JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 39/2003

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)

IN THE MATTER TOUCHING AND
concerning the death of **PATRICK GENIUS**

A N D

IN THE MATTER OF The Coroner's Act

A N D

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

BETWEEN	**LEONIE MARSHALL**	**CLAIMANT**
A N D	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Richard Small & David Batts instructed by Livingston, Alexander & Levy for Appellant

Georgiana Fraser, Assistant Deputy Director of Public Prosecutions for the Crown

November 9, 10, 11, 12, 15, 16, 17, 18, 2004
& March 18, 2005

FORTE, P:

I have read in draft the judgment of Smith, J.A. and agree that this appeal ought to be dismissed. However, while I agree with the analysis by Smith, J.A. of the available evidence and his conclusion that as a result of the analysis, it would not be correct to interfere with the Director's exercise of his Constitutional powers in his decision not to initiate charges against the police officers, there are a few comments I would nevertheless desire to record.

The appeal called into question inter alia, the responsibility of the Director in the discharge of his Constitutional powers, and his accountability to those on behalf of whom he exercises those powers i.e. the Citizens of Jamaica. Smith, J.A. in his judgment has referred to the Constitutional provisions which deal with those powers, and consequently there is no necessity to repeat them here. During the arguments both here and below it was agreed that the Director's exercise of those powers can be questioned on Judicial Review by the Court by virtue of Section 1(9) of the Constitution which reads as follows:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

To put the appeal in proper context, it is necessary to set out the matters into which judicial review were asked for and the reliefs which were sought, at

the time when the ex parte application was made. The appellant sought judicial review of:

> (i) the decision of the Coroner to refer the matter to the Director of Public Prosecutions;
>
> (ii) the decision of the Director of Public Prosecutions that no proceedings are to be instituted against the three (3) police officers;
>
> (iii) the decision of the Director of Public Prosecutions not to disclose to the applicant his reasons for not prosecuting.

Smith, J.A. has already recorded the reliefs sought, and for my purposes, it is not necessary to repeat them here. It is significant to state that the ex parte application having been refused; the application was moved before the Full Court. That Court granted leave to apply for judicial review only in respect of:

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

in accordance with its earlier stated opinion that "the absence of gun powder on the hands of the deceased could have the effect of negativing self-defence".

Significantly, also, the Court refused specifically to grant leave for judicial review re the contention that the Director of Public Prosecutions had failed to give reasons.

In my view the granting of leave to enquire into the Director's decision that no proceedings are to be instituted and the rejection of the application for leave to enquire into the absence of reasons for that decision, is inconsistent. An examination of the former in my view necessitates an examination of the latter.

The Director, obviously, in answer to what the Full Court (the Leave Court as described by my brother Smith J.A.) concluded, was content to say in affidavit form that his decision not to prosecute was based on the fact that in his opinion there was not sufficient evidence to do so.

Before us Mr. Richard Small, for the appellant, contended that much more was required of the Director given the circumstances of the case.

To understand the merits of Mr. Small's argument, the circumstances of the case must indeed be examined.

As recorded in the judgment of Smith, J.A. the circumstances under which Patrick Genius came to his death was the subject of a Coroner's Inquest in which the jury concluded that there was criminal responsibility for his death without naming any person or persons who was/were so responsible. The evidence, however was such that if anyone was, in the jury's mind, criminally responsible, it had to be the police officers who were, apart from the deceased, the only persons present at the incident, and whom in their statements admitted firing shots at the deceased, albeit in circumstances in which they maintained, they were acting in defence of themselves. It is remarkable in those circumstances that the Coroner's jury was either unable or unwilling to name the person or persons whom in their minds was/were criminally responsible.

The matter was thereafter referred to the Director of Public Prosecutions for his decision, given his Constitutional powers, as to whether a prosecution

should be undertaken and if so of whom. It is his decision not to initiate any proceedings which was the subject of judicial review.

The Director of Public Prosecutions is an officer created by the Constitution and whose powers are set out therein. Some may say he has awesome powers, being able to determine whether to initiate criminal proceedings against any citizen, as also to bring to an end any such proceedings which have been commenced. He is not subject to the direction or control of any other authority, and can only be questioned in the context of judicial review in Court by virtue of section 1(9) of the Constitution. He is however accountable to the people of Jamaica whom he serves, and should be expected, except in cases where it is not in the public interest, to be open in respect to the processes by which he makes his decisions. Cases like the subject matter of this appeal, where a Coroner's Inquest has concluded that persons are criminally responsible, and where police officers of the State are the likely persons to be so responsible, places even a greater burden on the Director of Public Prosecutions to declare publicly the reasons for coming to his conclusion that no one should be charged. The necessity to do so, in my view, became even more so, when the Full Court granted leave for judicial review of his decision. See ***R. v. Civil Service Appeal Board*** [1991] 4 All E.R. 310 at page 315 where L. A. Donaldson, M.R. had this to say:

> "In ***R. v. Lancashire CC, ex p Huddleston*** [1986] 2 All E.R. 941 at 945 I expressed the view that we had now reached the position in the development of judicial review at which public law bodies and the

> courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of public administration, including, I would add, the administration of justice. It followed from this that, if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to. Parker, LJ and Sir George Waller did not share my unease at the limited disclosure made by the council in that case, but I do not understand them to have disagreed with the principle."

During the course of arguments before us several other cases were cited but it is only necessary to refer to two (2) of those, which in my view are relevant to the issues involved here, and which state principles which are in keeping with my own opinion.

The first is ***Regina v. DPP ex parte Manning and Another*** [2000] 3 WLR 463 in which Lord Bingham of Cornhill expressed the following words at page 477:

> "It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined class of cases which meet Mr. Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the state must always arouse concern, as recognized by section 8(1)(c),

> (3)(b) and (6) of the Coroners Act 1988, and if the death resulted from violence inflicted by agents of the state that concern must be profound. The holding of an inquest in public by an independent Judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry: see ***McCann v. United Kingdom*** [1966] 21 E.H.R.R. 97. 163-164, paras. 159-164. Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given." [*emphasis added*]

Counsel for the Respondent, sought to distinguish this dicta on the basis that in the cited case, the deceased was in custody at the time of his death. In my view, however, in the circumstances of the subject matter of this appeal that is to say (1) where a Coroner's Inquest has returned a verdict of criminal responsibility (2) that persons who though not named, can be identified by the evidence, and (3) who are agents of the state, then the underlined words in the above cited dicta of Lord Bingham will be equally applicable.

The following words which came from Lord Bingham in his judgment, readily, in my view weaken the contention of counsel for the respondent, that the DPP's mere assertion that he did not order a prosecution, because there was insufficient evidence amounted to reasons for his decision. The learned Lord states:

> "We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision."

Lord Bingham then went on to make the following statement which is in keeping with my own views and which is also relevant to this appeal:

> In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require."

Unhappily in the instant case, even though the appellant made the complaint, no detailed reasons were forthcoming. I think that was wrong.

