[2017] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 204/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**GORSTEW LIMITED**	**APPLICANT**
AND	**HER HON MRS LORNA SHELLY-WILLIAMS (Sitting in the Corporate Area Resident Magistrate's Court (Criminal) Holden at Half-Way-Tree)**	**1st RESPONDENT**
AND	**PATRICK LYNCH**	**2nd RESPONDENT**
AND	**JEFFREY PYNE**	**3rd RESPONDENT**
AND	**CATHERINE BARBER**	**4th RESPONDENT**

Douglas Leys QC, Hugh Wildman and Miss Barbara Hines instructed by Hugh Wildman & Co for the applicant

Mrs Susan Reid-Jones instructed by the Director of State Proceedings for the 1st respondent

KD Knight QC, Miss Stacy Knight and Miss Nieoker Junor instructed by Knight Junor & Samuels for the 2nd respondent

No appearance for the 3rd respondent

Miss Deborah Martin and Mrs Sharon Usim instructed by Usim Williams & Co for the 4th respondent

24, 25, 28 April and 4 May 2017

MORRISON P

[1] This is an application for leave to appeal against the decision of the Full Court of the Supreme Court given on 4 November 2016[1]. On 28 April 2017, we delivered our decision in this matter, granting leave to appeal in respect of the issue of costs only. The terms of our decision were as follows:

> "1. The application for leave to appeal against the Full Court's decision dated 4 November 2016 to refuse the applicant's application for leave to apply for judicial review of the decision of the 1st respondent given on 3 June 2014 is refused.
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> 2. The application for leave to appeal against the Full Court's decision to order that the applicant should bear the respondents' costs of the renewed application for leave to apply for judicial review is granted. In order that the appeal as to costs only can be dealt with as efficiently and cost effectively as possible, it is ordered that:
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> (i) the applicant is to file and serve its grounds of appeal against the Full Court's award of costs, together with skeleton arguments in support of the grounds, within 21 days of the date of this order;
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> (ii) within a further 21 days of the service on them of the applicant's grounds of appeal and skeleton arguments on costs, the respondents are to file and serve skeleton arguments in response to the appeal; and
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> (iii) within 28 days of the filing of the last of the respondents' skeleton arguments, the court will issue its decision on the appeal in writing.
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> 3. The applicant is to pay 75% of the respondents' costs of this application, such costs to be agreed or taxed."

These are my reasons for concurring in that decision.

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[1] [2016] JMSC Full 8

[2] It is common ground between the parties that the test to be applied by this court in considering an application for leave to appeal is that set out in rule 1.8(9) of the Court of Appeal Rules 2002, which provides that:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

In order to determine whether this threshold has been met in this case, it is necessary to state briefly the background to the application.

[3] At all times material to this application, the 1st respondent was a Resident Magistrate for the Corporate Area assigned to the Corporate Area Resident Magistrate's Court at Half Way Tree.

[4] Between April 2013 and 3 June 2014, the 2nd, 3rd and 4th respondents stood trial before the 1st respondent on a 16 count indictment containing various charges: conspiracy to defraud and falsification of accounts (preferred against the 2nd, 3rd and 4th respondents); forgery (preferred against the 3rd respondent); and uttering a forged document (preferred against the 4th respondent). At the heart of the case against the 2nd, 3rd and 4th respondents was the contention that, with fraudulent intent, they had caused funds to be paid out of the pension fund of which the applicant was the founder without the consent of the applicant, contrary to the rules of the pension fund.

[5] On 3 June 2014, the 1st respondent upheld a no-case submission made on behalf of the 2nd, 3rd and 4th respondents and dismissed all charges against them. I will refer

to the 1st respondent's ruling as 'the challenged decision'. At the outset of her ruling, which was given orally, the 1st respondent said this:

> "Let me just say first of all that I think I have given myself too little time in relation to this matter. I had hope [sic] to give persons copies of the decision, it's not going to be possible. In fact, we do have a court reporter in court so whatever is going to be said will be recorded so you can, in fact, get it from the court reporter. Okay?"

And, at a later point during the ruling, the 1st respondent added that, "[a]s I said, this is a work in progress".

