



[2014] JMSC Civ.175

**IN THE SUPREME COURT OF JUDICATURE
THE CIVIL DIVISION
CLAIM NO. 2014 HCV 03460**

BETWEEN	THE INDEPENDENT COMMISSION OF INVESTIGATIONS	1st APPLICANT
AND	LINETTE WILSON	2nd APPLICANT
AND	THE CORONER OF CLARENDON	1st RESPONDENT
AND	ATTORNEY GENERAL OF JAMAICA	2nd RESPONDENT

IN CHAMBERS

Mr. Terrence Williams and Miss. Courtney Foster for the 1st Applicant.

Miss. Althea Jarrett instructed by the Director of State Proceedings for the 1st and 2nd Respondents.

Heard: 22nd July 2014 and 31st October 2014.

Judicial Review — Application for leave to apply for Judicial Review — Arguable grounds with realistic prospect of success — Application for an exhumation order and subsequent independent post mortem examination — Coroner refused to grant orders — Coroner has no jurisdiction — Need for an Inquest — Application for leave to apply for Judicial Review refused.

CAMPBELL J.

Background

[1] On the 12th day of January 2013, Seydane Nelson was allegedly shot and killed by policemen in the parish of Clarendon. The Independent Commission of Investigations (INDECOM) is investigating the matter due to a suspicion of extra-judicial killing.

- [2] An application was made by the 1st Applicant, INDECOM, before the Coroner of Clarendon, Her Honourable Stephany Orr, for an order to exhume the body and subsequently conduct an independent post mortem examination. This order was not granted on the basis that she had no jurisdiction to grant such an order. Consequently, the 1st Applicant is now seeking leave to apply for Judicial Review of the Coroner's decision.
- [3] A Notice of Application for Leave to Apply for Judicial Review was filed on 17th July 2014. In this Notice of Application, the 1st Applicant seeks the following orders;
- (a) An Order of Certiorari quashing the decision of the Coroner made on the 27th May 2014;
 - (b) A writ of Mandamus that the Coroner for Clarendon grant an order for the exhumation and further post-mortem examination of Seydane Nelson;
 - (c) A declaration that the Coroner is permitted to order an exhumation and post-mortem examination after a body has been interred.

The Applicant's Case

- [4] The Applicant relied on the following grounds;
- (i) The Coroner has custody and responsibility for a body that dies within her jurisdiction where the said person has died, either violently, or an unnatural death, or has died a sudden death, of which the cause is unknown, or there is no medical certificate of the cause of death, or the person died in custody for the purpose of conducting a judicial investigation into the death.
 - (ii) The Coroner misconstrued section 18 of the **Coroners Act** in holding that the power to exhume only existed when an inquest is commenced, when on a true construction, the section was only clarifying that the power to exhume continued despite the repeal of the mandatory requirement to view the body before an inquest.
 - (iii) The Coroner, having heard the circumstances, acted unreasonably in not granting the order for exhumation and a second post-mortem examination.
- [5] The application was supported by the affidavit of Mr. Hamish Campbell, filed on 17th July 2014, who is the Assistant Commissioner at INDECOM, with responsibility for all investigations undertaken by the Commission into fatal

shootings committed by members of specific units of Jamaica Constabulary Force.

[6] Mr. Campbell states, at paragraphs 4 to 7 and 9 of his said affidavit;

"4. The Clarendon Investigation concerns forty (40) incidents wherein sixty (60) persons were killed. Some of these killings were reported as fatal shootings by the police in confrontations with citizens whilst others were reported as murders committed by ordinary citizens. A number of officers have been identified as having participated in these killings.

5. That the Commission has information that members of the Jamaica Constabulary Force have conspired to conduct and conceal extra-judicial killings in the parish of Clarendon that are the subject of the Clarendon investigation. This information comes from admissions made by co-conspirators, statements of witnesses and the actions of the suspected persons."

[7] Paragraph 6 states;

"The fatal shooting of Seydane Nelson

vi. On Saturday 12th January, 2013 at about 7.00pm, Seydane "Santa" Nelson was shot and killed at the intersection of Allan Street, Denbigh Main Road, May Pen in the parish of Clarendon."