The facts of the instant case, like those in the ***Manning*** case (supra) required reasons to be given for the decision not to prosecute.

Having said that, however, I now turn to the consequence if any of the Director's omission to give full reasons, given the particular circumstances of this case. This brings me to the other cited case, which in my view is of relevance to the issues involved in this appeal. It is the case of ***Minister of National***

Revenue v. Wright Canadian Ropes Ltd [1947] A.C. 109. The case is of vintage but nevertheless the principle laid down is still of relevance and indeed applicable to the instant appeal. In that case dealing with the provisions of the Income War Tax Act it was held inter alia:

> "There is nothing in the language of the Income War Tax Act or in the general law to compel the Minister to state his reason for taking action under s. 6, sub-s. 2 and he gave no reason for his decision in this case but that does not necessarily mean that by keeping silence he can defeat the tax-payer's appeal. The court is always entitled to examine the facts which are shown by the evidence to have been before the Minister when he made his determination, and if in the opinion of the court they are insufficient in law to support it, the determination cannot stand. If, on the other hand, there was sufficient material before the Minister to support his determination, the court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion."

The above view is consistent with the dicta of Lord Bingham in the later case of ***Manning*** (supra) where in considering the function of the English DPP to determine whether to prosecute, he had this to say at page 474:

> "The Director and his officials ... 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."

In keeping with the above cited dicta I would hold, that in the absence of reasons by the DPP, a Court conducting judicial review into his decision, may look at the evidence available to the DPP, and determine, by the strength and weaknesses of that evidence, whether his decision was in breach of his powers under the Constitution or any other law.

The DPP was at least helpful in identifying the material to which he addressed his mind when he stated the following in his affidavit:

> "11. That the Director of Public Prosecutions having been made aware of the inquisition and depositions at the inquest touching the death of Patrick Genuis sought to exercise his powers to determine, notwithstanding the findings of the jury, whether there was anyone he could pursue charges against in relation to the said death, after a proper examination of the inquisition, depositions, statements and other documents at his disposal.
>
> 12. That on a careful examination of all the material available to him including medical and forensic evidence, the Director of Public Prosecutions came to the decision that there was not sufficient evidence in law to charge anyone."

In revealing to some extent, the thought processes of his mind in coming to his conclusion, he quoted the above cited dicta from Lord Bingham [at page

474 of the ***Manning*** case (supra)] and expressly stated that he was guided by several factors, not limited to, but including that cited passage. It appears then that, having examined the documents available to him he formed the judgment based on how in his view the case would likely fare in the context of a serious trial before a jury.

The evidence before the Full Court, was that taken at the Inquest, and remains before us, the only evidence upon which the Court could make an assessment in a determination whether the decision was consistent with his Constitutional function or any other law (Section 1(9)). I would agree with Mr. Small that in the absence of the "other documents" and "statements" to which the Director of Public Prosecutions referred in his affidavit, the Court is entitled to proceed as if they did not exist and determine the matter solely on the evidence before it i.e. the depositions taken at the inquest.

Smith, J.A. has done a detailed analysis of that evidence, and has concluded that on that evidence it cannot be said that the Director acted outside of his powers. That is an opinion with which I agree and it is therefore unnecessary for me to enter into my own examination of the available evidence or to reiterate what Smith, J.A. has said in relation to the test to be applied in such circumstances.

In the event, although in my view the DPP should have given fuller reasons to facilitate the proper examination of his decision, in the circumstances

of this case, having regard to the evidence that would be led at a trial and our conclusion thereon, I would also refrain from granting the orders prayed.

I would dismiss the appeal and agree that no order for costs should be made.

SMITH, JA:

These proceedings arise out of the fatal shooting of Patrick Genius, the son of the appellant, by the police on the 13th December, 1999. A Coroner's Inquest into the circumstances surrounding his death was held during the months of April and May, 2001. On the 27th May, 2001 the Coroner's jury, by their verdict, found that the cause of death was "gunshot wounds to the head" and that "person or persons" were criminally responsible. They certified their verdict by subscribing their names to an Inquisition which is required by law to contain certain particulars including the names of the persons, if any, whom they charge with murder or manslaughter (see section 19(5) of the Coroner's Act). The Coroner did not issue his warrant for the arrest of anyone but instead submitted the inquisition and depositions to the Director of Public Prosecutions for him to determine if anyone should be charged. This course was taken, presumably, because the inquisition did not specifically charge anyone. The Director of Public Prosecutions, after examining all the material available to him, concluded that there was not sufficient evidence in law to charge anyone.

On January 9, 2002 the Director of Public Prosecutions was interviewed on radio. He publicly explained his decision not to prosecute the police officers. By letter dated February 1, 2002, Mr. David Batts wrote to the Director of Public Prosecutions on behalf of the appellant

requesting, among other things, a copy of his ruling and/or opinion and/or decision in relation to the matter as well as the reasons therefor. No reply was received by the appellant.

On the 18th March, 2002, the appellant filed an Ex-parte Notice of Application in the Supreme Court for leave to apply for judicial review of:

> "1. The decision of the Coroner of the Parish of Kingston and St. Andrew to refer a matter to the Director of Public Prosecutions rather than to charge the three (3) police officers with the offence of murder in accordance with the verdict of the Coroner's jury.
>
> 2. The decision of the Director of Public Prosecutions that no proceedings are to be instituted against the three (3) police officers.
>
> 3. The decision of the Director of Public Prosecutions not to disclose to the Applicant his reasons for not instituting proceedings against the three (3) police officers."

On the 10th April, 2002 Jones J dismissed the application on the grounds that :

(a) the applicant had failed to provide vital support for her application (the inquisition and the Coroner's summation to the jury were not submitted); and

(b) the application was out of time and the applicant's application to enlarge the time for hearing of the application for leave could not be entertained because the applicant had failed to give notice to the Coroner and the Director of Public Prosecutions.

The applicant renewed her application to a Full Court (Wolfe, CJ, Beckford and Marsh JJ) hereinafter referred to as the "Leave Court" pursuant to Section 564 (c) (4) of the Judicial Review Rules 1998. On the 31st October, 2002, the Leave Court came to the conclusion that leave should be granted but limited such leave to paragraph 2 of the Ex parte Notice dated 18th March, 2002. Accordingly leave was granted to apply for judicial review of:

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

On the 6th November, 2002, the applicant filed an Originating Motion pursuant to the leave granted by the Leave Court. On May 2, 2003 the Full Court (Reid, Harrison and D. McIntosh JJ), hereinafter referred to as the "Review Court", dismissed the Motion and ordered the applicant to pay the respondent's costs.

Before this Court now is an appeal against the order of May 2, dismissing the Motion.

It is, I think, necessary to refer briefly to the proceedings in the "Leave Court" and the "Review Court" before considering the submissions made to this Court.