[6] In the ruling, the 1st respondent stated that although, based on the evidence for the prosecution, the *actus reus* in relation to all the counts in the indictment was not in issue, it was nevertheless necessary to go on to examine the evidence as to the *mens rea*: that is, whether the 2nd, 3rd and 4th respondents acted dishonestly. After a full and careful review of the evidence and a number of the relevant authorities, the 1st respondent stated that the prosecution "have not produced evidence to establish the mens rea in relation to dishonesty and intent to defraud". Accordingly, applying the test for consideration of a no-case submission laid down in the authorities[2], the 1st respondent's conclusion was "that a reasonable jury could not draw an inference of guilty mens rea based on the evidence that was heard".

[7] By notice of application filed on 28 August 2014, the applicant sought leave to apply for judicial review of the challenged decision, by way of –

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[2] **Practice Note** [1962] 1 All ER 448; **R v Galbraith** [1981] 2 All ER 1060; **Director of Public Prosecutions v Varlack** [2008] UKPC 56

> "i. A declaration that the statement by the 1st Respondent in her ruling on the no case submissions in the trial ... that she really needed more time to go through the evidence and that it was a work in progress, amounts to jurisdictional errors on the part of the 1st Respondent, rendering her findings and the subsequent verdict null and void and of no effect:
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> ii. A declaration that the verdict of the 1st Respondent is so unreasonable, that no Tribunal, properly directed in law and having considered all the relevant evidence could have arrived at the said verdict.
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> iii. An order of Certiorari quashing the verdict of the 1st Respondent, that the 2nd , 3rd and 4th Respondents were not guilty of the charges with which they were indicted."

[8] The application for leave to apply for judicial review was heard in the first instance by Lawrence-Beswick J, who refused it. In the written reasons for her decision which was given on 10 December 2014[3], the learned judge considered that, in keeping with well-established principles[4], "[t]he question to be determined at this stage is whether I am satisfied that there is an arguable ground for judicial review having a realistic prospect of success, not having a discretionary bar such as delay or alternative remedy". Applying this test, the learned judge took the view that the words spoken by the 1st respondent in delivering her ruling could not be taken to mean that she had not had sufficient time to consider the matter. Therefore, having accepted the submission of counsel for the respondents that, "at the substratum of this application is the

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[3] [2015] JMSC Civ 71, para [46]

[4] **Sharma v Antoine and others** [2006] UKPC 57; **The Minister of Finance and Planning & Public Service and others v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22

assertion that the 1st respondent stated...she did not have sufficient time to consider the case", the learned judge concluded that the application was bound to fail.

[9] However, as a supplementary basis for her decision, Lawrence-Beswick J considered[5] that "...judicial review of the finding that there is no case to answer and that the 2nd, 3rd and 4th respondents are not guilty of the charges would amount to allowing the prosecution to appeal an acquittal". This, the learned judge said, "is not permissible under our law". And in any event, the learned judge added, even if the challenged decision could be successfully impugned, "[o]ur constitution protects persons from the jeopardy of being tried twice for the same offence".

[10] In a supplementary ruling on costs issued on 19 October 2016, after considering written submissions received from the parties, Lawrence-Beswick J made the following order[6]:

> "...I award costs to each respondent for one counsel each to be agreed or taxed save for the specific costs which had been awarded to the applicant against the 1st respondent on December 9, 2014 those costs having been limited to the costs of counsel reviewing the 1st respondent's submissions filed and served on December 8, 2014. The costs are on an indemnity basis as it concerns the 2nd, 3rd and 4th respondents."

[11] It is in these circumstances that the applicant therefore renewed the application for leave to apply for judicial review before the Full Court[7]. As already indicated, that

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[5] At para. [67]
[6] [2016] JMSC Civ 71, para. [61]
[7] Campbell, Thompson-James and Brown-Beckford JJ

court decided unanimously that the renewed application for leave to apply for judicial review should be refused.

[12] The leading judgment was delivered by Brown-Beckford J, with whom Campbell and Thompson-James JJ agreed. As Lawrence-Beswick J had done, Brown-Beckford J approached the matter on the basis of whether the applicant had established the existence of an arguable ground for judicial review with a realistic prospect of success. In deciding that it had not, the learned judge endorsed the 1st respondent's view that there was no evidence on the prosecution's case upon which a finding of an intention to defraud on the part of the 2nd 3rd and 4th respondents could be based.[8]

[13] The learned judge also rejected the submission put forward on behalf of the applicant that the 1st respondent ought not to have come to a conclusion on the question of whether the element of an intention to defraud had been established without first hearing the evidence of the 2nd, 3rd and 4th respondents.[9]

[14] As regards the contention that the 1st respondent had not allowed herself sufficient time within which to consider her ruling on the no case submission, the learned judge considered that "the entirety of [the 1st respondent's] reasons shows that she accorded it the proper consideration"[10]; and that "taken as a whole, the repeated

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[8] Para. [93]
[9] Para. [98]
[10] Para. [105]

references to time in the judgment of the resident magistrate appear to be in reference to the production of copies of her decision and not the decision itself"[11].

