the court has the capacity so to do. So far as prerogative remedies are concerned, a Court of superior jurisdiction may exercise superintendence over an inferior court but not over a court of concomitant jurisdiction.

A High Court is a superior court of record. It is not subject to judicial review. Lord Scarman, in the case of ***Re Racal Communications Ltd.*** [1980] 2 All E.R. 634, lends support to this proposition, when at page 646, he said:

> "But the High Court is not an inferior tribunal. It is one of Her Majesty's courts of law. 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. It has inherited the jurisdiction of the superior common law courts of first instance."

Further support for the foregoing principle is found in Wade and Forsyth, Administrative Law, 7th Edition at page 640 where the learned authors declare:

> "The High Court and other superior Courts are beyond the scope of these remedies not being subject to judicial review."

In dealing with the status of the High Court and the question of judicial review of its decisions, in ***Sulaiman v Commandant, Tanglin Detention Barracks*** [1986] LRC (Const.) 528 at 532, Sirnathuray, J stated:

> "Where courts are expressly declared by statute to be in superior court it is beyond doubt that the High Court has no jurisdiction over it. Their decisions cannot be subject to review."

The remedy sought by the appellant is certiorari. The applicability of this remedy is reserved for the quashing of a decision of an inferior court on review by a superior court. This principle is acknowledged by the learned authors of Halsbury's Laws of England, 4th Edition Volume 1 at page 150 as follows:

> "Certiorari lies, on the application of a person aggrieved to bring proceedings of an inferior tribunal before a High Court for review so that the court can determine whether they shall be quashed or to quash such proceedings."

In addition, the learned authors stated:

> "The order cannot be directed by the High Court to any tribunal which is a branch of the High Court for the purpose of quashing its proceedings."

It has been clearly demonstrated by the authorities that in matters in which judicial remedy is sought, the court's jurisdiction is limited by statute. No enquiry is permitted by a court save as to that which is within its power to decide.

Any party who is adversely affected by a decision of one arm of a superior court is not at liberty to seek redress by way of judicial remedy from another arm of such court. Consequently, a party aggrieved by the decision of one division of the High Court is restricted from obtaining permission to move another division of that court, for an order of certiorari. See ***Wee Choo Keong v Lee Chong Meng*** [1996] 4 LRC 1.

In an effort to establish that a not guilty verdict, improperly or irregularly obtained may be reviewed by judicial process, Mr. Small cited several cases. These include ***R v Dorking*** JJ ex p. Harrington [1984] 1 AC 743, ***R v Steven John Griffiitt et al*** (1981) 72 Cr. App. R 307 ***R v Hendon*** JJ ex p. D.P.P. (1993) Cr. App. R 227 ***R v West***

Sussex Quarter Sessions ex p. ***Albert and Maud Johnson*** [1974] 1 Q.B. 24. and ***R v Gillyard*** (supra). Unfortunately, none of these cases assist in demonstrating that the decision of the Portland Circuit Court a court of equal jurisdiction to a judicial review court, can be judicially reviewed. All of the cases cited were concerned with the setting aside of decisions of inferior courts by courts of superior jurisdiction.

The learned judges of the Full Court were bound to act within the ambit of the Judicature (Supreme Court) Act and as a consequence were powerless in granting the application. No material error of law or fact was committed by the judges of the majority court in the exercise of their discretion.

It is of manifest importance to allude to the fact that the appellant sought not only to be permitted to proceed to be heard on a claim for *certiorari* to quash the verdict of acquittal but also a declaration that the trial was a nullity. In an appropriate application, certiorari will issue from the High Court to quash the decision of an inferior court and a declaration would render the proceedings nugatory. Jones, J fell into error as he concluded that a declaration to quash the verdict would be an appropriate remedy. The substance of the declaration sought is effectively the same remedy sought by way

of certiorari. A judicial review court would lack the competence to make a declaratory order.

Any declaratory order made by it, quashing the verdict, would be void for want of jurisdiction.

I would dismiss the appeal with no order as to costs.

HARRISON, J.A.

ORDER:

The appeal is dismissed with no order as to costs.