In the "Leave Court"

As already stated, the appellant's ex parte application for leave to apply for judicial review was refused by Jones J. Pursuant to section 564

(c)(4) of the Judicial Review Rules the appellant renewed her application before the "Leave Court".

The following reliefs were sought:

> "(a) An order of Mandamus directing the Coroner and/or the Director of Public Prosecutions... to charge the three police officers;...
>
> (b) An order of certioriari to quash the Coroner's decision to refer the...file to the Director of Public Prosecutions ...and/or Certiorari to quash the ruling of the Director of Public Prosecutions ...(not to prosecute);
>
> (c) A declaration..."

(i) as to the meaning of the finding of the Coroner's Jury

(ii) that it is the duty of the Coroner upon such a finding to institute proceedings against the police officers ; and

(iii) that the decision of the Coroner to refer the matter to the Director of Public Prosecution was wrong.

> "(d) A declaration...that the three (3) police officers or any of them ought to be charged with murder...
>
> (e) An injunction to restrain the Director of Public Prosecutions from taking any steps to quash, withdraw and/or terminate any such criminal proceedings.
>
> (f) An Order directing the Director of Public Prosecutions to take such steps as will be necessary to have the body of Patrick Genius exhumed for the purpose of retrieving from his body the bullet or bullets lodged therein."

The grounds relied on by the appellant were:

"(1) The Coroner of Kingston and St. Andrew erred in law and/or acted unreasonably and/or failed to act judicially when he refused, neglected and/or failed to institute prosecution of the three (3) police officers in accordance with the verdict of the jury and the provisions of the Coroner's Act.

(2) That the Coroner of Kingston and St. Andrew erred in law and/or acted in excess of his jurisdiction and/or unreasonably and/or arbitrarily and without any lawful justification when he directed the jury not to name the individuals they considered to be responsible for the death of the deceased.

(3) That the Director of Public Prosecutions has erred in law and/or acted unreasonably and/or ultra vires when he ruled that the said three (3) police officers were not to be charged.

(4) That the Director of Public Prosecutions failed, neglected and/or refused to pay any or any sufficient attention to the medical evidence given at the Coroner's inquiry and/or to the oral evidence of the three (3) police officers in relation thereto.

(5) The Director of Public Prosecutions and/or the Coroner have abdicated their statutory and/or constitutional duties in that they have acted unreasonably and/or have failed to act as required by law and this Honourable Court in the interest of justice ought to order them so to act.

(6) That the applicant relies upon the following authorities among others:

(a) The Coroner's Act sections 19(5) and 20

(c) Re: Kings Application [1991] 40WIR 15 and cases cited therein.

(c) C.O. Williams Construction Ltd. v Blackman [1994] 45 WIR 94."

The Director of Public Prosecutions, having received a Notice of Intention to renew application for judicial review, filed an affidavit dated 18th June, 2002. In paragraphs 3-9 of this affidavit he dealt with the complaint against the Coroner in the light of the Coroner's Act. From paragraph 10 onwards he sought to answer the complaints against himself in the light of his constitutional powers. Paragraphs 11 and 12 are important. They read:

> "11. That the Director of Public Prosecutions having been made aware of the inquisition and depositions at the inquest touching the death of Patrick Genius sought to exercise his powers to determine, notwithstanding the findings of the jury, whether there was anyone he could pursue charges against in relation to the said death, after a proper examination of the inquisition, depositions, statements and other documents at his disposal.
>
> 12. That on a careful examination of all the material available to him including medical and forensic evidence, the Director of Public Prosecution (sic) came to the decision that there was not sufficient evidence in law to charge anyone."

In response to the Director of Public Prosecutions' affidavit, Mr. Small submitted that the Director of Public Prosecutions did not take into consideration all the relevant matters. There was, he said, considerable material on the depositions which negatived the testimony of the police officers that they had shot at the deceased in self defence. He also contended that the Director of Public Prosecutions had failed to give

reasons as the averments in paragraphs 11 and 12 do not constitute reasons.

The following conclusions of the Leave Court are important:

(i) The Court, per Wolfe CJ, was of the view that "the absence of gunpowder on the hands of the deceased could have the effect of negativing self defence."

(ii) The Court rejected the contention that the Director of Public Prosecutions had failed to give reasons.

(iii) In so far as the complaint against the Coroner was concerned, the Court was of the view that "no useful purpose would be served in ordering a review of what transpired at the Coroner's Court or what ought to have been done by the Coroner. The Director of Public Prosecutions having acted upon the submission to him by the Coroner, the Coroner has become functus."

In accordance with (i) above, the Court granted leave to apply for judicial review of:

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

It seems to me that since all the parties were before the Full Court it would have been more appropriate for that Court to have heard the whole matter on the merits and then decide whether leave should be

refused or whether judicial review should be granted. This would certainly have saved much judicial time and expense.

In the "Review Court"

By Originating Motion dated 6th November, 2002 the applicant sought judicial review of the decision of the Director of Public Prosecutions that no proceedings are to be instituted against the three (3) officers. This was all that was before the "Review Court." The reliefs sought were the same as those referred to in the Application which was before the "Leave Court" (supra) so far as they relate to the Director of Public Prosecutions.

The grounds for the reliefs sought were that the Director of Public Prosecutions:

(a) erred in law and/or acted unreasonably and/or ultra vires when he ruled that the three police officers should not be charged with murder;

(b) failed, neglected and/or refused to pay any or any sufficient attention to the medical evidence given at the Coroner's inquiry and/or the oral evidence of the three police officers in relation thereto;

(c) abdicated his statutory and/or constitutional duties in that he acted unreasonably and/or failed to act as required by law.

In addition to these grounds, Mr. Small argued that in as much as leave had been granted by the Full Court it was open to and expected of the Director to make the reasons for his decision not to prosecute available to the Review Court. The absence of such explanation, he argued, warranted an inescapable inference that there was no plausible explanation.

Reid J was of the view that the Director of Public Prosecutions was not obliged to give reasons for declining to embark on a prosecution. More importantly the learned judge held that nothing advanced by the applicant demonstrated that the Director of Public Prosecutions had fallen into error. He concluded that the decision not to prosecute was not flawed.

Harrison J held that the absence of reasons was not a matter for the consideration of the Review Court since the Leave Court did not grant leave. However, he was also of the view that there was no general duty on the Director of Public Prosecutions to give reasons. Further, he held that it was for the Court to determine whether or not reasons ought to be given and that the mere fact that leave was granted for judicial review could not, by itself, create the need for the reasons. The learned judge made the following findings:

1. There is nothing unlawful in the policy of the DPP in this case. It has not been shown either that his decision not to prosecute was unfair.
2. It has not been established that the Director failed to act in accordance with any policy.
3. There is no evidence to support the proposition that the DPP must have failed to consider relevant material or that he had irrelevant considerations in mind.
4. The significance of the absence of gunpowder residue on the back of the hands of the deceased must be considered in the light of the other aspects of the forensic evidence and all the circumstances of the case.
5. There is evidence that the deceased was not shot at close range.
6. There is no need to have the remains of the deceased exhumed in order to determine from whose firearm the fatal bullet was discharged.
7. The exercise of the Director of Public Prosecutions' judgment involves an assessment (bearing in mind the burden and standard of proof) of the strength, by the end of the trial, of the evidence against a defendant and of likely defences. In this instance self defence would indeed be a live issue.