[15] In relation to the question of whether the 1st respondent's decision to uphold the no-case submission was unreasonable in the **Wednesbury** sense[12], as the applicant contended strongly that it was, the learned judge said this[13]:

> "[110] I find it was eminently reasonable for the Learned Resident Magistrate to have found that the evidence which Counsel for the Applicant suggests is 'overwhelming' goes to the *actus reus* of the crime, that is, the procedure relating to the distribution of the funds was breached. However, it does not extend to prove on the Crown's case the other required element of *mens rea*, that is, that there was an intention to defraud. Based on this state of the evidence the Learned Resident Magistrate could have found on the second limb of Galbraith that a jury properly directed could not properly convict on the prosecution's case, for the absence of the essential element of the *mens rea.*
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> [111] The Prosecution must adduce sufficient evidence upon which a finding of guilt can be made. The Learned Resident Magistrate was entitled at the end of the prosecution's case to ask herself the question of whether the prosecution has presented enough evidence to make out a *prima facie* case. It is only if her answer is yes that she is entitled to continue the trial. Where the answer is no, she is duty bound to put an end to the proceedings.
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> [112] In respect of the question of jurisdiction to determine the state of the prosecution's case at the point of the no case submission, for the foregoing reasons I find merit in the submission of Counsel for the Respondents that the Learned Resident Magistrate did have proper jurisdiction and moreover was duty bound on the application of the defence

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[11] Para. [106]
[12] **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223
[13] At paras [110]-[112]

to consider the withdrawal of the matter from consideration of her jury mind."

[16] Finally, Brown-Beckford J observed[14], basing herself on the decision of the Privy Council in **Millicent Forbes v The Attorney General of Jamaica**[15], that the court should "be mindful that it would be inappropriate to entertain judicial review proceedings against a court's decision to acquit an accused, since it is for the Director of Public Prosecutions to decide whether to re-indict the accused, and that body is not bound by the decision of a court on judicial review".

[17] As regards the question of costs, Brown-Beckford J took the view[16] that the renewed application was "vexatious for being so against the weight of authority that there could have been no reasonable expectation that it would have succeeded". She accordingly concluded that, pursuant to rule 56.15(4) and (5) of the Civil Procedure Rules 2002 ('the CPR'), the applicant should pay the respondents' costs of the application.

[18] In a brief concurring judgment, Thompson-James J addressed the issues of: (i) whether leave is required to apply to the court for a declaration; (ii) whether the granting of the declarations sought by the applicant in this case would have the same result as the granting of an order for certiorari and thus provide an adequate alternative remedy to the applicant; and (iii) costs.

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[14] At para. [113]
[15] [2009] UKPC 13
[16] At para. [119]

[19] On the first point, the learned judge concluded[17] that, based on the provisions of part 56 of the CPR, no leave is required to apply for a declaration.

[20] On the second point, the learned judge said[18] that -

> "[34] ...if the court were minded to make a declaration that the impugned decision is null and void, it would not be necessary for the court to make a quashing order. The declaration would suffice to achieve the desired outcome, that is, that the impugned decision would no longer stand. Thus, there would be no decision to quash.
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> [35] In any event, since the court has decided to refuse leave, the issue is inconsequential."

[21] And on the third point, that is, the issue of costs, Thompson James J concluded that although no submissions had been heard from the parties in this regard, the applicant had acted unreasonably in renewing the application for leave and ought therefore to pay costs.

[22] In the result, the renewed application for leave to apply for judicial review of the challenged decision was refused, with costs to the respondents to be agreed or taxed. Leave to appeal having been refused by the Full Court, the applicant now seeks leave from this court, as it is entitled to do.

