IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00999/2005

BETWEEN	DIONNE HOLNESS	CLAIMANT
AND	THE CORONER OF KINGSTON AND ST. ANDREW	FIRST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	SECOND RESPONDENT

Ms. Shawn Wilkinson for the Claimant.

Ms. Tasha Manley instructed by the Director of State Proceedings for the Respondents.

Heard 10th July 2006 and 18th September 2006

Coroners Inquiry – S. 21 Alternative Remedy – Independent Evidence – Leaving Available Verdicts – Jury Selection

Campbell J

(1) A Coroners Inquest was held by His Honour Mr. Patrick Murphy, sitting with a jury in the Coroners Court for the Corporate Area, between the 8th December 2004 and the 10th day of January 2005. The inquest was to enquire into circumstances touching the death of Dwayne Graham, a 20 year-old male of 57 Waltham Park Road in the parish of Kingston.

(2) The Inquisition, sworn to by the jurors stated that Graham died on the 19th June 2003 at the intersection of Euspeut Avenue and Waltham Park Road, as a

result "of multiple gunshot wounds and that his death was as a result of justifiable homicide and no one was criminally responsible."

(3) On the 11th April 2005, Dionne Holness, businesswoman of 57 Waltham Park Road, the mother of the deceased, applied for judicial review pursuant to Part 56 of the Civil Procedure Rules 2002, as "a person with sufficient interest in the subject-matter of the application." She sought a Writ of Certiorari to quash the verdict of the jury and an order for Mandamus to compel the Coroner of Kingston to hold another inquisition touching and concerning the death of her son.

(4) The Attorney General applied to have Ms. Holness' application for judicial review struck out on the ground that she had failed to seek leave and that the Attorney General of Jamaica was not a proper party to the proceedings. A Change of Attorney was filed on the 11th November 2005. On 28th November 2005 the new attorneys amended Ms. Holness' application by applying for leave to apply for judicial review.

(5) On the 27th March 2006 Mr. Justice King refused the application for leave and gave as his reason that "The Coroners Act provides an alternative form of redress which is currently being pursued." The proceedings before this Court were therefore made pursuant to Section 21 of the Coroners Act.

S. 21 of Coroners Act, as an Alternative Remedy to Judicial Review

(6) It is well to note that judicial review is a collateral challenge and not an appeal. Where Parliament has therefore *uno flatu* provided an alternative statutory remedy, that remedy should be pursued before judicial review is permitted. Judicial review is a remedy of "last resort."

(7) In **R (on an application by JD Wheatherspoon plc) v Guilford Borough Council [2006] EWHC 815 (Admin)**, the Defendant submitted that the application for judicial review before the Court should be dismissed for failure to pursue the alternative remedy. The Defendants' submissions were supported by the authorities of R v Chief Constable of Merseyside Police ex parte Claverley (1986) 1 All ER 257 and R v Secretary of State of Home Department, ex parte Swati (1986) 1 All ER 717. In his judgment of Weatherspoon, Beatson J, at para 87, said;

> "Many other cases also refer to the principle that judicial review is a remedy of 'last resort' (*R v Hammersmith and Fulham LBC, ex parte Birkett* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593 at para 42, per Lord Steyn) or a 'long stop' (*R v Takeover Panel, ex parte Guinness plc* [1990] 1 QB 146, 177-178, [1989] 1 All ER 509, [1989] 2 WLR 863, per Lord Donaldson MR)."

(8) A vital issue for consideration in determining whether judicial review or the alternative remedy is the preferred course, is the adequacy of the alternative remedy in addressing the concerns raised by the Applicant In **R (on an application by JD Wheaterspoon plc) [Supra]** at para 90, Beatson J said:

"The test of whether a Claimant should be required to pursue an alternative remedy in preference to judicial review is the 'adequacy', 'effectiveness' and 'suitability' of that alternative remedy: see *ex parte Cowan, R v Devon CC, ex parte Baker* [1995] 1 All ER 73 at 92, 91 LGR 479, 11 BMLR 141. In *R v Leeds CC, ex parte Hendry* (1994) 6 Admin LR at 443 it was said that the test can be boiled down to whether 'the real issue to be determined can sensibly be determined' by the alternative procedure and in *R v Newham LBC, ex parte R* [1995] ELR 156 at 163 that it is whether 'the alternative statutory remedy will resolve the question at issue fully and directly.'"