8. This is not a case fit for further investigation.

9. The decision not to prosecute is not perverse and neither is it a decision which no reasonable prosecutor could have arrived at.

D. McIntosh J was of the same view. He held that the Director of Public Prosecutions had demonstrated that to have engaged in a prosecution on the basis of the material at hand would have been an exercise in futility.

The Appeal

Fourteen (14) grounds of appeal were filed:

"(a) The learned judges of the Full Court erred in that they failed to appreciate that there was no relevant Policy guideline or document applicable to the exercise of a discretion by the Director of Public Prosecutions. As such the duty of the learned Director of Public Prosecutions was to rule in favour of a Prosecution provided a Prima Facie case of homicide could be made out. The Full Court failed to appreciate that there was evidence capable of negativing self defence.

(b) The learned judges of the Full Court erred in law in that they failed to give any or any sufficient weight to the

fact that a Coroner's jury had found persons criminally responsible and had therefore rejected the allegations of self defence. Prima facie therefore there were triable issues.

(c) The learned judges of the Full Court failed to appreciate that the absence of reasons is evidence of unreasonableness and/or unlawful conduct and a basis for Judicial Review of administrative action.

(d) The learned judges of the Full Court failed to appreciate that in the absence of reasons it was not for the court when reviewing the learned Director of Public Prosecutions' ruling to speculate as to what those reasons were or might have been.

(e) The learned judges of the Full Court failed to appreciate that in the absence of evidence it was not for the court of Judicial Review to assume that relevant matters were considered.

(f) The learned judges of the Full Court failed to pay any or any sufficient attention to the evidence that at the time of his ruling the learned Director of Public Prosecutions had not considered all the Forensic

evidence and in particular the evidence of Marcia Dunbar.

(g) The learned judges of the Full Court failed to appreciate that the refusal of Leave to Apply for Review of the Decision of the Director of Public Prosecutions not to give reasons was separate and distinct from, and did not preclude review of the decision of the Director of Public Prosecutions not to prosecute. The court failed to appreciate that the absence of reasons is evidence of the abdication of statutory and/or constitutional duties, unreasonableness and/or failure to act as required by law when deciding not to prosecute and in respect of which the complaint was made and Leave granted.

(h) The learned judges of the Full Court failed to appreciate that Section 94 (6) of the Constitution did not preclude the existence of a duty to give reasons. The court ignored Section 2 of the Constitution which expressly granted a right of Judicial Review. The Full Court ignored the duty to give reasons, that is, rationality and not arbitrariness was required in law.

(i) That the Full Court erred in law and in fact in that it failed to pay any or any sufficient attention to the evidence of

Marcia Dunbar, the forensic expert, as to the absence of gunpowder residue on the back of the deceased hands.

(j) The Full Court erred in law and in fact in giving credence and evidential status to the learned Director of Public Prosecutions' submission with reference to a text on Forensic Science which postulating circumstances in which gunpowder residue may have been removed. The court failed to appreciate that the issue was whether the learned Director of Public Prosecutions had considered all relevant material at the time of his ruling.

(k) The Full Court further erred in that it failed to appreciate that questions pertaining to the circumstances in which gunpowder residue may have been removed were issues for a jury at trial.

(l) The Full Court erred in law and fact in that it failed to pay any or any sufficient regard to the injuries upon the deceased. The court failed to appreciate that the several bullet wounds to the head were from behind and at an oblique angle. There was also a wound to the leg.

(m) The Full Court erred in law and fact in that it failed to appreciate that the retrieval of the bullet lodged in the skull of the deceased may have identified the officer

who had fired it and thereby give important information which could corroborate or refute that officers account of when he fired and his position in relation to the accused when he did fire. The decision not to direct exhumation deprived the Director of Public Prosecutions of potentially important evidential material.

(n) The Full Court erred in law when it made an Order for Costs against the Applicant in that it failed to pay any or any sufficient regard to the following:

(i) The learned Director of Public Prosecution had failed, neglected and/or refused to explain his decision when requested so to do prior to the application to the court.

(ii) The remedy of Judicial Review was the only recourse open to the mother of the deceased who had seen and heard a coroners jury declare the police officers criminally responsible and who had received no explanation for the failure to prosecute.

(iii) The issue was one of general public interest as the Office of the Director of Public Prosecutions is

> independent of all control save only for the power of the court to judicially review its decisions."

Mr. Small indicated that these grounds involve five issues:

(1) What was the duty of the Director of Public Prosecutions?

(2) Whether the presence of evidence of self defence precluded the Director of Public Prosecutions from preferring the charge?

(3) Whether the Director of Public Prosecutions ought to give reasons and if he does not what inference can be drawn therefrom?

(4) The significance of the forensic evidence

(5) The Order as to Costs.

I am afraid that I cannot agree with counsel for the appellant that the above five issues are all germane to this appeal.

Issue number 3 does not arise at all. In the first place the "Leave Court' held that the Director of Public Prosecutions had in fact given his reason for the decision not to prosecute. The learned Chief Justice in delivering the judgment of the Court said (page 96 of the Record):

> "It was further submitted that the Learned Director of Public Prosecutions failed to give reasons for his decision. The applicant contended that the averments in paragraphs 11 and 12 do not constitute reasons.
>
> Certainly, when the Director of Public Prosecutions says, 'there was not sufficient evidence in law to charge anyone', he must be understood to be saying there was no evidence to establish a prima facie case against anyone, and therefore, it would be pointless to rule that someone be charged."

It is clear that the learned Chief Justice was saying that the Director of Public Prosecutions had given sufficient reason for his decision and I entirely agree with him. The question as formulated at 3 above is in my view misconceived. Harrison J was right when he said that in the circumstances the issue as to the absence of reasons was not a matter for the consideration of the Review Court.

Mr. Small's oral submissions on this point were lengthy and sustained but, in my view, were to no avail because they were predicated on a false premise, namely, that the Director of Public Prosecutions had failed to give any or any sufficient reason.

To my mind the real issue is whether or not the Review Court was right in upholding the decision of the Director of Public Prosecutions not to prosecute for the reason given, namely, that there was not sufficient evidence. This would involve, to some extent, the issues identified by Mr. Small at 1,2 and 4 above (see grounds a, b,e,f,i,j,k l,m).

