IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 03617

IN THE MATTER of the death of Janice Allen on the 14th day of April, 2000

AND

IN THE MATTER of [a decision] of the Director of Public Prosecutions

BETWEEN MILLICENT FORBES CLAIMANT/RESPONDENT

AND THE DIRECTOR OF PUBLIC PROSECUTIONS DEFENDANT/ APPLICANT

Mrs. Shawn Wilkinson instructed by Wong Ken and Co. for the Claimant/Respondent.

Mrs. Diahann Gordon-Harrison and Mrs. Tracey-Ann Johnson for the Defendant/Applicant.

Civil Procedure – Judicial Review – Claim filed pursuant to leave to apply being granted - Application to strike out claim – Whether application may be granted - Whether leave to apply may be set aside –

Civil Procedure – Judicial Review – Exercise of discretion by Director of Public Prosecutions – Whether clear that discretion properly exercised

March 1 & April 9, 2010

BROOKS, J.

This is an unusual application, but unusual applications are not strange to Miss Millicent Forbes who lost her daughter, Janice Allen to a bullet from a gun almost ten years ago. The application is to strike out Miss Forbes' claim for judicial review of a decision of the Director of Public

Prosecutions. The decision was the Director would not to prosecute Constable Rohan Allen for the death of young Janice. Miss Forbes secured leave to apply for judicial review from Campbell, J. on July 23, 2009, yet the Director seeks to strike out the claim filed in pursuance of that leave. Whether that is procedurally possible and whether it should be done in this case are the questions which are to be decided in assessing this unusual application.

The Background

Constable Allen (no relation to Janice) had previously been charged with murder in respect of Janice's death but was acquitted by a jury. This was after the prosecution at his trial offered no evidence against him. Miss Forbes sought to have the acquittal quashed but that application was refused by the Supreme Court, the Court of Appeal and the Privy Council.

Their Lordships' decision in *Forbes v The Attorney General of Jamaica* PCA 81 of 2007 (delivered 19/3/2009) seems to be the inspiration behind both Miss Forbes' present claim as well as the instant application. At paragraph 13 of the judgment, the Privy Council said it was for the Director to decide whether to re-indict Constable Allen. Their Lordships further said in that paragraph, that the Director's decision:

> "...will require [the Director] 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 [of autrefois acquit]. **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.**" (Emphasis supplied)

The Director delivered her decision on the matter on April 30, 2009. She decided not to re-indict Constable Allen. It was then that Miss Forbes sought and received leave to apply for judicial review of the Director's decision. Miss Forbes' resultant claim sought the following reliefs:

1) An Order of Certiorari to quash the Defendant's Ruling issued on April 30, 2009 not to re-indict the accused for murder;

2) An Order of Mandamus directing the Defendant to conduct a thorough investigation into whether the facts will support the allegation that the acquittal was procured by fraud on the court and whether, as a matter of law, that would deprive the accused of his plea (of *autrefois acquit*); and directing the Respondent to reconsider her decision in light of the questions posed by the Privy Council and the Applicant in correspondence dated 12th May 2009.

The claim came on for its first hearing on September 9, 2009 and orders were made, with which both sides have complied. On February 22, 2010, the Director filed the present application, for hearing at the scheduled continuation of the first hearing.

Can the grant of leave be properly set aside?

As part of her application, the Director has asked the court to set aside the grant of leave to apply. Mrs. Harrison, on behalf of the Director relied on the fact that the decision of Campbell, J. was made without notice to the Director and therefore a judge of concurrent jurisdiction may, in an

appropriate case, properly set it aside. Learned counsel relied on *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies and another* (1991) 28 JLR 198; [1991] 4 All ER 65 in support of the submission.

In that case, the Privy Council accepted that an *ex parte* order was, by nature, provisional only. It also seemed to accept the principle "that a judge of the Supreme Court has an inherent jurisdiction to set aside or vary an order made *ex parte* and even to revoke leave given *ex parte*, but that this only applied where new matters are brought to his attention either with respect to the facts or the law". (See page 202 A of the JLR report) Their Lordships, however, preferred a statutory basis for the jurisdiction to set aside. I take that view because, in resolving the issue, their Lordships, at page 202E, relied on Order 32 rule 6 of the English Supreme Court Rules, which addressed orders, made *ex-parte*. That specific rule (among others) was then applicable in Jamaica by virtue of section 686 of our Judicature (Civil Procedure Code) Law.

I am of the view that, with the advent of the Civil Procedure Rules 2002 (CPR), we now have specific guidance in our jurisdiction, touching and concerning the matter. Rule 11.16 of the CPR specifically allows for orders made on an application made without notice (such as this was) to be set aside. The application to set aside such an order must, however, be made

not more than 14 days after the resultant order was served on the respondent. The Director clearly cannot claim the benefit of that rule.