(9) The grievance that Ms. Holness harbours are the perceived defects in the Coroners Inquest, which are particularised in the affidavit of Tasha Rodney, Attorney-at-Law, where at **para 11** she states;

In written submission to the Court I asked the judge to;
Read into evidence the reports of the independent pathologist, Dr. Odunfa.
Allow an expert to explain Dr. Odunfa's complicated report
Allow counsel to address the jury regarding the applicable law; and
Advise the jury that one of the conclusions that they can arrive at is that both constables are criminally responsible for Dwayne's death.
I exhibit hereto marked TR1 the said written submissions.

12 The Coroner read into evidence Dr. Odunfa's report but refused all my other requests.

13 The Coroner did not offer an explanation for his refusal.

14 I have attended Coroners Court regularly over the last nine months and I have noticed that the Coroner uses a number of jurors repeatedly.

15 I have seen the jurors on the panel in Dwayne Graham inquisition on many other panels before.

(10) The alternative remedy contained in Section 21 of the Coroners Act, provides as follows:

(1) Where a judge of the Supreme Court upon application made by an interested person or by or under the authority of the Director of Public Prosecutions, is satisfied either

(a) That a Coroner refuses or neglects to hold an inquest which ought to be held, or which he has been directed by the Director of Public Prosecutions to hold; or

(b) Where an inquest has been held by a Coroner that by reason of fraud, rejection of evidence, irregularity of proceedings insufficiency of inquiry, or any other circumstances or considerations, whether similar to the foregoing or not, it is necessary or desirable in the interest of justice, that another inquest should be held.

The judge may order an inquest to be held touching the said death, and may, if he thinks it just, order the said Coroner to pay such costs of an incident to the applicant as he thinks just, and where an inquest has already been held may quash the inquisition on that inquest.

(11) Before this Court, attorney for the Applicant submitted that, "If the learned Coroner had granted Counsel's application, there is a real likelihood that a different verdict could have been reached."

(12) What is sought is a new inquiry at which it will be open to the jury, after "proper" directions, to find either or both police officers criminally liable for her son's death. To my mind Section 21 adequately and effectively provides for this remedy. Section 21 (b) covers the areas normally allowed for judicial review. In the Council of Civil Service Unions v Minister for the Civil Service (1985) AC 375 Lord Diplock formulated a classification for judicial review, at page 410 he says, "**The first ground I would call 'illegality', the second 'irrationality' and**

the third 'procedural impropriety.'" The learned law lord had also forecasted that, **"That is not to say that further development on a case by case basis may not in the course of time add further grounds."** Proportionality, as a fourth head, may very well have arrived as evidence of that development. The claim here is to the illegality of the proceedings and additionally that they were procedurally improper.

(13) The procedure provided for by Section 21 of the Coroners Act is wider than judicial review. The item listed in Section 21(b) "fraud and rejection of evidence" may be regarded under the head of illegality, "irregularity of proceedings," may be regarded as "procedural impropriety," irrationality may well fall under the realm of any other consideration. Additionally, Section 21(b) allows for another inquest to be held, if it is **necessary or desirable in the interest of justice.**

(14) Considerations by the Court of factors designed to foster and maintain good administration in the dispensing of justice are relevant. The Court may properly consider that interested parties may be entitled to a full and fair inquiry. If the administration of justice is to enjoy the respect and the confidence of the citizenry, it must adhere to all procedural rules designed to preserve fairness and transparency.

(15) Section 19 of the Jamaican Coroners Act 1900 grounds the jurisdiction to hold an inquest. The particulars necessary for certification of the jury's verdict are

provided for in Section 19(5), the corresponding legislation, S. 4 (3) of the Coroners Act 1887, (U.K.) which was a consolidating legislation, provided;

> (3) After (viewing the body and) hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when and where the deceased came by his death, (and if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to murder).

(16) In the current English legislation the section is without both areas in brackets whereas the Jamaican legislation is without the first but has substantially retained the second bracketed area with some drafting changes. The Jamaican legislation therefore provides for verdicts which are accusatorial of criminal offences. In England, Section 56 (1) of the Criminal Law Act 1977 abolished committal for trial of any person for murder or manslaughter by a Coroner or jury. Rule 36 (2) of the Coroners Act 1984 states, "Neither the Coroner nor the jury shall express any opinion on any other matters." The Coroners' jury in the U.K. is expressly prevented from any expression of opinion other than what is enumerated in S. 4(3).