[8] Paragraph 7 states;

"The incident was investigated by members of the Jamaica Constabulary Force as a civilian shooting. The scene was processed by Area 3 Technical Services Division of the Jamaica Constabulary Force and eight 9 mm spent casings were recovered from the scene."

[9] And at paragraph 9;

"On the 22nd January 2013, a post-mortem examination of Seydane Nelson was conducted by Dr. N Prasad Kadiyala at Spanish Town Hospital morgue. The cause of death was noted as Hemorrhagic shock and Cranio-cerebral injury, as

well as multiple gunshot wounds to the trunk. A bullet was recovered from the body of Mr. Nelson."

- [10] The affidavit raised serious concerns as to the probity of the police proceedings prior to the conduct of the post-mortem examination. Concerns, that if realized would call into question the direction of the investigation undertaken by the police force.

The Respondents' Case

- [11] To this application, the Attorney General's Chambers, raised opposition to the grant for leave to apply for judicial review, on the basis that, the 1st Applicant have not met the threshold test propounded in **Satnarine Sharma v Carla Brown-Antoine et al** [2007] 1 WLR 780 at 787;

*"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an **arguable ground for judicial review having a realistic prospect of success** and not subject to the discretionary bar such as delay or an alternative remedy... But arguability cannot be judged without reference to the nature and gravity of the issue to be agreed. It is a test which is flexible in application....it is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen."* [Emphasis provided].

- [12] The Respondents accept that the Coroner has responsibility for a body that dies within her jurisdiction where the said person has died, either violently or an unnatural cause etc., for the purpose of conducting a judicial investigation into the death. Counsel submits, however, that, the Coroner's custody and responsibility arises for a body as soon as she decides to hold an inquest, and lasts until the inquest is determined. The Coroner's custodial responsibilities over the body arise for the purposes of an inquest into death. (See; **Regina v Bristol Coroner, Ex P Kerr** (1974) QB 652).
- [13] That the Coroner did not misconstrue Section 18 of the **Coroners Act**. Section 2 of the said Act saves the common law.

The Law

[14] Section 2 of the **Coroners Act** states;

“Save in so far as is inconsistent with this Act, any principle or rule of law, or established jurisdiction, practice, or procedure, or existing usage or custom, shall not withstanding the repeal of any enactment by this Act, remain in full force.”

[15] Section 18 of the **Coroners Act** provides:

INQUEST

“It shall not be necessary upon any inquest for the appropriate Coroner or the jury to view the body, but this provision shall not preclude the appropriate Coroner from requiring the exhumation of the body for the purpose of viewing and examining the same, if in his opinion it is expedient so to do:

Provided further that if a majority of the jury sitting on an inquest are of the opinion that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner or other witnesses brought before them, they may require the appropriate Coroner in writing to summon as a witness a duly qualified forensic pathologist named by them, and except where the body has been cremated further direct a post mortem examination of the deceased, with or without an analysis of the contents of the stomach or intestines, to be made by that forensic pathologist, and that whether such examination has been previously made or not, and the appropriate Coroner shall comply with such requisition, and in default shall be guilty of a misdemeanour.”

[16] Section 21(1) of the **Coroners Act** states:

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

- (a) that the appropriate Coroner **refuses or neglects to hold an inquest** which ought to be held, or which he has been directed to by the DPP to hold; or*

(b) *where an inquest has been held by the appropriate 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 appropriate Coroner to pay such costs of and incident to the application as he think just, and where an inquest has already been held may quash the inquisition on that inquest.” [Emphasis provided].

Discussion

- [17] The application turns on a proper construction of Section 18 of the **Coroners Act** and the effect of the common law which not being inconsistent with the provisions of the Act, remains in full force pursuant to Section 2 of the **Coroners Act**. The 1st Applicant's submitted that the power of the Coroner to order an exhumation of the body that existed prior to the amendment of the law, continued after despite the repeal of the mandatory requirement previously laid on the Coroner, to view the body before an inquest.
- [18] It was submitted on behalf of the Attorney General, that in her reasons given for the refusal to order an exhumation, the learned Coroner, recognized the importance and relevance of the common law. The Coroner reasons relied on an excerpt from **Halsbury Laws of England** 3rd Edition, Vol. 8, published in 1954, to maintain, her finding that, *“the Coroner has power at common law to order the exhumation of a body which has been buried within his jurisdiction in order to enable him to hold an inquest.”*
- [19] The Coroner to my mind has correctly maintained that under Section 18, of the **Coroners Act**, there is no provision for anyone but a jury during the course of an inquest to request that the Coroner order that a body be exhumed. The learned authors of **Jervis on Coroners**, 11th Edn. at page 93 state;