In considering whether to institute criminal proceedings the Director of Public Prosecutions must first have regard to the sufficiency of evidence test. If there is sufficient evidence then he may go on to determine whether it is in the public interest to prosecute. In this appeal the public interest criterion is not relevant. We are here only concerned with the evidential sufficiency criterion. In this regard, if the available and admissible evidence is indubitably sufficient, bearing in mind any

defence which is clearly open to the police officers, then the Director of Public Prosecutions' decision not to prosecute would be unreasonable and therefore bad in law. It is only in such an event that the court may interfere with his decision. In other words, unless the appellant shows that the Director of Public Prosecutions' decision not to prosecute is bad in law there will be no basis for the Court to inferfere – see ***R v D.P.P Exp. Manning*** [2000] 3WLR 463 at 474. In the language of section 1(9) of the Constitution the question on judicial review is whether the Director of Public Prosecutions has "performed his functions in accordance with the Constitution or any other law".

I must now turn to examine the real issue on appeal.

The Evidential Sufficiency Issue

The three police officers involved, gave evidence at the Coroner's Inquest. Detective Corporal Claude James deponed that on December 13, 1999 about 5:10.pm he was driving his motor vehicle along Hope Boulevard, St. Andrew when he saw two men riding a motor cycle. They were going towards Old Hope Road. He had seen these men on about three occasions before in the area. They were suspected of committing robberies of businessmen in the area. He followed them at a "safe distance and telephoned the Matilda's Corner Police Station for assistance. The men on the motor cycle entered Mona Heights and proceeded along Garden Boulevard. They stopped near Buttercup Drive

and alighted from the motor cycle. They went to the side of the road. Cpl. James informed his colleagues at Matilda's Corner Police Station of the situation. A police vehicle driven by Corporal Earl Grant arrived. Corporal Ronald Francis was with him. The police officers alighted from their vehicles and approached the two men. The men looked in the direction of the officers, pulled guns from their waist bands and fired at the police. Cpl. James said that he dived to the ground and returned the fire. One of the men jumped on the motor cycle and sped away towards Mona Road. The other jumped a fence and ran onto the premises of the Mona Primary School. Cpl. James said he ran back to his car and drove to Mona Road. He did not see the cyclist. He drove onto a minor road in an endeavour to intercept the man who had run onto the school premises. He left his car and went over a fence. He joined his colleagues Grant and Francis who were in the bushes. Whilst in the bushes he again saw one of the men. The man he said, opened fire at them and he returned the fire. The man fell. A.38 revolver was seen on the ground beside him. In this revolver were four (4) spent shells and one(1) live round. This man was subsequently identified as Patrick Genius. Cpl. James said that in all he fired about six shots from his 9mm browning pistol.

Cpl. Francis deponed that on the 13th December, 1999 he received a radio message and proceeded to Garden Boulevard in Mona Heights in a marked police vehicle driven by Cpl. Grant. He saw Cpl. James in his

private motor vehicle. They spoke. He then saw two men facing a fence to the side of the road. A motor cycle was nearby. He said Cpl. Grant drove down Garden Boulevard which is a dual carriageway and parked on the opposite side of the road. He deponed that as he opened the door of the vehicle the two men spun around. They had guns in hand. He heard explosions and took cover behind the door of the vehicle. One of the men ran to the motor cycle, mounted it and sped off. The other went over the fence. Cpl. Francis said whilst the man was going over the fence he fired one shot in his direction. The man continued running with Cpl. Francis in pursuit. During the chase the man fired a shot at Francis who in turn fired two shots in the direction of the man. The chase continued across the school's play field. The man went through an opening in the fence and ran into nearby bushes. Cpl. Francis was then joined by Cpl. Grant and Cpl. James. They went in search of the man. In describing what transpired during the search Cpl. Francis said:

> "Cpl. James was on the far right and in front. Cpl. Grant was in the middle and I was at the rear over to the extreme left. Whilst checking the accused man appeared. He pointed the gun in the direction of Cpl. James who was closest. I then heard explosions. By then I had taken cover. The man fell to the ground."

He further stated that he saw a .38 revolver on the ground beside the deceased. The deceased was taken to the hospital where he was

pronounced dead. Thereafter the body was taken to Madden's Funeral Home. In all he fired three (3) shots from his 9mm pistol.

Cpl. Grant deponed that when he arrived at the intersection of Buttercup Drive and Garden Boulevard he saw and spoke to Cpl. James. He drove along Garden Boulevard. He saw two men standing close to a motor cycle. He stopped his vehicle about 18 meters from them. The men looked over their shoulders, pulled guns and fired in his direction. He took cover behind the police vehicle. He heard the motor cycle "speed off". He stood and saw one man on the motor cycle. He saw the other man jump the fence and run onto the compound of Mona Primary School. He and Cpl. Francis gave chase. He heard explosions. They chased the 'suspect' across a "a playing field". The 'suspect' ran through an opening in the fence and disappeared in the bushes. Francis who, he said, was ahead of him, went through the said opening in the fence. He followed. James joined them. They proceeded towards the bushes where the suspect had run. The suspect he said sprang to his feet and fired shots in his direction. He threw himself to the ground and fired four (4) shots at the suspect. He heard explosions in the direction where James was. The suspect fell, wounded. A .38 revolver was seen on the ground close to the suspect's right hand. The firearm had four (4) spent shells and one (1) live round. Cpl. Grant was, like his colleagues, armed with a 9mm pistol. He fired four (4) shots during the incident.

Of the other witnesses who deponed at the Inquest the evidence of the forensic pathologist, Dr. Prasad Sarangi, and of the forensic analyst, Marcia Dunbar is relevant for the purpose of this appeal. Dr. Sarangi deponed that he observed five (5) gunshot wounds on the body of the deceased:

(i) A perforating gunshot entrance wound to the back of the left thigh with corresponding exit wound on the front of the left thigh. There was no gunpowder deposition.

(ii) A perforating gunshot entrance wound on the right outer aspect of the lower right thigh with corresponding exit wound on the lower front or right thigh. There was no gunpowder deposition.

(iii) A superficial bullet graze on the back of the head. It was not deep - just scalp layer deep. There was no gunpowder deposition.

(iv) A penetrating gunshot wound on the left side of the back head above the left ear. The bullet travelled inside the cranium through the skull. The trajectory took a course downwards having gone inside the cranium of the skull cavity. The bullet could not be recovered due to its location. There was no gunpowder deposition.

(v) A perforating gunshot entrance wound on the left side of the back of the head close to the left ear with corresponding exit wound on the right side of face over the zygoma bone (cheekbone). There was no gunpowder deposition.

In his opinion death was due to the gunshot wounds to the head. The other wounds did not contribute to death. Dr. Sarangi opined that the wounds he saw were "indicative of far range firing because there was no gunpowder deposition". In respect of injuries number (i) and (v) he said that the person discharging the firearm would have to be behind and to the left of the deceased. The skull bone he said can change the trajectory and speed of a bullet. It is possible he said, for a person with injury number (v) to run and be up for a period of five (5) minutes after receiving such injury.