(17) In construing the Jamaican legislation, the conflicting interest of the parties have to be balanced by the Court, due consideration must be given to (a) the interest of the victims, and those representing them and the general public in being able to investigate the circumstances surrounding a death, moreso when agents of the state are involved, (b) the constitutional safeguards to protect the interest of

those who the jury might hold liable for the death of the deceased (c) the need to ensure that cases are dealt with expeditiously and that the matters are accorded proportionate share of available resources.

(18) In an inquest into a death caused by the police, the highest standard of investigation is required. Lord Woolf in R (Amin and Middleton) v Secretary of State for the Home Department (2002) 3 WLR 505 at para 62 said;

> "The use of fatal force by agents of the state requires the most careful scrutiny as 'a credible accusation of murder or manslaughter by state agents will call for an investigation of the outmost rigour conducted independently for all to see.' The functions of the inquest where state agents are involved are 'to give the beginnings of justice to the bereaved, to assuage the anxieties of the public.'"

The Applicant's Complaints

(a) **Application to address jury on the law**

(19) Counsel for the Applicant has conceded before this Court, that her application to the Coroner to be allowed to address the jury on the relevant law is inconsistent with settled law. The authority on which she had relied offers her no assistance. In **R v Southwark Coroner ex parte Hicks (1987) 1 WLR 1624**, the transcript of the inquest, contrary to the Coroner's affidavit, showed that Counsel had applied to be heard on the law in *the absence of the jury.* The Judge, having refused Counsel's application to make submissions because he thought that Counsel had wanted to address the jury on the law, had remarked that even if

submissions had been made, he would have rejected it. The Court felt that there was no need for pre-judgment of the issue, based on the remark of the Coroner. There is no such prejudgment in the instant case.

(b) **Independent Evidence**

(20) The Applicant complained further that the Coroner, read into evidence the report of Dr. Odunfa, the independent pathologist retained by the family of the deceased, but refused to have another expert explain Dr. Odunfa's report. As it transpired, the family was unable to locate Dr. Odunfa. The jury had before it two post-mortem reports, that of Dr. Ere Sheshaiah, who gave sworn testimony and was cross-examined by Counsel on the report of Dr. Odunfa.

(21) The Coroner, in his affidavit, stated that at the end of Dr. Sheshaiah's testimony, he asked the jury if they had questions for the doctor and they stated that they had no questions. It is noteworthy that Counsel, during cross-examination, did not seek to have Dr. Sheshaiah, reconcile or clarify such discrepancies that she thought existed between the two reports. There was no complaint that Dr. Odunfa's report was not properly put to the jury.

(22) Counsel for the Claimant relied on the case of R (on the application of Stanley) v Her Majesty's Coroner for Inner North London (2003) EWHC 1180 (ADMIN), the Coroner had failed to call any expert witness except the commanding officer, of the two police officers, who were responsible for the

shooting of the deceased. Although there were two experts present who were funded by the family. Dr. Sheshaiah does not stand in the same relationship to the deceased as does the expert in R v (on the application of Stanley) (Supra) or the examples cited therein. For example, in R v Wright and Bennet the reliance of the Coroner solely on the expert evidence of the Chief Medical Officer of the prison, in which the death took place. Similarly in R (Nicholls) the refusal to call any other evidence other than the Forensic Medical Examiner, whose conduct was being impugned. The Court found that 'this could not constitute a sufficient enquiry.'

(23) It cannot be overstated that evidence from an independent source is a crucial factor in the conducting of an inquest. Administrative inconvenience is not a sufficient reason not to call independent witnesses. I find that there was independent evidence in the report of Dr. Odunfa. There was sufficient opportunity provided to the jury and to Counsel for the Claimant to seek such clarification as they needed.

Failure To Leave All Available Verdicts

(24) The Applicant contended that the Coroner erred in law or acted unreasonably when he failed to inform the jury of all available verdicts/conclusions which they could arrive at based on the evidence.

The Coroner, in his affidavit, stated, "There was a paucity of evidence upon which to base a verdict of murder or manslaughter against any individual or individuals. Nevertheless, the jury was advised of the relevant verdicts that were available for them to decide upon, based on the evidence adduced. In directing the jury, I reminded them of their right to return a verdict of murder or manslaughter in respect of one or both police officers."