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[17] At para. [16]
[18] At paras [34]-[35]

[23] The application is opposed by the 1st, 2nd and 4th respondents. The court was told that the 3rd respondent had died subsequent to the decision of the Full Court and no one appeared on this application to protect or otherwise speak to his interests.

[24] In its notice of application for leave to appeal filed on 8 November 2016, the applicant advances a total of eight grounds, on the basis of which it submits that its prospective appeal has a real chance of success. These grounds are as follows:

> "1. [sic] The court fell into grave error in holding that the Applicant had failed to demonstrate that the 1st Respondent committed Jurisdictional Errors in upholding the No Case Submission in the trial of the 2nd 3rd and 4th Respondents presided over by the 1st Respondent and in which the 2nd 3rd and 4th Respondents were indicted with various counts of Conspiracy to defraud, forgery, uttering forged documents and falsification of accounts;
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> b) The court fell into grave error in holding, that the Applicant had failed to show that sufficient evidence was led at the trial to warrant the 1st Respondent calling on the 2nd 3rd and 4th Respondents to state their defence as to the requisite mens rea required for the various offences;
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> c) The Court fell into grave error in failing to appreciate that the 1st Respondent had before her compelling evidence at the end of the Crown's case to warrant the 1st Respondent calling on the 2nd 3rd and 4th Respondents to state their defence to the various offences with which they had been charged;
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> d) The court fell into grave error in holding that the evidence led by the crown on which the Applicant relied, in establishing a prima facie case of mens rea against the 2nd 3rd and 4th Respondents go to the elements of the actus reus and not the mens rea;

e) The court fell into grave error at paragraph 96 of its judgment in holding that the 1st Respondent did direct her mind properly to the question of whether there was any evidence of intent to defraud. The court failed to appreciate that the 1st Respondent should not have considered at that stage that question, without calling on the 2nd 3rd and 4th Respondents to state their defence having regard to the compelling nature of the evidence led by the crown establishing a prima facie case of intent to defraud against the 2nd 3rd and 4th Respondents;

f) The court fell into grave error in failing to appreciated that the 1st Respondent applied the wrong principles of law in determining whether to call on the 2nd 3rd and 4th Respondents to state their defence and by so doing improperly upheld a no-case submission made on behalf of the 2nd 3rd and 4th Respondents and in so doing committed serious jurisdictional errors, rendering her decision null and void and of no effect;

g) The court fell into grave error in holding that at paragraph 113 of its judgment that the decision of the Judicial Committee of the Privy Council in **Millicent Forbes v the Attorney General** established "*that it would be inappropriate to entertain Judicial Review Proceedings against a court's decision to acquit an accused since it is for the Director of Public Prosecution to decide whether to re-indict the accused and that body is not bound by the decision of a court on Judicial Review*". The court failed to appreciate that dicta in Millicent Forbes by the Judicial Committee of the Privy Council are of no application to the instant case as the Millicent Forbes case was concerned with a peculiar circumstance as to whether Judicial Review was permissible against the decision of a Supreme Court Judge which is not an inferior tribunal. Their Lordships reinforced the principle that Judicial Review was not permissible against the decision of a Supreme Court Judge. In the instant case, the 1st Respondent was an inferior tribunal and is subject to the strictures of Public Law Principles, therefore any decision it makes in the conduct of the trial of the 2nd 3rd and 4th Respondents, which exceeds her jurisdiction would

render the decision of the inferior tribunal liable to be quashed.

h) The court fell into grave error at paragraph 117 of its judgment, in holding that the application by the Applicant to challenge the ruling of the 1st Respondent by way of Judicial Review would *"amount to allowing the prosecution to appeal an acquittal where this is impermissible under law and would be in breach of their constitutional right to be tried only once for the offences charged against them*". The court failed to appreciate that Judicial Review is not an appeal, but a challenge to the manner in which the decision was arrived at. Where that decision was arrived at in breach of public law principles, the decision is deemed to be null and void and of no effect. The result being, the decision must be treated as if it never occurred. Therefore the question of double jeopardy does not arise."