In so far as the issue of the inherent jurisdiction is concerned, I do not find that there has been any new material which would justify invoking that jurisdiction. It was also the finding of their Lordships in *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780, at page 789 that:

> "Where leave to move for judicial review has been granted, the court's power to set aside the grant of leave will be exercised very sparingly."

Their Lordships also said at page 792, that "[i]t is clear, on the authority of [*R v Secretary of State for the Home Department, Ex p Chinoy* (1991) 4 Admin LR 457], that the leave previously granted should not have been set aside unless the court was satisfied on *inter partes* argument that the leave should plainly not have been granted". I do not understand Mrs. Harrison to be asserting that position in respect of this grant of leave. In my view, no such charge could properly be made. The Director has not convinced me that the leave granted by Campbell, J. should be set aside.

Should the claim be struck out?

Mrs. Harrison is, however, on more sure ground in respect of the jurisdiction to strike out the claim. There are important differences between an application to set aside leave to apply and an application to strike out the claim resulting from leave having been granted. Firstly, the latter

application considers a Claim Form filed subsequent to the order granting leave. Secondly, rule 56.13 of the CPR, stipulates that at the first hearing of a claim for judicial review, the provisions of Parts 25-27 of the CPR, dealing with case management, apply. Rule 26.3 (1) (c) allows the court to strike out a statement of case if it discloses no reasonable grounds for bringing or defending a claim.

On this basis, therefore, the court does have the jurisdiction to strike out a claim which has been filed as a consequence of leave having been granted. The question now, is whether this claim should be struck out.

The applicable principles in relation to Judicial Review

The law relating to the issue of judicial review of a decision of the Director of Public Prosecution is somewhat paradoxical. On the one hand it is clear that the Director's decisions are subject to judicial review. However, on the other hand, the courts are generally unwilling to grant review of those decisions.

The Director, by the Constitution of Jamaica, is vested with power to institute criminal proceedings and the exclusive power to take over or discontinue such proceedings. In the exercise of those powers, the Director, "shall not be subject to the direction or control of any other person or authority". (Section 94(6)) That provision does not preclude this court from

exercising jurisdiction in relation to the exercise of the Director's powers. (Section 1(9))

That the court does have the power to review decisions made by the Director, was made clear by the Privy Council in *Mohit v The Director of Public Prosecutions of Mauritius* PCA 31 of 2005 (delivered 25/4/2006). Their Lordships were then considering constitutional provisions very similar to ours concerning the authority of the Director of Public Prosecutions.

A number of cases have been cited by Mrs. Harrison to demonstrate that the court will not interfere with a decision of the Director but in the most exceptional circumstances. A distinction is drawn however, between cases where the Director decides to prosecute and those where the Director decides not to prosecute. In the latter situation the court is more likely to grant leave to apply for judicial review and to impose sanctions in appropriate cases.

If then, the Director decides not to prosecute any person, on what basis may this court interfere with that decision and to what end? In *Sharma,* cited above, their Lordships explained that "[d]ecisions have been successfully challenged where the decision is not to prosecute [see *Mohit v Director of Public Prosecutions of Mauritius* ...] in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on

appeal, and judicial review affords the only possible remedy...". (See page 788) The rationale for the court being reluctant to review such decisions is set out at paragraph 23 of the judgment in *R v The Director of Public Prosecutions, Ex parte Patricia Manning and Elizabeth Melbourne* [2001] QB 330, [2000] EWHC 562 (QB):

> "Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, R. v. Director of Public Prosecutions, ex parte C [1995] 1 Cr. App. R. 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else.... The Director and his officials ...will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. **It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere." (Emphasis supplied)**

Their Lordships did, immediately after those words, express the need for caution. They said:

> "At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

Two other authorities need to be cited. The first is *Matalulu and another v DPP* [2003] 4 LRC 712. That was a decision of the Supreme

Court of Fiji. In it, the court considered constitutional provisions in respect of the Director which are very similar to our own. This was against the background of the DPP of Fiji taking conduct of privately instituted prosecutions and issuing a *nolle prosequi* therein. The DPP gave reasons in writing for the course taken. The Supreme Court, on appeal, found that leave to seek judicial review ought not to have been granted and gave guidelines as to the manner in which applications for leave in such cases ought to be assessed. At page 735-6 of the judgment the court said:

> "The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:
>
> 1. In excess of the DPP's constitutional or statutory grants of power- such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).
> 2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion- if the DPP were to act upon a political instruction the decision could be amenable to review.
> 3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
> 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
> 5. Where the DPP has fettered his or her discretion by a rigid policy- e.g. one that precludes prosecution of a specific class of offences.
>
> There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. **But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be**

> **vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings.** Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice. (Emphasis supplied)

The court conceded that where the DPP decides to discontinue a prosecution on a mistaken view of the law then a stronger case for review may be made. The error which informs such a decision, the court explained, "is not an error which goes to the scope of the DPP's power or vitiates the proper exercise of the DPP's discretion". It continued at page 736-7:

> "Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The DPP is empowered to make such judgments even though they maybe wrong on the law or mistaken on the facts."