(25) It is clear that if the Coroner is of the view that the evidence is so weak or fraught with discrepancies, that it would be unsafe for a jury to come to a verdict, then he may take the matter from the jury. See R v Inner South London Coroner ex parte Douglas Williams (1999) 1 All E.R 344 page 348 Letter H – page 349 Letter c, per Lord Woolf MR:

> There is no prosecutor in relation to an inquest and while an inquest is a court, the Coroner's role is more inquisitorial, even when sitting with a jury than a judge. A prosecutor has considerable discretion as to what charges he prefers and the trial takes place on those charges. There are no charges at an inquest and a coroner must decide the scope which is appropriate and the witnesses to be summoned. He must therefore have a greater say as to what verdict the jury should consider than a judge at an adversarial trial...The conclusion I have come to is that, so far as the evidence called before a jury is concerned, the Coroner should adopt the Galbraith approach in deciding whether to leave a verdict to the jury.....the strength of the evidence is not the only consideration.....where in the judgment of the Coroner,.....it is not in the interest of justice that a particular verdict should be left to the jury, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is technically evidence to support them. It is sufficient if he leaves those verdicts that realistically reflect the thrust of the evidence as a whole. To

> leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the Coroner's conclusion he cannot be criticized if he does not leave a particular verdict."

Improper Selection of Jury

(26) Tasha Rodney's affidavit, states that over a period of nine months, she has noticed that the Coroners Court uses a number of jurors repeatedly, and that the jurors used in the inquisition touching the death of Dwayne Graham were used on several panels previously. I understand the challenge to the jury is twofold; firstly, the jury was constituted of persons who appeared regularly, secondly, selection was inconsistent with the Coroners Act. The affidavit of the Coroner on this point is to the effect; "I do not agree that in every inquest all of the jurors are the same jurors. It is correct that in some cases some jurors are repeated due to the perennial difficulty in securing the attendance of suitable persons to serve as jurors."

(27) The contention by Tasha Rodney, attests that over a period of nine months, some of the jurors who served on the panel were observed serving on several panels previously. The Coroner does not refute that contention; he denies that in all cases the same jurors serve. The Coroner attributes this to the problem of obtaining suitable persons to serve as jurors.

(28) The Coroners Act, 1900; Section 11 (1)

> Upon receipt of the medical and police reports, the Coroner shall, except under the circumstances hereinafter mentioned, as soon as practicable, issue his warrant for summoning not less than five nor more than thirty good and lawful persons to

> appear before him at a specified time and place, there to enquire as jurors touching the death of such persons as foresaid

The section mandates the Coroner to summon the persons before him "at a specified time and place." The Coroners Act is to be read in this context, in conjunction with relevant provisions of the Jury Act, Section 23 of the Coroners Act allows for the imposition of a fine on any juror summoned who does not appear, Section 23(2) expressly provides for Section 41 of the Jury Act to apply to the Coroners jury, as regards the recovery and enforcement of a fine.

(29) The process of empanelling jurors from the jury lists must be random, haphazard and indiscriminate. In the R v Divine, ex parte Walton [1930] 2 K.B 29 on an application for judicial review to quash the inquisition of a Coroner's jury, the Coroner stated in his affidavit, "It necessarily happens that *some of the same persons are summoned as jurors time after time*, and it follows therefore that most of the jurymen who can and who do attend are regularly summoned and become regular jurymen...." (Emphasis mine). The Court held, at page 34;

> "It is in our opinion quite contrary to the principle of jury system, which is the determination of questions of fact by persons **taken at haphazard from the general body of qualified persons**. It is an entire departure from this to have a small panel of 'regular jurymen' who must be perfectly well known to everyone in Hull who takes an interest in the matter. We are not called on to say whether or not the practice is actually illegal, and we express no opinion as to that, but it is in our view improper, and it has in fact led to what we hold to be an irregularity in the present case." (Emphasis mine)

(30) The Jury Act, Section 18, mandated the Registrar to make up panels for service so that all jurors shall be summoned equally and made impermissible the repeat placing of any juror until all the jurors have been placed once. Section 18 (b) allowed a Coroner to exempt any juror serving on any particular occasion, for any period that he thinks fit.

(31) The Coroner's affidavit is silent on the procedure that was used to summon the jurors in the instant case. The Act laid down a procedure that ensured that no juror should serve on repeated occasions before all other jurors have served; a clear attempt to have as many jurors participate and minimizing the frequency with which any one juror would be required to serve. S. 18 is the codification of the common law principle as enunciated in R v Divine.

(32) The language of Section 18 of Jury Act is mandatory. The provision that requires the Registrar to ensure that all jurors are equally summoned is similarly mandatory. On a proper application of these procedures it is inconceivable that one or more jurors who sat on the Dwayne Graham inquest could have served the Coroners Court repeatedly within the preceding nine months period. Even if the Coroner had issued his written summons, in compliance with S. 11 (1) of the Coroners Act, and we have no evidence on the point; it is clear there has been a failure to comply with the mandate of Section 18 of the Jury Act.