[25] There is obviously, if I may say so with respect, a significant element of repetition (or, perhaps I should say, overlap) in these grounds. I hope that I will do them no disservice by condensing them into the single proposition that the Full Court erred in (i) holding that the 1st respondent had directed her mind properly to the question of whether there was any evidence of intent to defraud; (ii) failing to hold that the 1st respondent had compelling evidence before her to establish a *prima facie* case of an intention to defraud against the 2nd, 3rd and 4th respondents; (iii) failing to appreciate that the 1st respondent applied wrong principles of law in determining whether to call on the 2nd, 3rd and 4th respondents to state their defence; and (iv) failing to appreciate that the decision of the Privy Council in **Millicent Forbes v The Attorney General** had no application to this case, which is concerned with an application to review the decision of an inferior tribunal.

[26] In his submissions before us on behalf of the applicant, Mr Leys QC supplemented the grounds of appeal with the following points:

1. An application for leave to judicially review the decision of the 1st respondent is not an attempt to appeal against an acquittal and an acquittal by an inferior court is in principle reviewable.

2. The purpose of judicial review is to invoke the supervisory jurisdiction of the Supreme Court to ensure that, in reaching her decision to uphold the no-case submission, the 1st respondent acted in accordance with the law.

3. If the application for judicial review succeeds, the challenged decision will be a nullity and will therefore not qualify for protection under section 16(9) of the Constitution, since only a lawful acquittal will support the plea of autrefois acquit.

4. The Supreme Court in the exercise of its supervisory jurisdiction over an inferior court will ordinarily treat as a nullity a decision which is so unreasonable that no reasonable magistrate could in the circumstances have come to it, or if the decision-maker has otherwise acted without jurisdiction.

5. Thompson-James J erred in concluding that: (i) under the CPR, no leave is required for an application for a declaration; and (ii) the

availability of a declaratory remedy could therefore amount to an alternative remedy to judicial review.

6. The Full Court erred in awarding costs against the applicant without affording it an opportunity to be heard on the question.

[27] Following on from Mr Leys' submissions, Mr Wildman took us in some detail to the evidence as revealed in the 1st respondent's ruling. On the basis of that evidence, he submitted that at the close of the prosecution's case there was, as he described it, overwhelming evidence to establish a prima facie case of an intention to defraud on the part of the 2nd, 3rd and 4th respondents. Mr Wildman submitted further that, in arriving at the challenged decision, the 1st respondent had so misunderstood and misapplied the relevant authorities that her decision was irrational and therefore a nullity. In particular, he complained, the 1st respondent ought not to have come to a conclusion on the question of fraudulent intent without hearing what the 2nd, 3rd and 4th respondents had to say in their defence.

[28] Hardly surprisingly, the 1st, 2nd and 4th respondents were unanimous in opposing the application. For the 1st respondent, Mrs Reid-Jones submitted that the Full Court was correct in its conclusion that the 1st respondent had: (i) sufficiently considered the challenged decision; (ii) correctly applied the relevant authorities; and (iii) acted entirely within her jurisdiction and authority in making the challenged decision.

[29] For the 2nd respondent, Mr Knight QC submitted that, even if the 1st respondent had fallen into error, she would have acted within her jurisdiction and hence her

decision was not capable of being quashed by certiorari. But in any event, Mr Knight submitted, the 1st respondent's analysis of the evidence in her ruling on the no-case submission was well-nigh impeccable and therefore not open to challenge. Mr Knight submitted further that the grant of the relief sought by the applicant would expose the 2nd respondent to a breach of his rights under section 16(9) of the Constitution. Accordingly, it was submitted, the Full Court had been correct in its decision to refuse the application for leave to apply for judicial review and this application should be similarly dismissed.

[30] For the 4th respondent, Miss Martin also submitted that leave to appeal should be refused on the ground that the applicant's contentions are not arguable and have no reasonable prospect of success. In arriving at her decision, it was submitted, the 1st respondent had correctly directed her mind to the evidence and the relevant authorities.

[31] Although counsel for the applicant and respondents very helpfully referred us to several authorities, it is, I think, only necessary to refer to four of them for present purposes.

[32] First, there is **R (on the Application of Crown Prosecution Service) v Norwich Magistrates' Court**[19], upon which Mr Wildman placed great reliance. That

[19] [2011] EWHC 82

was a case in which judicial review was sought of a decision of the Norwich Magistrates' Court upholding a submission of no case to answer.

