

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M.35 OF 2002

**CORAM: THE HONOURABLE MR. JUSTICE WOLFE, CHIEF JUSTICE
THE HONOURABLE MISS JUSTICE BECKFORD
THE HONOURABLE MR. JUSTICE MARSH**

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

AND

IN THE MATTER of the Coroner's Act

AND

**IN THE MATTER of the Office of the Director
of Public Prosecutions**

Richard Small and David Batts for the applicants
Kent Pantry, Q.C., Director of Public Prosecutions and Miss Christine Morris
for the Director of Public Prosecutions Office
Mrs. Nicole Foster-Pusey and Mrs. Monique Harrison-Beckford
for the Attorney General of Jamaica

Heard: July 15, 16, and October 31, 2002

Wolfe, CJ

Patrick Genius was fatally shot on the 13th day of December 1999. The allegations are that he was shot and killed in a shoot out with three policemen at Mona in the parish of Saint Andrew.

On the 29th day of May 2001, a Coroner's Jury in the Corporate Area Coroner's Court returned the following verdict:

"that Patrick Genius, late of 9A New Lincoln Road, Kingston, 26 years old, unemployed, marital status unknown, died on the 13.12.1999 at the University Hospital, as a result of gunshot wounds to the head and do further say person or persons criminally responsible."

Subsequent to the verdict of the Jury the matter was referred by the Coroner for the Corporate Area Coroner's Court to the Director of Public Prosecutions for him to take such action as may appear to him appropriate.

The Learned Director of Public Prosecutions having perused the depositions and such other available evidence ruled that there was not sufficient evidence in law to charge anyone for the death of Patrick Genius.

By Exparte Notice dated March 18, 2002, leave was sought to apply for Judicial Review of:

- (1) The decision of the Coroner of the Parish of Kingston and St. Andrew to refer a matter to the Director of Public Prosecutions rather than to charge the three (3) police officers with the offence of murder in accordance with the verdict of the Coroner's jury.
- (2) The decision of the Director of Public Prosecutions that no proceedings are to be instituted against the three (3) police officers.

- (3) The decision of the Director of Public Prosecutions not to disclose to the Applicant his reasons for not instituting proceedings against the three (3) police officers.

The applicant seeks the following relief:

- (a) An Order of Mandamus directing the Coroner and/or the Director of Public Prosecutions or either/or both of them to charge the three (3) police officers, namely, Detective Corporal Ronald Francis, Detective Corporal Claude James and Corporal Earle Grant with murder.
- (b) An Order of Certiorari to quash the Coroner's decision to refer the file in this matter to the Director of Public Prosecutions for a ruling and/or Certiorari to quash the ruling and/or determination of the Director of Public Prosecutions that no criminal proceedings be brought against any/or all of the said three (3) police officers.
- (c) A declaration that the finding of the Coroner's Jury meant and could only mean that the said three (3) police officers were to be charged with murder and a further Declaration that it is the duty of the Coroner upon such a finding to institute such prosecutions himself and a Declaration that the decision of the Coroner to refer the matter to the Director of Public Prosecutions was wrong.

- (d) A Declaration that in all the circumstances of this case the three (3) police officers or any or all of them ought to be charged with the murder and their respective guilt or innocence determined at trial.
- (e) An injunction to restrain the Director of Public Prosecutions from taking any steps to quash, withdraw and/or terminate any such criminal proceedings.
- (f) An order directing the Director of Public Prosecutions to take such steps as will be necessary to have the body of Patrick Genius exhumed for the purpose of retrieving from his body the bullet or bullets lodged therein.

The grounds upon which the reliefs are sought are as follows:

1. The Coroner of Kingston and St. Andrew erred in law and/or acted unreasonably and/or failed to act judicially when he refused, neglected and/or failed to institute prosecution of the three (3) police officers in accordance with the verdict of the jury and the provisions of the Coroner's Act.
2. That the Coroner of Kingston and St. Andrew erred in law and/or acted in excess of his jurisdiction and/or unreasonably and/or arbitrarily and without any lawful justification when he directed the jury not to name the individuals they considered to be responsible for the death of the deceased.

3. That the Director of Public Prosecutions has erred in law and/or acted unreasonably and/or *ultra vires* when he ruled that the said three (3) police officers were not to be charged.
4. That the Director of Public Prosecutions failed, neglected and/or refused to pay any or any sufficient attention to the medical evidence given at the Coroner's inquiry and/or to the oral evidence of the three (3) police officers in relation thereto.
5. That the Director of Public Prosecutions and/or the Coroner have abdicated their statutory and/or constitutional duties in that they have acted unreasonably and/or have failed to act as required by law and this Honourable Court in the interest of justice ought to order them so to act.
6. That the Applicant relies upon the following authorities among others:
 - (a) The Coroner's Act section 19(5) and 20
 - (b) Re Kings Application [1991] 40 WIR 15 and the cases cited therein.
 - (c) C. O. Williams Construction Limited v. Blackman [1994] 45 WIR 94.

On the 10th day of April, 2002, Jones J (Ag.) refused the Exparte Application for leave to apply for Judicial Review. The applicant now applies pursuant to section 564 (C)(4) of the Judicial Review Rules 1998, which states:

"where the application for leave is refused by the judge, or is granted on terms, the applicant may renew it by applying -

- (a) in any matter involving the liberty of the subject or in any criminal cause or matter, to a Full Court

- (b) in any other case, to a single judge sitting in open court or, if the Court so directs, to a Full Court."