Marcia Dunbar, the forensic analyst, testified that she examined swabs allegedly taken from the back and front of the hands of the deceased. Her examination and analysis of the swabs revealed no evidence of gunpowder residue on back of the hands or on the palm of the left hand. She found gunpowder residue at trace level on the swab taken from the palm of the right hand. It is her evidence that if a person fires a gun, one would expect gunshot residue to be found on the back of the palm of the hand in which the gun was when fired.

The question then arises: Is there sufficient evidence to support a charge against the police officers or any of them? The only evidence as to the circumstances of the fatal shooting of the deceased is provided by the three police officers.

It may be helpful in analysing the evidence as to the involvement of each officer to divide this incident into three parts:

(i) The confrontation on the road

(ii) The chase

(iii) The search in the bushes.

(1) **The confrontation**

The evidence of the officers is that the two men, one of whom was later identified as the deceased, fired shots at them. Cpl. James took cover and returned the fire. Cpl. Francis and Cpl. Grant did not discharge their firearms at this stage.

(2) **The chase**

James was not involved in the chase and did not fire at the deceased at this time. Francis fired at the deceased as he was going over the fence. During the chase across the field the deceased fired at Francis who in turn fired two shots at him. Grant did not discharge his firearm during the chase.

(3) **The search in the bushes**

The evidence of the police officers is that the deceased fired at James. James and Grant fired at the deceased. Francis did not fire.

It seems clear to me that, without more, it cannot be argued that the conduct of Cpl. James in firing shots at the men during the confrontation was not justified.

The conduct of Cpl. Francis in firing shots at the deceased during the chase may be justified on the grounds of self defence and/or attempting to apprehend an escaping felon – see for example ***R v Astley Ricketts*** 24 JLR 411. However, in my view it is the circumstances of the shooting of the deceased in the bushes which are of critical importance .

The Courts below were of the view that the absence of gunpowder residue on the back of the hands of the deceased would be the important factor in determining whether the reason given by the Director of Public Prosecutions for his decision was valid. Mr. Small submitted that the Director of Public Prosecutions was wrong in holding that there was insufficient evidence in that there was material before the Director which could negative the evidence of the police that they had shot the deceased in self defence. In this regard he referred to :

(1) The forensic evidence as to the absence of gunpowder residue on the back of the deceased's hands.

(2) The forensic evidence of the pathologist as to the location of the injuries and the trajectories of the bullets.

(3) The absence of any evidence of damage to the police vehicle behind which Cpl. Francis and Grant said they took cover during the shooting.

It was Mr. Small's contention that the Full Court erred in holding that the decision of the Director of Public Prosecutions not to prosecute was not unreasonable in the **Wednesbury** sense (see ***Associated Provincial Picture House Ltd. v Wednesbury Corp.*** [1948] 1K.B. 223.)

Mrs. Fraser for the Director of Public Prosecutions submitted that the absence of powder residue on the back of the hands of the deceased is not conclusive evidence that the deceased had not fired a gun. She referred to the analyst's evidence that what is done after the weapon is fired might affect the presence or level of gunpowder residue. Counsel also referred to the finding of gunpowder residue on swabs taken from the palm of the deceased's right hand, albeit at trace level only. She also submitted that the fact that no gunpowder residue was found on the swabs taken from the hands of the policemen, who admitted discharging their firearms and which swabbing was done prior to the swabbing of the deceased's hands, raises questions as to the competence of the officer who did the swabbing and the integrity of the process.

As to the pathologist's evidence of the location of the injuries and the trajectories of the bullets, counsel for the Director of Public Prosecutions submitted that this evidence was not inconsistent with the evidence of the three police officers and had not rebutted their evidence that the deceased possessed and/or discharged a firearm. The pathologist, she said, could not say at what stage any of the wounds were inflicted. Further, the pathologist did say that the fatal wounds could have been inflicted at an early stage and that the injured person could run for a period of five minutes after receiving the injuries. It was also the opinion of the pathologist that injuries numbers four and five could have caused the deceased to fall immediately or he could have continued performing normally for a little while.

Finally, she referred to the expert's opinion evidence that skull bone can change the trajectory of a bullet because it is a rigid structure. Therefore, she argued, the downward trajectories in respect of injuries numbers four and five provide no assistance as to the position of the deceased at the time when the injuries were inflicted.

Many cases were cited to this Court by counsel on both sides in so far as the judicial review of the Director of Public Prosecutions' decision not to prosecute is concerned. It is only necessary, in my view, to refer to a few of them. In ***R v Director of Public Prosecutions Ex parte Manning***

and Another[2000] 3WLR463, Lord Bingham of Cornhill had this to say (p. 474 F-G):

> "In most cases the decision will not turn on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant if brought, would be likely to fare in the context of a criminal trial before (in a serious case as this) the 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"

In **Re King's Application** [1988] 40WIR 15, a decision of the High Court of Barbados, is very instructive. A coroner inquiring into the death of a person ruled that the deceased had been murdered by a police sergeant. The coroner did not commit the police sergeant for trial. A copy of the coroner's report was sent to the Director of Public Prosecutions. The director, after considering the file, advised the police that there was insufficient reliable evidence to justify a prosecution for murder and no proceedings were instituted against the police sergeant (who had acted in self defence). The deceased's mother applied to the High Court for judicial review of the decision of the director not to prosecute the police sergeant. In dismissing the application, Sir Denys Williams C.J. said at p. 35 (e-f):

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

It is important to note that in the opinion of Sir Denys Williams C.J. the fact that the coroner had ruled that the deceased had been murdered by the sergeant did not derogate from the duty of the director. At page 36(a-b) he had this to say:

> "It was the director, not the coroner or counsel, who had the discretion to exercise and the constitutional function to perform and it has not been shown that the director exercised it in a manner that was not reasonable, proper or regular. This court has no power to substitute its discretion or the discretion of anyone else for that which the Constitution has conferred on the director."

The constitutional powers of the Director of Public Prosecutions conferred by section 79 of the Constitution of Barbados are similar to those in section 94 of the Jamaican Constitution. In my opinion, the views expressed by Sir Denys Williams are correct and reflect the law applicable in this jurisdiction. Nothing said by Lord Bingham of Cornhill CJ in ***Ex parte Manning*** (supra) indicates otherwise.

The majority of the cases cited and relied on by counsel for the appellant concern the giving of reasons for decision. As I have stated before, I do not think these cases are very helpful as, in my view, the Director of Public Prosecution has indeed given his reason.

However, the authorities clearly establish that although a decision of the Director of Public Prosecutions not to prosecute is subject to judicial review, the power of review should be sparingly exercised. The sufficiency or otherwise of evidence to prosecute as a matter of law is within the purview of the Director of Public Prosecutions' discretion. For that discretion to be overturned on judicial review it would have to be shown that the discretion was unreasonably exercised within the meaning of the rule in the **Wednesbury** case. If there is no realistic prospect of a conviction then a decision not to prosecute is reasonable and is not bad in law. The authorities also establish that the prosecutor should have regard not only to the defence indicated by the alleged offender but also to any defence which is plainly open to him.

