Privy Council Appeal No 2 of 2006

Leonie Marshall *Appellant*

v.

The Director of Public Prosecutions *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE
22nd November 2006, Delivered the 24th January 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance

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*[Delivered by **Lord Carswell**]*

1. On 13 December 1999 Patrick Genius, a man of 26 years, was shot by police officers, sustaining wounds from which he died. An inquest jury subsequently brought in a verdict which reads "person or persons criminally responsible", but the Director of Public Prosecutions ("DPP") decided not to bring any prosecution. The mother of the deceased Leonie Marshall, the appellant in this appeal, brought an application for judicial review of the DPP's decision. The Jamaican courts refused her application and she

appealed with the leave of the Court of Appeal to the Privy Council. At the conclusion of the hearing the Board stated that they would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons for this conclusion at a future date. This judgment contains the Board's reasons for that decision.

2. Evidence was given at an inquest into the death of the deceased by three police officers, Corporal James, Detective Corporal Francis and Corporal Grant, who were the only eye-witnesses of the shooting incident. The first contact with the deceased was made by Cpl James, who deposed that at 5.10 pm approximately on 13 December 1999 he was travelling in his private car on Hope Boulevard, St Andrew when he saw two men on a motor cycle. He suspected that they had been involved in local robberies and followed them at a distance, summoning assistance from his station. This came in the form of Det Cpl Francis and Cpl Grant in a police car.

3. The three officers drove to a point about 35 yards from where the two men had alighted from the motor cycle and got out of their cars. When they saw the officers both men pulled guns from their waistbands and fired at them. James returned fire while the other two officers took cover. One of the two men jumped on to the motor cycle and made his escape. The other, later identified as Patrick Genius, climbed a fence into the grounds of a school and while he was scaling it Francis fired one shot at him. He ran across a playing field towards some bushes, with the officers in pursuit. As he ran he fired another shot at the officers and Francis fired another two shots at him. The officers headed after him into the bushes. While they were searching for him, Genius appeared out of the bushes and fired at them. James and Grant both returned fire and Genius fell to the ground, bleeding and apparently dead. James fired six shots in all in the course of the incident, Francis three and Grant four. They each deposed that they found beside Genius' body a Smith & Wesson .38 revolver, with four spent cartridges and one live round in the chamber. He was taken at once to hospital, where he was pronounced dead on arrival. It was suggested to the officers in cross-examination by counsel for the next-of-kin at the inquest that the deceased had been shot in the back of the head when they went up to him after he fell, but they all denied the suggestion.

4. A post mortem examination of the body of the deceased was carried out on 30 December 1999. The pathologist Dr Sarangi deposed at the inquest that he found five wounds on the body:

(i) a perforating entrance wound on the back of the left thigh, with an exit wound on the front of the thigh one centimetre lower;

(ii) a perforating entrance wound on the right outer aspect of the right thigh, with an exit wound on the front of the thigh, some two centimetres higher;

(iii) a superficial bullet graze on the back of the head in the mid line;

(iv) a penetrating circular entrance wound on the left side of the head above the left ear. The bullet travelled in a downward trajectory after it entered the skull cavity. It was not recovered by the pathologist because of its location inside the cranium.

(v) A perforating circular entrance wound "on the left side back of head" close to the left ear, with an exit wound on the right side of the face over the zygoma bone. The exit wound was 3 cm lower than the entrance wound, indicating that the bullet took a downward trajectory inside the skull.

Death was attributed to the head wounds. There was no gunpowder deposition at the site of any of the wounds, which indicated that they had been fired from a distance greater than close range, normally placed at two to three feet. Dr Sarangi stated in the course of questioning that the skull bone, being a rigid structure, can change the trajectory and speed of a bullet which has struck it. He agreed that the wounds were consistent with a person running away from the person firing and perhaps turning his head when hit. They were also consistent with his having been standing without moving. The pathologist said that it is possible for a person who receives an injury such as wound (v) to keep running for a period of up to five minutes. It was possible that wounds (iv) and (v) could have caused the deceased to fall immediately or he could have performed normally for a little while.