The other case that I find important for the present purposes is *Andrews v The Director of Public Prosecutions and others* HCVAP 2008/003 (delivered 14/7/2008). It is an unreported decision of the Court of Appeal of Saint Vincent and the Grenadines. There, the court considered a refusal of leave to apply for judicial review of actions taken by the Director of Public Prosecutions which were identical to those in *Matalulu.* An important difference to the cases is that the private prosecution was against the Prime Minister of Saint Vincent and the Grenadines.

The constitutional provisions were, again, almost identical to our own provisions in respect of the functions of the Director of Public Prosecutions. The court cited a number of cases including *Matalulu* and relied on the

guidelines from that case which have been quoted above. After considering those guidelines and finding no purchase in them for the applicant's case the court went further still. It considered whether there was "some other compelling reason why the appeal should be heard". It assessed whether the "public interest element" and "the applicant's feeling of injustice", should cause the applicant's case to go forward. On the question of the public interest, it cited the decision in *Re King's Application* (1980) 40WIR 15. There the court said, in part:

> "...It cannot be accepted that a police officer should be charged and prosecuted for murder if a prima facie case is not made out. It cannot be in the public interest that a police officer should be treated differently from a civilian in such matters".

The Court of Appeal went on to demonstrate that to pursue a prosecution, where was no sufficient evidence to warrant the charges, could well be deemed an abuse of the process of the court.

The appellant's apparent feeling of injustice was an element, the court stated, that had to be objectively assessed. In that case the court found that the applicant had no objective basis on which to feel a sense of injustice as a result of the refusal of leave.

The applicable principles relating to Striking out Statements of Case

The current law regarding applications to strike out statements of claim on the basis that they disclose no reasonable grounds for bringing or

defending a claim stems from rule 26.3 (1) of the CPR. There are several cases which stipulate that an application to strike out will be refused if the application requires minute and protracted examination of documents. Mrs. Wilkinson, on behalf of Miss Forbes cited *S & T Distributors Ltd. and another v CIBC Jamaica Ltd. and another,* SCCA 112/04 (delivered 31/7/2007) in which Harris J.A. said at page 29:

> The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases...
>
> **In light of the foregoing, it is clear that a claim will only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real prospect of success contemplates the existence of a claim which carries with it realistic prospect (sic) of successfully prosecuting the claim as opposed to a "fanciful" prospect**." (Emphasis supplied)

There is, therefore, another principle to be borne in mind. It is that, although this is not the hearing of the review application, the court must decide in assessing the issues, whether the claim is frivolous and vexatious or an abuse of the process of the court. Similarly, if the law on the point is clear and it resolves the relevant issues then the claim should not be allowed to go to trial. (See *Kent v Griffiths* [2000] 2 All ER 474 *per* Woolf, M.R. at page 485 b.

Application to the instant case

Miss Forbes has laid a number of complaints against the Director's decision. They were wide ranging but mostly they accused the Director of failing to do a number of things before coming to her decision. Mrs. Harrison has submitted that the Director has addressed all these matters in her detailed reasons for her decision.

I have sought to demonstrate that this exercise is not to be a detailed assessment of the respective cases of the parties. The question is whether Miss Forbes has shown this case to fall into the category of the exceptional, so as to show a reasonable prospect that there will be a judgment to quash the Director's decision.

In examining the grounds for the application it will be observed that the first five grounds of complaint spoke to the issue of whether Constable Allen's acquittal was secured by fraud. The sixth and seventh accuse the Director of failing to sufficiently consider the public interest where this was a case that a citizen had died at the hands of an agent of the State. The eighth mainly detailed failures to determine why it was that the available evidence was lost and/or not produced at the trial. The ninth and tenth accuse the Director or unreasonableness in arriving at the decision.

In my view, the real point of the exercise on which the Director embarked, was to determine whether Constable Allen could be successfully prosecuted on a new indictment. It is true that the question of *autrefois acquit* was the primary hurdle to be cleared in achieving that end, but there were others, not the least of which was whether sufficient evidence could be marshalled to convict Constable Allen. The relevant complaints raised by Miss Forbes in this area are detailed in ground 8 o of her Claim:

> "In relation to whether or not the Defendant [the Director] could effectively prosecute a case against Rohan Allen:-
>
> 1. the Defendant failed to interview Calvin DaCosta [a potential eye-witness] to ascertain whether he could be a viable prosecution witness;
>
> 2. The Defendant failed to conduct an adequate investigation into whether [Inspector] Lynval Dunchie could be located, more specifically, the Defendant failed to contact Interpol or the Canadian authorities to seek their assistance in locating the said Lynval Dunchie;
>
> 3. The Defendant failed to conduct an interview with Ann Marie Allen, an eye-witness to the killing of Janice Allen, to ascertain whether she may be a viable prosecution witness;
>
> 4. The Defendant failed to consider sufficiently, or at all, why the statement of Lynval Dunchie could not have been read into evidence;
>
> 5. The Defendant failed to consider sufficiently, or at all, whether parole (sic) evidence of the contents of the Firearms Register could have been taken."