I must now return to the facts of this case. The only witnesses as to circumstances of the fatal shooting of Patrick Genius are the three police officers. In their account they foreshadow the defence of self defence. The defence of lawful arrest is also open to them. The law is that a person may use such force as is reasonable in the circumstances for the purposes

of self defence or lawful arrest. A person may use force to ward off an anticipated attack provided such attack is imminent.

In considering whether the prosecution would be in a position to negative these defences, the only relevant and independent evidence available was that of the analyst and the pathologist. The "Leave Court" as we have seen, in granting leave, said (per the learned Chief Justice):

> "We are of the view that the absence of the gunpowder on the hands of the deceased could have the effect of negativing self defence."

Before the Review Court, the Director referred to a publication entitled "**Handbook on Firearms and Ballistics Examination and Interpretation of Forensic Evidence**" by Brian J Heard. In Chapter 6 – Gunshot Residue Examination – the author states, among other things, that if the deceased is sweating heavily at the time of the firing the result will be negative. The "Review Court" accepted the Director's submission that in a situation where the deceased was chased by the police that engagement could have caused him to sweat. The Court also found merit in The Director's further submission that the handling of the deceased at the scene, at the hospital and at the morgue, where he was finally taken, are other factors that could have caused the absence of gunpowder residue on the back of the hand.

Before us Mr. Small argued that the Full Court erred in relying on the Director's impermissible use of the publication. Further, he contended

that the Full Court erred in relying on the mere speculation as to the existence of certain facts which could explain away the evidence capable of negativing self defence.

The evidence is that the swabbing of the deceased's hand was done at about 10:00 p.m. on the 13th December, 1999, that is about four hours after the incident. Immediately after the shooting the deceased was taken to the University Hospital where he was pronounced dead. From the hospital the body was taken to the Madden's Funeral Home. Thus it seems that the body was at the morgue when the hands were swabbed. With this evidence in mind the Director had to decide whether the absence of gunpowder residue in the swabs taken from the deceased's hands would inexorably lead to the conclusion that the deceased had not fired a firearm.

The circumstances in which the result of the swabbing will be negative after a firearm has been discharged must be examined. In my view, it is permissible for the Director of Public Prosecutions, in considering such a situation, to resort to the results of research published by a reputable authority. It is, in my judgment, also permissible for him in the exercise of his discretion to rely on the opinion of an expert published in a reputable journal.

The opinion of the author of the **Handbook** referred to is that "if the deceased was sweating heavily at the time of firing the result will be

negative." It is true that there is no evidence as to whether or not the deceased was sweating at the time when, according to the police officers, he fired at them in the bushes. However, in the circumstances it is, I think, reasonable for the Director of Public Prosecutions to conclude that after the chase the deceased might have been sweating. In any event, by virtue of the incidence of the burden of proof, the prosecution must be in a position to establish evidentially that the absence of gunpowder deposit on the hands of the deceased is conclusive evidence that the deceased had not fired. In this regard the evidence of the handling of the deceased at the scene, at the hospital and at the morgue is also relevant.

Once there is, on the Crown's case, a reasonable explanation for the absence of gunpowder deposit on the hands of the deceased the defence raised by the police officers would be credible. There is justification for the Director to refuse to prosecute when credible self defence is raised on the Crown's case.

Accordingly, in my judgment, the Full Court did not err in holding that the Director of Public Prosecutions acted reasonably and properly in taking into account the fact that the deceased might have been sweating at the material time. Moreover, the presence of a trace of gunpowder residue in the palm of the right hand of the deceased and the recovery of a firearm are factors that the Director of Public

Prosecutions had to take into consideration in deciding whether or not to prosecute.

In so far as the injuries and their locations and trajectories are concerned, Reid J was of the view that in the context of the narrative from the witnesses, the pathologist's evidence could not negative self defence. Mrs. Fraser's submissions in support of this finding are, in my view, correct.

As regards the absence of damage to the police vehicle behind which the policemen took refuge this would only be relevant to the shooting at "confrontation stage". Clearly, without more, the fact that there is no evidence of any damage to the police vehicle cannot refute the police officers' evidence that they were shot at.

As stated before, apart from defending themselves, the police officers were entitled to use such force as was reasonable in the prevention of crime or in effecting the lawful arrest of offenders or suspected offenders. It would be difficult to argue that the shooting of a person armed with a gun and who is resisting or fleeing from lawful arrest is not justifiable.

For the reasons given I hold that the Full Court did not err in the exercise of its discretion to refuse the application made by the appellant.

As to the order for costs made below, Rule 56.15 of the Civil Procedure Rules 2002 provides:

> "(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

It was not said that the applicant acted unreasonably in making the application or in the conduct of the application.

In the circumstances, no order ought to have been made.

For the reasons given, I would dismiss the appeal. I would make no order for costs in this Court and set aside the order for costs in the Court below.

McCALLA J.A. (Ag.):

This appeal is from a decision of the Full Court (the Review Court) contained in a judgment dated May 2, 2003 whereby the Appellant's motion for judicial review was dismissed with costs to the respondent to be agreed or taxed. The appellant Leonie Marshall is the mother of the deceased Patrick Genius.

Before setting out the basis on which the Review Court's decision is challenged, a brief historical background of the circumstances leading up to the appeal might be instructive.

On December 13, 1999 Patrick Genius was shot and killed by the police in the parish of St Andrew. Three police officers who were involved in the shooting incident gave statements as to the circumstances in which Mr. Genius was killed and a firearm recovered from beside his body after the shooting. It is not disputed that these policemen as well as Mr. Genius were involved in the incident.

On May 29 2001, a Coroner's inquest was held touching and concerning the death of Patrick Genius. The Coroner's jury returned a verdict that person or persons were criminally responsible for his death but declined to name such persons.

The Coroner then referred the matter to the learned Director of Public Prosecutions, (the D.P.P.), for his decision. The learned D.P.P. handed down his decision not to prosecute anyone in the matter as the

available evidence was not sufficient in law for him to do so. The D.P.P. did not disclose to the appellant his reasons for not instituting proceedings against the three police officers.

On March 18, 2002, the appellant filed an ex parte notice for leave to apply for judicial review. The application challenged the Coroner's decision to refer the matter to the D.P.P., instead of charging the three police officers for murder, as well as the decision of the D.P.P. not to institute charges against the three police officers. This application came before Jones, J. (Ag.), (as he then was), in chambers, but it was unsuccessful because of what he considered to be a procedural irregularity.

The matter next came before a Full Court, (the Leave Court) pursuant to the Judicial Review Rules 1998 and leave was sought for judicial review of:

1. The decision of the Coroner to refer the matter to the D.P.P. rather than to charge the 3 police officers with murder in accordance with the verdict of the Coroner's jury.
2. The decision of the D.P.P. not to institute criminal proceedings against the three police officers.
3. The decision of the D.P.P. not to disclose to the applicant his reasons for not instituting proceedings against the police officers.