5. Swabs were taken from the hands of the three police officers about 9 pm on 13 December 1999 and from the hands of the deceased about 10 pm the same evening. A forensic scientist Marcia Dunbar, who tested the swabs for gunshot residues, deposed at the inquest that she found no trace of residue on any of the swabs taken from the officers. She found gunshot residue at trace level on the swab from the palm of the right hand of the deceased, but no residue on the swabs from the back of the hand. She stated in her evidence that one would expect an elevated level of residue to be deposited on the back of the firing hand. The location of the deposit of

residue may depend on how the firer holds the gun. The amount of residue found on the palm of the deceased's hand could have been transferred there by rubbing. If a subsequent attempt is made to clean hands which have been contaminated by gunpowder residue little or no trace may be left.

6. An inquest into the death of the deceased was held in April and May 2001. It appears that the next-of-kin were represented by counsel, who cross-examined the witnesses, but that the three police officers were not. On 27 May the jury returned a verdict that the deceased died as a result of gunshot wounds, adding the words recorded in the inquisition "And do further say person or persons criminally responsible." The appellant averred in her grounding affidavit that the Coroner told the jury when they were about to deliver their decision that they should not "call any names". As the inquisition did not charge any specific person with murder or manslaughter, the Coroner correctly did not issue a warrant for arrest in pursuance of section 20(1) of the Coroners Act, but referred the matter to the DPP.

7. Under section 94(3)(a) of the Constitution of Jamaica the DPP has power, in any case where he considers it desirable so to do, to institute and undertake criminal proceedings against any person in respect of any offence against the law of Jamaica. Section 94(6) provides:

> "In the exercise of the powers conferred upon him by this section the director of Public Prosecutions shall not be subject to the direction or control of any other authority."

His independence is underpinned by the provisions of section 96, specifying the manner in which he may be removed from office, which is only for inability or misbehaviour. The DPP examined the material available to him and decided that no prosecution should be brought against anyone, on the ground of insufficient evidence on which to base a charge.

8. The appellant placed some reliance upon the fact that the DPP gave a radio interview on 9 January 2002, in which the circumstances of the death of the deceased and his decision not to prosecute were discussed at some length. He made it clear that before a prosecution could be instituted it was necessary for there to be evidence which could form the basis of a prosecution case, which was lacking in the instant case. In the course of the interview the following exchange took place:

"PB [the interviewer]: In relation to his hand, you know if it was swabbed and if so ...

DPP: My recollection is that the swabbing of his hands revealed ... ahm ... residue from gunpowder.
PB: Yes, now we spoke with Dr Carolyn Gomes earlier and she suggested that the ... according to the forensic expert, such residue as there may have been was inconsistent with Mr Genius firing or discharging a firearm.

DPP: I can't recall seeing any such statement by the forensic expert, but I will look at that again."

9. The appellant brought the present application for judicial review of the DPP's decision, claiming that he ought to have charged the three police officers with the murder of Patrick Genius. The basis of the claim was that there was sufficient material in the inquest depositions to throw doubt on the veracity of the officers' evidence and create a prima facie case that they were not acting in self-defence as they had averred. The appellant also sought judicial review of the DPP's decision not to disclose any further reasons for not instituting proceedings against the officers and of the Coroner's decision to refer the matter to the DPP rather than charge the officers. The latter decision was not the subject of challenge in the appeal before the Board. She asked for orders of mandamus and certiorari, declarations and an injunction and an order directing the DPP to have the body of the deceased exhumed to retrieve the bullet lodged in the head.

10. The appellant's application for leave to apply for judicial review came before Jones J (Ag) in the Supreme Court, who in a written decision given on 15 April 2002 refused to extend the time for applying. The judge did, however, express the view that there was room for serious argument by the applicant with respect to the decisions of the DPP.

11. The appellant renewed her application to the Full Court (Wolfe CJ, Beckford and Marsh JJ), which heard the matter on 15 and 16 July 2002 and gave a written decision on 31 October 2002. In addition to the material considered by Jones J, the court had before it an affidavit sworn on 18 June 2002 by the DPP. In paragraphs 11, 12 and 14 the DPP averred:

"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 who 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 Prosecution came to the decision that there was not sufficient evidence in law to charge anyone.

14. That in the exercise of his powers, the Director of Public Prosecutions would be guided by several factors, not limited to but including matters expressed by Lord Bingham of Cornhill in *R v Director of Public Prosecutions ex parte Manning* [2000] 3 WLR 463, 474 where he said:

> ' ... In most cases the decision will turn not on any 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 ... '"

12. Counsel for the applicant submitted that there was considerable material on the depositions which tended to negative the testimony of the police officers that they had shot at the deceased in self defence. It is apparent from the judgment of Wolfe CJ (Record, pp 103-4) that he appreciated the difficulty of establishing a prima facie case through the forensic evidence. The court concluded, however, that the absence of gunpowder residues on the hands of the deceased could have the effect of negativing self defence and that accordingly leave should be granted to apply for judicial review. Leave was limited to challenging the decision of the DPP that no proceedings were to be instituted against the three police officers.