The Director, in the reasons for the decision, addressed the issue of fraud, the issue of *autrefois acquit* and the critical issue of a successful prosecution.

On the issue of fraud, the Director found that no fraud could be established as a matter of law and "the prosecution could not seek to deprive the accused of his plea of *autrefois acquit* under the Constitution.

The Director also specifically addressed the following issues in the document outlining the reasons for the decision:

a. the missing firearms register and the admissibility of the contents of the register (pages 10-11);

b. the location of Inspector Dunchie and the prospects of reading his statement into evidence (pages 16-17);

c. the admissibility of a statement signed by Constable Allen (pages 14-15);

d. the credibility of the identification of Constable Allen by the eye-witness (pages 9 and 29), and,

e. factors to be considered when exercising the discretion not to prosecute (pages 27-28).

Having reviewed all those matters the Director concluded at pages 28-29:

> "For the avoidance of further doubt, I wish to clearly state that the Crown would not be in a position to evidentially establish a *prima facie* case wherein there is a nexus/link between the accused [Constable] Rohan Allen and the M16 firearm from which the fragments of bullets which were found in Janice Allen's body. This is further compounded by the fact that there is no evidence of identification as a matter of law which would connect Rohan Allen as the person who fired the M16 (he was not known before to the sole eyewitness and he was never pointed out on an identification parade)"

I find that the decision was comprehensively reasoned and addressed the critical issue of the probability of a successful prosecution. It is true that there was no assessment made of Calvin DaCosta (a person found injured arising from the same shooting incident which claimed young Janice Allen's life), as s potential witness, but it would seem to me obvious that the same weakness in respect of the issue of identification (dock identification) would affect Mr. DaCosta's testimony.

On the issue of the public interest and on the question of Miss Forbes' sense of whether justice has been done, I can do no better than to adopt the words of the court in *Re King's Application* which I have quoted above. It cannot be that a person should be forced to go through the rigours of a prosecution and trial, where the evidence is plainly insufficient, just to appease a public sense of indignation, however rightly held. I accept that, unlike the applicant in the *Andrews* case, Miss Forbes has sought to advance this prosecution in every way possible. Miss Forbes will undoubtedly be aggrieved by her Claim being struck out but I am obliged to decide based on the principles of law which guide the court in this matter. It is not only Miss Forbes' grief which must be considered.

Conclusion

The Director's application to set aside the grant of leave to apply for judicial review must be refused, firstly, because it is not entitled to the benefit of the provisions of rule 11.16 of the CPR and secondly, insofar as the inherent jurisdiction of the court is concerned, because the Director has not shown that the grant of leave clearly ought not to have been granted.

On the application to have the claim struck out on the basis that it discloses no reasonable grounds for having been brought, I find that despite the fact that Miss Forbes has raised a number of complaints against the Director's decision, the Director has fully and adequately addressed the critical issue of whether Constable Allen may be successfully prosecuted. There is no doubt that queries may be raised, after the fact, about any decision, but the Director has a constitutional power which must be exercised taking into account a wide scope of matters. In *Matalulu* the court stated at page 736 c:

> "....contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings."

I find that there is no basis on which the Director has been proved to have acted in bad faith or unreasonably and in the circumstances there is no basis on which this matter may properly be allowed to go forward for

review. The court will not quash a decision of the Director but in the most exceptional circumstances. In my view no exceptional circumstances have been proved by Miss Forbes. Her claim must be struck out as having no reasonable prospect of success.

Although the basis for striking out the claim is pursuant to the provisions of rule 26.3 (c) of the CPR, (disclosing no reasonable grounds for bringing same), I do not find that the claim was frivolous or vexatious and so I am prepared to find that no costs should be awarded against Miss Forbes pursuant to rule 56.15 (5) of the CPR (the applicant has not acted unreasonably in bringing the claim). It may, perhaps, be viewed as inconsistent to do so, but in any event, costs are in the discretion of the court and I am prepared to exercise that discretion in her favour on the basis just mentioned.

The orders of the court are therefore:

1. The Claimant's claim herein is hereby struck out as disclosing no reasonable grounds for bringing same;
2. The application to set aside the decision of Campbell, J. made herein on 2nd July 2009, is refused;
3. No order as to costs.