[33] The following summary of the relevant facts is taken from the judgment of Richards LJ sitting as a single judge of the Divisional Court. On a charge brought under section 4 of the Public Order Act 1986, the standard case management form was completed before trial. The box for the prosecution's case stated: "Kebab house incident. CCTV records [the defendant] punching somebody and about to throw a chair". The box for the defence case stated: "Defendant says acting in self-defence and Crown cannot prove case". At the trial the prosecution advocate opened the case to the magistrates, stating (without correction or dissent from the defence advocate) that identification was not in dispute. CCTV footage of the incident, taken from within the kebab shop, was played to the magistrates. It showed a man wearing a white tie throwing a punch at another man and a scuffle ensuing. In addition to the CCTV footage, the agreed summary of the defendant's interview was read as part of the prosecution's case. It recorded that the defendant had identified himself on the CCTV and it summarised what he said about his role in the incident, including an acceptance by him that he struck the first blow.

[34] At the close of the prosecution case, the defence advocate made a submission of no case to answer based in part on a failure on the part of the prosecution to prove identification, that is to say to prove that the defendant was the man seen throwing the punch on the CCTV footage. The prosecution then complained that it had been ambushed and sought leave to re-open its case in order to call a police officer to deal

with the point. The magistrates granted a short adjournment to ascertain if the officer was available, which he was, but then refused the prosecution's application to re-open its case and held that there was no case to answer. In their written reasons for their decision, the magistrates said that the application to re-open the case was refused in the interests of justice, given that the prosecution were on notice to prove all elements of the case but did not do so before closing.

[35] Richards LJ observed[20] that it was not in dispute "that the magistrates had a discretion to allow the prosecution to adduce further evidence to plug a gap identified in the submission of no case, provided that such a course would cause no justice". The learned Lord Justice observed further[21] that, in this case, "the balance of considerations lay overwhelming in favour of acceding to the prosecution application". Accordingly, he concluded[22], "...the decision to refuse the prosecution application to re-open ran counter to the overriding objective of the Criminal Procedure Rules, was plainly contrary to the interests of justice and lacked any reasonable basis".

[36] This case therefore makes good, albeit without any discussion of the jurisdictional basis for doing so, Mr Wildman's submission that the decision of an inferior court to acquit on the basis of a successful no-case submission is reviewable.

[37] Next, there is **Millicent Forbes v The Attorney General**, to which counsel for the parties made reference. That was a case in which judicial review was sought for the

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[20] At para. 17
[21] At para. 21
[22] At para. 25

purpose of quashing a verdict of acquittal entered in the Portland Circuit Court on the ground that it had been procured by fraud. Wolfe CJ refused leave to apply for judicial review on the ground that the Circuit Court was a superior court of record and therefore not amenable to judicial review. A renewed application for leave was also refused by the Full Court[23] on the same ground and this court[24] subsequently dismissed an appeal from the Full Court.

[38] On an appeal to the Privy Council from the decision of this court, the Board entertained no doubt that the courts below were right:[25]

> "Judicial review is not an available remedy in this case and the grounds upon which the Chief Justice refused leave are unassailable. Judicial review is the procedure by which the Supreme Court ensures that inferior courts and administrators act lawfully and within their powers. It is not a mechanism by which one judge of the Supreme Court can quash the decision of another."

[39] However, in a judgment delivered by Lord Hoffmann, the Board went on to observe that even if judicial review was possible in this case and the applicant was entirely successful, the question of the suitability of the remedy of certiorari would still arise, given the availability to the defendant in the fresh criminal proceedings of the plea of autrefois acquit. In practical terms, Lord Hoffmann pointed out[26], "... the important point is not whether the verdict of acquittal can be set aside but whether the

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[23] G Smith and Dukharan JJ, Jones J dissenting
[24] Harrison P, Cooke and Harris JJA
[25] At para. 5
[26] At para. 12

accused can be tried again". His Lordship went on to observe that that question can only be determined in criminal proceedings against the defendant and that it would be for the Director of Public Prosecutions to decide whether to re-indict the defendant and submit that he is not entitled to plead autrefois acquit.

[40] Mr Wildman points out, firstly, that Lord Hoffmann's remarks in this case were made in the context of an unsuccessful application for leave to apply for judicial review to quash the decision of the superior court: they therefore have no applicability to the instant case, in which we are concerned with the decision of an inferior court in respect of which the availability of judicial review is not in doubt. But secondly, Mr Wildman submits, the dilemma posed by Lord Hoffmann in **Millicent Forbes v The Attorney General** does not arise in this case since, if the decision of the 1st respondent is quashed as having been made without jurisdiction, it would be a nullity and therefore call for no fresh decision from the Director of Public Prosecutions whether to re-indict the 2nd and 4th respondents. In such circumstances, Mr Wildman submits, the question of autrefois acquit would not arise.