13. The application for judicial review came before a differently constituted Full Court (Reid, Harrison and DO McIntosh JJ) on 7, 8 and 9 April 2003, and the court gave its written decision on 2 May 2003. In the course of his argument the DPP referred to a statement in a text book, *Handbook of Firearms and Ballistics Examination and Interpretation of Forensic Evidence,* by Brian J Heard, in which the author stated at pages 190-1 that washing the hands will immediately remove all the gunshot residue particles and if it is raining or the suspect is sweating heavily at the time of firing the result will once again be negative. The judges considered that the DPP was not required to give reasons. They held that it had not been demonstrated that the DPP had fallen into error in failing to take into account all the relevant circumstances and his decision was not flawed. Harrison J said that the exercise of the DPP's judgment involves an assessment of the strength by the end of the trial of the evidence against a defendant and of likely defences, and that in the instant case self defence would indeed be a live issue. McIntosh J expressed his conclusion in more trenchant terms:

> "The DPP illustrated that which should have been obvious to the applicant upon the receipt of the available evidence. That to have engaged in a prosecution on the basis of that material would have been an exercise in futility."

The Full Court accordingly dismissed the application for judicial review.

14. The appellant appealed to the Court of Appeal (Forte P, Smith JA and McCalla JA (Ag)), which heard the matter over eight days in November 2004 and gave judgment on 18 March 2005. The court held that in an appropriate case judicial review could be granted of a decision of the DPP, particularly in view of the provisions of section 1(9) of the Constitution. This had been conceded by the DPP and was not in issue before the Board. Forte P and McCalla JA were of opinion that the DPP should have given further and more detailed reasons, particularly after leave was given to apply for judicial review, but Smith JA regarded the reasons which he did give as sufficient. All three judges were in agreement that the court was entitled to look at the sufficiency of the evidence for prosecution of the officers, which Smith JA regarded as the real issue. Smith and McCalla JJA came to the conclusion on examination of the evidence that it would not be sufficient to disprove the defence of self defence raised in the depositions of the police officers. It followed that the DPP had sufficient justification for his decision not to bring charges. Forte P considered that judicial review would lie in

respect of the absence of reasons, but that in light of the insufficiency of evidence to ground a prosecution he would not grant the orders sought.

15. Mr Small for the appellant sought to advance an argument before the Board based on the insufficiency of the DPP's reasons, notwithstanding the fact that leave to rely on this ground of challenge to his decision was not given by the Full Court. He claimed that without proper reasons the court's task was impossible and that its proper functioning was frustrated by the absence of reasons for or explanation of the decision not to prosecute. If the appeal turned on this issue, the Board would have some difficulty in accepting either that the DPP was bound to give reasons at all or that the reasons when given were insufficient in the circumstances. It does not have to express any opinion on the former point, since the DPP did state in his affidavit that he decided that there was not sufficient evidence in law to charge anyone. The Board is not convinced that further elaboration was required. It might well be different if his decision had turned on a factor such as the public interest in a case where there was a plain prima facie case on the evidence. Once he had stated that there was not sufficient evidence, however, the persons interested and the courts were in a position to examine the evidence and gauge its strength for themselves, so that any elaboration by the DPP would be mere debate on points of detail. If it had appeared that he had misapprehended or left out of account an important piece of evidence some explanation could have been required. The suggestion which Mr Small appeared to be putting forward, that the radio interview showed that the DPP had omitted to take account of the forensic analyst's opinion about expecting to find residues on the back of the hand of the deceased if he had fired a weapon, is in their Lordships' view misplaced. The interviewer put to him that the analyst had said that "such residue as there may have been was inconsistent with Mr Genius firing or discharging a firearm". Ms Dunbar did not use those words, though what she said carried such an implication. In view of that it may not be altogether surprising that the DPP said that he could not recall such a statement being made by the forensic expert. That is not in their Lordships' view sufficient to establish that he had overlooked that piece of evidence. Again, if his decision had been inexplicable and aberrant, it is possible that intelligible reasons might have been required to explain it (cf *Re Adams' Application for Judicial Review* [2001] NI 1) though their Lordships would reserve their view on whether the DPP would even in such a case be required in law to give reasons, however advisable it might be that he should do so as a matter of good practice. The point does not arise in the present case, since for the reasons which they will

give, their Lordships consider that he had very solid grounds for deciding against a prosecution.

