Privy Council Appeal No 81 of 2007

Millicent Forbes *Appellant*

v.

The Attorney General of Jamaica *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 19th March 2009

Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Walker of Gestingthorpe
Lord Carswell
Lord Mance

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*[Delivered by **Lord Hoffmann**]*

1. On 14 April 2000 the appellant's daughter Janice, aged 12, was shot dead in a street in Kingston. Since then, the appellant has been engaged in trying to have the child's killer brought to justice. The information which she received, in particular from another daughter who was present at the scene, was that Janice had been shot by one of a group of policeman who then refused assistance while she lay dying on the pavement. The appellant says that in the course of her attempts to discover what happened she was harassed by the police and offered money if she would drop the matter. Eventually a policeman named Rohan Allen was charged with murder. After a preliminary inquiry which

lasted sixteen months he was committed for trial. After some adjournments and a change of venue, this took place in the Portland Circuit Court, where on 15 March 2004 Allen pleaded not guilty and was put in the charge of the jury.

2. It appears that the main evidence to identify Allen as the person who fired the fatal shot was the ballistic examination of a fragment of a bullet taken from Janice's body. It was said to show that the bullet had been fired from a particular police gun. The prosecution proposed to prove that the gun in question had been used by Allen in two ways: first, by production of the firearm register, which would have shown which gun had been issued to him, and secondly by production of a statement which Allen had made in the course of the investigation. However, after the plea had been taken and the jury empanelled, Crown counsel told the judge that the relevant parts of the firearms register had been destroyed in a fire and that the Detective Sergeant to whom the statement had been made was overseas and that the inquiries which had been made suggested there was no likelihood that he would return. In the circumstances, he had decided that he could offer no evidence against the defendant. The judge thereupon directed the jury to return a verdict of not guilty and they did so.

3. The appellant claims that the information put before the court about the availability of the Detective Sergeant's evidence was false and was, together with the disappearance of the firearms register, part of a fraudulent conspiracy by members of the police to ensure that Allen was acquitted. She says that in the circumstances the proceedings were a sham and has applied for leave to bring proceedings against the Attorney General for certiorari to quash the acquittal and a declaration that the trial was a nullity.

4. Wolfe CJ refused leave on 1 October 2004 on the ground that the Circuit Court was a superior court of record and therefore not amenable to judicial review. A renewed application for leave was refused by the Full Court (G Smith and Dukharan JJ, Jones J dissenting) on the same ground on 24 February 2005. The Court of Appeal (Harrison P, Cooke JA and Harris JA) dismissed an appeal from the Full Court on 20 December 2006. The appellant appeals to Her Majesty's Privy Council.

5. Their Lordships are fully conscious of the tragic circumstances of this case and the pain and indignation which the appellant feels about the way the inquiry and the prosecution were handled by the police. But they have no doubt that the courts below were right. Judicial review is not an available remedy in this case and the grounds upon which the Chief Justice refused leave are unassailable. Judicial review is the procedure by

which the Supreme Court ensures that inferior courts and administrators act lawfully and within their powers. It is not a mechanism by which one judge of the Supreme Court can quash the decision of another.

6. Mr Small QC, who put the appellant's case with the greatest possible skill, referred the Board to cases in which it had been decided that a superior court had power to re-open one of its decisions on the ground that it had been obtained by fraud, or that an action could be brought to set aside a judgment so obtained. But this is not an application or action by the Crown to set aside the verdict of the jury. In its present form, it is an action for judicial review against the Crown represented by the Attorney-General. The Courts below expressed some doubt as to whether, even if jurisdiction were in other respects well founded, the Attorney-General would be the appropriate defendant. Judicial review does not lie against the Crown as such and the Attorney-General can have no role in this case except as representative of the Crown. But the difficulty of finding some alternative defendant only highlights the problems of adapting the remedy of judicial review to a case like this.

7. Next, Mr Small submitted that the Supreme Court must have an inherent jurisdiction to protect its procedures from fraudulent manipulation. But the inherent jurisdiction is essentially ancillary. It enables a court properly to exercise its primary jurisdiction. It is not a freewheeling power to right any wrong and there is certainly no inherent jurisdiction for one superior court judge to quash the decision of another. Any such jurisdiction must derive from specific powers conferred by statute or common law.

8. Finally, Mr Small said that appellant was not seeking to review the decision of the judge and jury but rather the actions of the accused himself and those who participated in the alleged conspiracy to secure his acquittal. But the appellant is not seeking any remedy against the accused or anyone else. Mr Small accepts that even if the acquittal were declared a nullity, there could be no question of substituting a conviction. Whether anything would be gained in the appellant's quest for justice for her daughter would depend entirely upon whether the accused could be tried again.

9. This last consideration serves to emphasise the inappropriateness of judicial review proceedings against the Crown for the purpose of bringing about the result sought by the appellant. Assume, for the moment, that their Lordships were willing to accede to Mr Small's submission that they should extend the power of judicial review to enable the Supreme Court to quash one of its own decisions and assume that, upon a full investigation of the facts, it turned out that the acquittal had indeed been

obtained by fraud and that this justified a declaration that the verdict had been a nullity. What then? Presumably the Director of Public Prosecutions would indict him again. But the issue would then be whether he could rely on his right to plead *autrefois acquit*, a right protected by section 20(8) of the Constitution:

> "No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence..."

10. Whether this section, or the common law rule upon which it is based, would provide the Allen with a plea in bar at a retrial may turn on whether he can be said to have been "tried", in the sense of being in jeopardy of conviction, for the same offence. In the ordinary way, once he has been put in the charge of the jury, he is on trial and the fact that the verdict is directed after the Crown has offered no evidence does not make it any the less an acquittal for the purposes of the plea of autrefois acquit. But the Solicitor General, who was very properly concerned to put before the Board any material which might assist the appellant, referred their Lordships to the case of *People v Aleman* 667 NE 2nd 615 (Ill.App. 1 Dist 1996) in which the Appellate Court of Illinois held that an accused who had secured his acquittal by bribery of a judge had not been in jeopardy of conviction and was therefore not entitled to plead autrefois acquit.

11. The Board expresses absolutely no view on whether this case provides a relevant analogy. But the question can be decided only at the retrial itself. An order of a civil court in judicial review proceedings, quashing the acquittal, would not bind or even assist the judge who presides at the retrial. The accused is not a party to the judicial review and therefore cannot be bound by anything it decides. Mr Small suggested that he could be joined as a party. But their Lordships do not consider that this would be a fair or proper course of action. In the present case, the question of whether autrefois acquit is available may raise questions of disputed fact which would be decided on a civil standard of proof instead of the criminal standard which would apply at the retrial.

12. Their Lordships therefore wish to make it clear that their decision in this appeal does not rest upon a technicality of procedure or unwillingness to extend the scope of judicial review to do justice in a new situation. It rather because nothing would be achieved by allowing these proceedings to go ahead, even if they were to be entirely successful. In

practical terms, the important point is not whether the verdict of acquittal can be set aside but whether the accused can be tried again. That question can only be determined in criminal proceedings against the accused.

13. It is therefore for the Director of Public Prosecutions to decide whether to re-indict the accused and submit that he is not entitled to plead autrefois acquit. That will require her to form a view, first, as to whether the facts will support the allegation that the acquittal was procured by a fraud on the court and, secondly, whether, as a matter of law, that would deprive the accused of his plea. The Director's decision will in principle be subject to judicial review, but their Lordships do not need to emphasise the reluctance of the courts to question the Director's discretion in these matters. So far as these proceedings are concerned, their Lordships will humbly advise Her Majesty that the appeal should be dismissed.