[41] I would observe in passing that it may be open to doubt whether Lord Hoffmann's observations can be distinguished in the manner posited by Mr Wildman's second point, since those remarks were explicitly premised on the hypothesis that judicial review was available to quash a decision of the Portland Circuit Court. But be that as it may, the important point for consideration in this case seems to me to remain whether it can be said, as the applicant submits, that the decision of the 1st respondent to uphold the submission of no case was so irrational as to render it a nullity. For if it

was not, Mr Wildman's point based on **Millicent Forbes v The Attorney General** would completely fall away.

[42] So this brings me then to the decision of the House of Lords in **Anisminic Ltd v Foreign Compensation Commission and another**[27]. In that case, as is well known, the court was concerned to interpret a provision in a statute[28] that "the determination by the commission of any application made to them under this Act shall not be called in question in any court of law". The House of Lords held[29] that the word "determination" in the statute should not be construed as including everything which purported to be a determination, but was not in fact a determination, because the respondent commission had misconstrued the provision of the Order-in-Council which defined their jurisdiction. Accordingly the court was not precluded from inquiring whether or not the order of the commission was a nullity. In a passage to which both parties have referred us, Lord Reid said this[30]:

> "...I have come without hesitation to the conclusion that in this case we are not prevented from inquiring whether the order of the commission was a nullity.
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> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the

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[27] [1969] 2 AC 147
[28] Section 4(4) of the Foreign Compensation Act, 1950
[29] By a 4-1 majority
[30] At page 171

> tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly...If [the tribunal] is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law."

[43] A statement to like effect may be found in the decision of this court in **Clifford Brown et al v The Resident Magistrate, St Catherine (Her Hon Mrs Von Cork) and the National Construction Company Limited**[31]. In that case, the defendants in a civil action tried before a Resident Magistrate for the parish of Saint Catherine sought an order for certiorari to quash a ruling made by her during the course of the proceedings. The basis of the challenge was that the Resident Magistrate had no jurisdiction to make the ruling in question. Dismissing the defendants' appeal against the Full Court's dismissal of their motion for certiorari, this court held that: (i) in considering the question of jurisdiction, it cannot be said that the tribunal has acted

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[31] (1995) 32 JLR 117

beyond its jurisdiction merely by making a decision which is erroneous in law or fact or even one that is wholly unsupported by evidence; and (ii) a resident magistrate or other judicial officer is permitted to fall into error but that does not necessarily make the judgment amenable to certiorari unless it can be established on the record that he or she has acted in excess of jurisdiction or without jurisdiction. Applying these principles, which were explicitly derived from the passage in Lord Reid's judgment in **Anisminic v Foreign Compensation Commission and another**, quoted above, the court concluded that the order made by the resident magistrate could not properly affect the jurisdiction which she had *ab initio* over the case.

[44] Both **Anisminic v Foreign Compensation Commission and another** and **Clifford Brown et al v The Resident Magistrate and another** therefore support a clear distinction between reviewable and non-reviewable errors of law made by an inferior tribunal. In **R (on the application of the Crown Prosecution Service) v Norwich Magistrates' Court**, the justices' error fell within the first category: it was amenable to certiorari because the court found that it was "plainly contrary to the interests of justice and lacked any reasonable basis". It was, therefore, an irrational decision in the sense postulated in Lord Diplock's oft-cited formulation in the landmark case of **Council of Civil Service Unions and others v Minister for the Civil Service**[32], that is –

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[32] [1984] 3 All ER 935, 951

> "...a decision which is so outrageous in its defiance of logic...that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[45] In the instant case, save for the contention that the 1st respondent failed to take sufficient time to consider her decision, to which I will return briefly in a moment, it seems to me that the applicant's complaints against the challenged decision all fall within the category of non-reviewable errors of law made by an inferior tribunal. In other words, even if the applicant is correct in thinking that the challenged decision was wrong in law, it was plainly a decision made within the 1st respondent's undoubted jurisdiction to hear the submission of no case and to assess whether it was made out in the light of the evidence adduced by the prosecution. Right or wrong, it was a valid decision and therefore non-reviewable.