(33) In R v Merseyside Coroner, ex p Carr (1993) 4 All ER 65. Submissions had been made to the Coroner that the inquest should be continued with a jury. The Coroner accepted the submission, but no jury had been summoned. The Coroner did not wish to adjourn the inquest because all the witnesses were present. He directed that a pool of jurors be obtained from the nearby Crown Court. The Court held, on an application for judicial review, that the procedure was not in accordance with the relevant sections of the Coroners Act. The relevant section was Section 3 of the 1887 Coroners Act (UK) which is pari materia to Section 11 of Coroners Act (J). The court held that the procedures for summoning of Coroners' juries prescribed by the Act and the rules were not merely directory but mandatory.

At page 73 Neil LJ said;

> "I have come to the conclusion, however, that the procedure prescribed by the 1988 Act and the 1984 rules cannot be regarded as merely directory. The procedure is concerned with the method whereby a tribunal of Coroner and jury is set up. The formalities be observed are therefore of importance.
>
> ...I have therefore come to conclusion with reluctance that the proceedings at the inquest ... were a nullity. I can well understand the actions which the Coroner took and it is to be remembered that no objection was raised at the time on behalf of the applicant or anyone else. If the jury was not lawfully summoned, they did not constitute a lawful tribunal and it follows that the proceedings before them was a nullity."

(34) The State has the responsibility of ensuring there is a sufficiency of jurors. The Statute mandates and justice requires that the jury be summoned and selected in accordance with the relevant Statutes. This is moreso when the inquest involves agents of the State apparatus. That is a necessary starting point to ensure that the concerns of interested parties and the public can be assuaged.

(35) No objection had been taken by Counsel for the Claimant to the jurors before they were empanelled or at the trial. This point rose in Berry v Director of Public Prosecution (1992) 48 WIR 192. The Privy Council had remitted to the Court of Appeal the issue of a retrial. Two of the members of the Court who heard the matter of retrial had participated in the substantive hearing. No complaint as to the membership of the panel of the Court was raised. The Court of Appeal, having ordered a re-trial, the Appellant moved the Court of Appeal for redress alleging a contravention of his constitutional right to a fair trial by an independent and impartial tribunal. It was held that unless a complaint of bias has been raised at or before the commencement of the hearing to which it relates, it cannot be entertained in subsequent proceedings.

Per Downer J.A at page 214, letter H:

> "The pertinent issue is whether Counsel on behalf of the appellant who drafted the notice of appeal and argued the case, can now complain of apparent bias without having raised that objection before the commencement of the hearing. To my mind,

> as Mr. Campbell submitted, he cannot so do on behalf of the appellant." See also R v Gough [1993] 3 ALL 724.

(36) However, in Berry's case, there was no contention that the panel was not constituted in conformity with the mandate of relevant statute, as there is in this case. In the Trinidadian case of Rees v Crane (1994) 43 WIR 444 where judicial review was sought to impugn the decision of the Chief Justice and the Judicial Services Commission, the professional backgrounds of the persons against whose decision the complaint was raised was an important feature to be taken into account. Their Lordships in Privy Council, said at page 463.

> "Their professional backgrounds are such that an assumption of bias should not lightly be made …."

See also Thellusson v Lord Rendlesham (1859) 7 H.C Cas. 429 28 L J CL 948. No such assumption can properly be made in respect of the jury who heard this inquisition. The case is therefore distinguishable from Berry (supra) and Rees v Crane (supra) on this ground.

(37) There was nothing random or indiscriminate about the jury selection process. The process that maintained was repeated, regular and convenient. Convenience and justice are oftentimes not companions. This flawed selection process is aggravated by the involvement of agents of the State, being involved in the killing of the deceased.

(38) The defect in the selection process makes it desirable in the interest of justice that another inquest should be held. The Court is of the view that the new inquest should be held by the Coroner of an adjoining parish. The Coroner should pay the cost of the applicant at this hearing, and of the Coroners Inquest.

(39) We find no fault with the Coroner's handling and conduct of the inquest. The matter of availability of jurors is not a matter for the Coroner, we are aware that a Coroner who is concerned for the work of the inquiry to proceed and in the absence of objection from Counsel may be inclined to continue with jurors who are readily available. The statutory award of costs is no reflection on the Coroner's competence. The presence of a representative of the Attorney General's Chambers will ensure that costs of the inquest below and at this hearing will be addressed.