Before embarking upon an examination of the legal arguments, it is necessary to summarize the alleged circumstances under which the deceased Patrick Genius came to his death.

Three police officers, Detective Corporal Claude James, Detective Corporal Ronald Francis and Corporal Earl Grant testified upon oath before the Coroner.

Detective Corporal James said that on December 13, 1999 he was travelling in his private motor vehicle along Hope Boulevard when he observed two men riding a motor cycle in the vicinity of the roundabout which intersects Hope Boulevard and Monterey Drive. He had seen both men in the area on three previous occasions. He telephoned Matilda's Corner Police Station and requested assistance. A police unit driven by Corporal Grant arrived on the scene. Corporal Grant was accompanied by Corporal Francis. The police officers alighted from their vehicles and approached the two men whereupon both men pulled guns and opened fire at the police men. The fire was returned. One of the men made good his escape on the motorcycle, the other who was later identified as Patrick Genius jumped over a nearby fence and ran away. He was pursued by the police. He ran into nearby bushes where he continued firing at the police. During the shoot out Genius fell to the ground and a .38 revolver

bearing serial No. BEE1557 was taken from a position beside him. He was taken to the University Hospital where he was pronounced dead.

The sworn evidence of Detective Corporal Francis and Corporal Grant as to how the deceased came to his death, support in every material particular the evidence of Detective Corporal James.

There is no witness other than the three police men who can say how the deceased came to his death.

The evidence of the Forensic Pathologist, Dr. Peasad Sarangi is that he saw five gun shot wounds on the body of the deceased. There was no evidence of gun powder deposit. His evidence as to the relative positions of the persons inflicting the wounds upon the deceased is at its highest equivocal.

Marcia Dunbar, a forensic analyst, testified that she examined swabs taken from the hands of the deceased and found no trace of gunpowder deposits.

The reasonable inference to be drawn from this evidence is that the deceased did not fire a gun on the day in question.

It is against this background of evidence that Mr. Small for the applicant submitted that there was considerable material on the depositions which negatived the testimony of the police officers that they had shot at the deceased in self defence.

This submission leads me to pose this question: if the three policemen were to be charged on what evidence would the crown rely to establish a *prima*

facie case? Would the forensic evidence be sufficient to establish a *prima facie* case?

This, no doubt, is the dilemma which confronted the Learned Director of Public Prosecutions when he ruled that there was not sufficient evidence in law to charge anyone.

It was conceded by Mr. Pantry, Q.C., that the exercise of his discretion pursuant to section 94(3) of the Constitution is subject to review by the Court.

In dealing with the review of the exercise of the Director of Public Prosecutions' discretion, Lord Bingham of Cornhill, in R. v. Director of Public Prosecutions ex parte Manning [2000] 3 WLR 463, 474, said:

"In most cases the decision will not turn on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to 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."

In Re King's Application (1991) 40 WIR 15 at p. 35, Sir Denys Williams C.J., dealing with a matter in which the basic criticism of the Director of Public Prosecutions' decision was that, on the evidence a person should have been charged and prosecuted, said:

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

The Learned Chief Justice went on to say:

"It must be remembered that if there was a prosecution, the burden would be on the Crown to make the jury feel sure, to prove beyond reasonable doubt, that Sgt. Bowen was not acting in self defence."

Mr. Small submitted that the Learned Director of Public Prosecutions did not take into consideration all the relevant matters and this can be deduced from the records, referring no doubt to the depositions and other available material.

The Director of Public Prosecutions in an affidavit dated June 18, 2002, at paragraphs 11 and 12 deposed as follows:

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

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

It was further submitted that the Learned Director of Public Prosecutions failed to give reasons for his decision. The applicant contended that the averments in paragraphs 11 and 12, do not constitute reasons.

Certainly, when the Director of Public Prosecutions says, "there was not sufficient evidence in law to charge anyone", he must be understood to be saying there was no evidence to establish a *prima facie* case against anyone, and therefore, it would be pointless to rule that someone be charged.

Let us assume that the Coroner's Jury had named the three police officers as being criminally liable for the death of Patrick Genius, would the Director of Public Prosecutions be obliged to prefer an indictment against them, while at the same time taking the view that there was not sufficient evidence to establish a *prima facie* case against any or all of them? We think not.

Section 94 of the Jamaica Constitution vests the Director of Public Prosecutions with authority to commence, take over or terminate prosecutions. This means, therefore, that it would have been legitimate for him to discontinue or terminate any charges arising from the jury verdict if he took the view that there was not sufficient evidence to sustain such a verdict.

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

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

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

Having regard to section 94 of the Constitution, the Director of Public Prosecutions would not be obliged to act upon the verdict of the Coroner's Jury or upon any directive from the Coroner himself. The matter having been submitted by the Coroner to the Director of Public Prosecutions and the learned Director having made a ruling, no useful purpose would be served in ordering a review of what transpired at the Coroner's Court or what ought to have been done by the Coroner.

The Director having acted upon the submission to him by the Coroner, the Coroner has become *functus*. The outcome of this matter must now turn upon the ruling of the Director of Public Prosecutions.

This approach is reinforced by the decision in Regina v. Director of Public Prosecutions, Exparte Manning and Another (Supra) where Lord Bingham of Cornhill said that a decision to quash the ruling of the Director of

Public Prosecutions, on Judicial Review, is not an order requiring the Director to prosecute but rather an order requiring reconsideration of the decision whether or not to prosecute.

Accordingly, leave is granted to apply for Judicial Review of:

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

Beckford, J: I agree.

Marsh, J: I agree.