[46] But the decision of the Full Court in respect of which the applicant seeks leave to appeal went further than that. For, as Brown-Beckford J stated in concluding that the applicant had failed to identify an arguable ground for judicial review having a realistic prospect of success[33], "[t]he applicant in its submissions has not identified on the evidence presented any failure on the part of the [1st respondent] to apply the applicable law in the proper manner". On this application, as it seems to me, notwithstanding Mr Wildman's as always energetic efforts, the applicant has not established that there is any reasonable chance of success on an appeal from that conclusion.

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[33] At para. [115]

[47] This brings me back, as promised, to the complaint that the 1st respondent said in her ruling that she had not had sufficient time to consider the matter. It will be recalled that, with some justification from the notice of application for leave and the affidavits filed in support, Lawrence-Beswick J had taken this complaint to be at the substratum of the application. In this regard, it is fair to observe that, although it was restated in the applicant's skeleton submissions, neither Mr Leys nor Mr Wildman addressed any argument to us in support of this complaint. Indeed, Mr Leys was anxious to suggest that, from the outset, this complaint was merely part of the context against which the applicant's more substantial complaint that the challenged decision was irrational was made. It is therefore only necessary to say that no reasonable chance of a successful appeal has been shown in respect of Brown-Beckford J's conclusion on this point[34] that "...taken as a whole, the repeated references to time in the judgment [of the 1st respondent] as delivered appear to be in reference to the production of copies of her decision and not the decision itself".

[48] For completeness, I should also deal with two other points made by the applicant. First, I do not think there could possibly be any reasonable chance of successfully appealing against the Full Court's rejection of the argument that, before concluding that there was no evidence of an intention to defraud, the 1st respondent ought to have heard the evidence proffered on behalf of the 2nd and 4th respondents. In my view, to accede to the applicant's contention would be to turn the accepted

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[34] At para. [106]

principles relating to the burden of proof in criminal cases upside down. And second, whether Mr Leys is right or wrong in his submission that Thompson-James J erred in thinking that the availability of declaratory relief could amount to an alternative remedy in this case, the fact is, as the learned judge said, that the decision of the Full Court to in any event refuse leave to apply for judicial review rendered the issue "inconsequential". The substance of the decision of the Full Court was that the applicant had failed to show an arguable ground for judicial review with a realistic prospect of success and I have already stated my view that I do not think that the applicant has shown a reasonable chance of success in arguing to the contrary.

[49] Finally, I come to the question of the order for costs of the Full Court hearing. It will be recalled that, upon refusing the applicant leave to apply for judicial review, Lawrence-Beswick J had ordered the parties to make written submissions on costs. I think that it is strongly arguable that, as Mr Leys submits, the Full Court ought to have afforded the applicant the same opportunity before making an order for costs against it. As Lord Sumption observed in **Sans Souci Limited v VRL Services Limited**[35], a decision of the Privy Council on appeal from this court, "[i]t is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard".

[50] I would accordingly propose that the court should: (i) refuse leave to appeal against the Full Court's decision which refused the applicant's application for leave to

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[35] [2012] UKPC 6, para. 22

the apply for judicial review of the challenged decision; (ii) grant leave to appeal against the Full Court's decision which ordered that the applicant should bear the respondents' costs of the renewed application for leave to apply for judicial review; and (iii) order that the applicant should pay 75% of the respondents' costs of this application, such costs to be agreed or taxed.

[51] In order that the appeal on costs can be dealt with as efficiently and cost effectively as possible, I would order that: (i) the applicant is to file and serve its grounds of appeal against the Full Court's award of costs, together with skeleton arguments in support of the grounds of appeal, within 21 days of the date of this order; (ii) within a further 21 days of the service on them of the applicant's grounds of appeal and skeleton arguments, the respondents are to file and serve skeleton arguments in response to the appeal; and (iii) within 28 days of the filing of the last of the respondents' skeleton arguments, the court will issue its decision on the appeal in writing.

F WILLIAMS JA

[52] I have read in draft the reasons for judgment of the learned President. I agree with his reasoning and conclusions and have nothing to usefully add.

STRAW JA (AG)

[53] I too have read the draft reasons for judgment prepared by the learned President and agree with his reasoning and conclusions. I have nothing further to add.