16. The sufficiency of reasons is not in their Lordships' opinion determinative of this appeal. If they should be regarded as deficient, the court can and should, as McCalla JA held, weigh up the evidence for itself and ascertain whether the DPP could sensibly decide as he did on that evidence. They see force in the opinion expressed by Smith JA that that is the real issue in the appeal. They turn now to that issue, first outlining the standard of cogency which is required before a decision not to prosecute can be successfully challenged.

17. The position and functions of the DPP are such that judicial review of his decisions, though available in principle, is a "highly exceptional remedy" (*Sharma v Brown-Antoine* [2006] UKPC 57, para 14). Where policy considerations come into the decision it is particularly difficult for a court to review it, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the judgment of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712, 735-6, which was cited with approval by the Board in *Mohit v The director of Public Prosecutions of Mauritius* [2006] UKPC 20:

> "It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."

18. Where the decision is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict: *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330, 349, para 41, per Lord Bingham of Cornhill CJ. There are many examples of such statements by courts in the common law world relating to

decisions to prosecute, as to which see *Sharma v Browne-Antoine, supra,* para 41. In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower. The reasons are set out in para 23 of the judgment of Lord Bingham CJ in *Ex parte Manning, supra:*

> "23 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 p 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. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by senior Treasury counsel who will exercise an independent professional judgment. The Director and his officials (and senior Treasury counsel when consulted) 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. 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."

The Board accepted the correctness of these principles in *Mohit v The Director of Public Prosecutions of Mauritius, supra.*

19. The DPP in considering whether to prosecute any of the officers had to assess what evidence could be adduced in court to establish beyond reasonable doubt the essence of the case, that the statements made by them were untrue and that they were not acting in self defence but wantonly shot the deceased. He did not necessarily have to implicate any specific officer as the one who fired a fatal shot, which would be impossible on the evidence available, since he could have relied on the joint enterprise principle. Exhumation of the body to retrieve the bullet was accordingly unnecessary, which is sufficient to dispatch the argument advanced on that issue.

20. Such a prosecution case for disbelieving the officers' testimony at the inquest would have had to be based on proving the depositions and calling pathology and forensic evidence to attempt to discredit that testimony. The appellant's argument is based on the doubts which that evidence raises about the veracity of the depositions, in particular the angle of wounds (iv) and (v) and the forensic analyst's evidence about the absence of residues on the hands of the deceased. The former can be explained by the pathologist's statement that the skull bone can change the trajectory of a bullet which strikes it, and also by the fact that in a running gun battle the angles of entry wounds can be unpredictable and insufficient to give a clear indication of the relative positions of the firer and the victim.

21. The suspicions which were raised from the paucity of residues on the hands of the deceased could readily be rebutted in cross-examination. The textbook evidence about the possible effect of sweating would go a long way to neutralise the effect of the forensic evidence. Moreover, the swabs were not taken until 10 pm on the day of the shooting, and in the interval the body had been handled and moved, apparently without any covering on the hands. The hands of the officers, who certainly had discharged firearms, showed no trace of residues, presumably because they had washed at some stage, which tends to support the suggestion that residues deposited may be reduced or dissipated by contact. The appellant's advisers might have hoped that if the police officers were to give evidence cross-examination would reveal discrepancies which could undermine their case, but on the evidence available to the DPP it must have looked extremely unlikely that the Crown

case could have survived a submission of no case to answer. Moreover, defendants in Caribbean jurisdictions frequently make unsworn statements rather than give evidence, which would have removed the possibility of cross-examination.

22. For these reasons the Board considers that the Full Court was right in saying that self defence was a live issue. In their Lordships' view the possibility of mounting a successful prosecution of any of the police officers by disproving that defence beyond reasonable doubt was minimal and the DPP was justified in deciding not to bring such a prosecution. They therefore advised Her Majesty that the appeal should be dismissed. They feel that they must, in accordance with their regular practice, order that the unsuccessful appellant pay the respondent's costs of the proceedings before the Privy Council, though they wish to indicate that in the circumstances the Jamaican authorities may not wish to execute this order. The orders for costs made by the courts below will not be disturbed.