“Early writers took the view that a coroner had power at common law to disinter a body within a reasonable time after

death for the purpose of holding an inquest when none had already been held. However, the courts were never clear that the coroner had such power by himself, and in one case (R v Saunders (1719) 1 Str.167, 93 E. r. 452.) the court said expressly that the coroner had no power without the leave of the court to order disinterment. The extent of the coroner's common law power never arose for decision in modern times; and the common law on the subject has now been replaced by recent statutory provision. "See; also Halsbury 3rd Edition Vol. 4 , para. 297."

- [20] Even if it were to be argued that, Section 2 of the **Coroners Act**, has preserved the common law and ensures that other provisions of the Act are not inconsistent with it, the state of the common law would not assist the 1st Applicant.
- [21] The provisions in the **English Coroners Act 1988**, provides the statutory source of exhumation. **Jervis on Coroners**, at paragraph 6-04, in examining those statutory provisions, states;

"A coroner may by warrant signed by him, order the exhumation of the body of a person buried within his district when either of two conditions is satisfied. Those conditions are, first, where it appears to the coroner that is necessary for the body to be examined for the purpose of holding an inquest into the death or for discharging any other function of his in relation to the body or death, and secondly, where it appears to the coroner to be necessary for the body to be examined for the purpose of any criminal proceedings either instituted or contemplated in respect of the death in question, or death which has taken place in circumstances connected with the death in question."

- [22] In **Regina v Bristol Coroner, Ex. Parte Kerr**, there was an application for an order of Certiorari to quash the Coroner's refusal, on the grounds that he had no jurisdiction to retain the body, or had wrongly exercised his discretion relating to its release. The court refused the application. For the Coroner it was submitted that the Coroner had complete control over the body from the time he decides to hold an inquest or from the beginning of the inquest until the end of the inquest. Lord Widgery C.J said;

"The point is whether the Coroner has general overriding custody and control prior to the termination of the inquest."

Mr. Henrick Colins' submission on behalf of the Coroner is that at common law the Coroner possessed that right and retains it today. In the submission of the Coroner the law in regard to the Coroners is largely governed by the common law, the modern statutes merely having made adjustments and amendments to the common law... I am in no doubt at the end of the argument that Mr. Henrick Colins is right."

The learned Chief Justice then referred to a learned work, **The Kings Coroner** by R Henslowe Wellington (1906), Vol. 11, pp. 82-83 and says;

"that clearly supports the view that the Coroners authority over the physical control of the body arises as soon as he decides to hold an inquest, and lasts at common law until the inquest itself is determined."

[Emphasis provided].

- [23] The UK Coroners Act 1988 is differently worded from its local counterpart and gives the Coroner in the UK broader powers than the local legislation. The learned authors noted that the "crucial" limitation on the Coroner's power to order exhumation is the necessity to examine for either of the two stated purposes and that since the abolition of the requirement of viewing the body before holding an inquest, the power of exhumation is *"for the general purpose of the inquest, and in particular the provision of evidence as to the cause of death."*
- [24] I accept the submission of Counsel, for the Attorney General, that the Coroner lacks the power to order the exhumation of Seydane Nelson, in order to assist the 1st Applicant in its own investigation and for an independent post mortem to be held.
- [25] The Respondents have been unable to raise any discretionary bars in the path of the 1st Applicant. However, I am not satisfied that there is an arguable ground with a realistic prospect of success, where the main argument of the 1st Applicant rests on the proposition that the common law permitted the Coroner to exhume the body in the absence of an inquest or of the Coroner's decision to hold one. The 1st Applicant was unable to provide any support for such a contention.
- [26] In light of all the evidence submitted to the court, the application for leave to apply for Judicial Review is refused.