The reliefs sought were as follows:

a) An order for Mandamus directing the Coroner and/or the D.P.P. to charge the three police officers.

b) An order of Certiorari to quash the Coroner's decision to refer the file to the D.P.P. and Certiorari to quash the ruling and/or determination of the D.P.P. not to prosecute.

c) Declarations in respect of the findings of the Coroner's jury, the duty of the Coroner upon such findings and the Coroner's referral of the matter to the D.P.P.

d) A declaration that the three policemen or any of them ought to be charged with murder

e) An injunction to restrain the D.P.P. from taking any steps to quash, withdraw and/or terminate any such criminal proceedings

f) An order directing the D.P.P. to take such steps as may be necessary to have the body of Patrick Genius exhumed for the purpose of retrieving therefrom the bullet or bullets lodged therein.

The grounds upon which these reliefs were sought may be summarized as follows:

(1) The Coroner erred in law and/or acted unreasonably and/or failed to act judicially when he refused, neglected and/or failed to institute prosecution of the three police officers in

accordance with the verdict of the jury and the provisions of the Coroner's Act.

(2) The Coroner erred in law and/or acted in excess of his jurisdiction and/or unreasonably and/or arbitrarily and without any lawful justification when he directed the jury not to name the individuals they considered to be responsible for the death of the deceased.

(3) That the D.P.P. has erred in law and/or acted unreasonably and/or ultra vires when he ruled that the said three police officers were not to be charged.

(4) That the D.P.P. failed, neglected or refused to pay any or any sufficient attention to the medical evidence given at the Coroner's inquiry and/or to the oral evidence of the three police officers in relation thereto.

(5) That the D.P.P. and/or the Coroner have abdicated their Statutory and/or Constitutional duties in that they have acted unreasonably and/or have failed to act as required by law and this Honourable Court in the interest of justice ought to order them so to act.

(6) That the Applicant relies upon the following authorities among others:-

(a) The Coroner's Act Section 19 (5) and 20.
(b) Re Kings Application [1991] 40 WIR 15 and the cases cited therein.
(c) C.O. Williams Construction Limited v Blackman [1994] 45 WIR 94.

The Leave Court having considered the matter, Wolfe, CJ at page 11 of the judgment said in part:

"...we are of the view that the absence of gunpowder on the hands of the deceased could have the effect of negativing self

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

The Leave Court granted the application for leave to apply for judicial review of the decision of the D.P.P. limited to a requirement for the D.P.P. to reconsider his decision that no proceedings are to be instituted against the three police officers.

The application for judicial review was heard in April 2003. The orders sought against the D.P.P. were in the same terms as those which were before the Leave Court.

The grounds on which the reliefs were sought were that the D.P.P.:

1. erred in law and/or acted unreasonably and/or ultra vires when he ruled that the three police officers were not to be charged with murder;

2. failed/neglected and/or refused to pay any or any sufficient attention to the forensic evidence given at the Coroner's inquiry and/or the oral evidence of the three police officers in relation thereto;

3. abdicated his statutory and/or constitutional duties in that he acted unreasonably and/or failed to act as required by law.

The evidence before the Review Court was summarized by Reid J as follows:

"Before the Coroner's Jury three (3) police officers namely Det. Cpl. Claude James, Det. Cpl. Ronald Francis and Cpl. Earl Grant testified and their depositions recorded by the Coroner support each other in the narrative of events. According to Det. Cpl. James on December 13,1999 he was driving his private motor vehicle along Hope Boulevard when he saw two (2) men astride a moving motor cycle, proceeding from Monterey Drive around the roundabout on Hope Boulevard and continuing towards Old Hope Road. On three (3) previous occasions he had seen the men in the said area. He drove behind at a safe distance and telephoned the Matilda's Corner Police for assistance. From Old Hope Road the men proceeded along Gordon Boulevard then stopped in the vicinity of Buttercup Drive in Mona Heights where they alighted and appeared to be urinating by the side of the road. Grant and Francis arriving in a police unit from Matildas Corner Police Station joined James and all three (3) proceeded closer to the men.

Alighting from their vehicles, the police officers approached within 35 feet of the men who looked at the police and pulled each a gun from the waist and fired at the police. James dived to the ground and returned fire. One (1) man jumped on the motor cycle and rode off towards Mona Road, the other jumping a fence and running onto the premises of Mona Primary School. James ran to the police car and drove it along Mona Road and having lost sight of the motor cycle, proceeded to a minor road in a bid to cut off the escape of the second man. He next crossed a fence into bush joining Grant and Francis. There the man again fired at them and in the return fire the man fell bleeding: beside him a .38 revolver with four (4) spent shells and one (1) unspent. At the University Hospital the man was pronounced dead.

> The Forensic Pathologist, Dr. Murar Surangi, deposed to five (5) gunshot wounds on the body of the deceased on which he saw no gunpowder deposit. The Forensic Analyst, Marcia Dunbar, deposed to her examination of four (4) swabs from the back and front of the hands of the deceased. Only that from the right palm revealed gunshot residue and at trace level merely. It is the absence of residue on the back of the hands on which reliance is placed that the officers fired at the deceased without lawful justification or in self defence."

The application for judicial review was refused by the Review Court and the applicant now appeals to this Court against the decision of the Review Court contained in the judgment delivered on May 2, 2003. The appellant's challenges are set out hereunder:

"1. The details of the order appealed are that the Claimant 's motion for Judicial Review was dismissed with costs to the Respondent to be agreed or taxed.

2. The following findings of fact and of law are challenged:

[a] **Findings of fact**:

1. The finding at page 15 of the judgment that the deceased retaliated by firing shots at the police and engaged the police in a shootout.

2. The finding at page 28 of the judgment that it was not established that the Director of Public Prosecutions failed to act in accordance with any policy.

3. The finding also at page 28 of the judgment that there was no evidence to show that the Director of Public Prosecutions failed to consider relevant material or had irrelevant considerations in mind.

4. The finding that there was no need to exhume the body to recover the bullet because of the principles of common design.

5. The finding at page 30 of the judgment that the application is wholly without merit or sincerity.

(b) **Findings of Law:**

1. That there is no obligation to give reasons for declining to prosecute (p.9,13,27 of the judgment of the court).

2. That a decision to review the exercise of the Director's decision not to prosecute is only possible on one or other of the following grounds:

   (i) because of some unlawful policy;
   (ii) failure by the Director to act in accordance with settled policy;
   (iii) because the decision was perverse, that is, one which no reasonable prosecutor could have arrived at (p.11, 25 of the judgment).

3. That a duty to give reasons is inconsistent with Section 94 of the Constitution (p.13 of the judgment).

4. That the absence of the reasons was not a matter for consideration by the court (p.27 of the judgment).

5. That an application for Judicial Review cannot create the need for reasons (p.27 of the judgment).

6. That there was nothing unlawful in the policy of the Director of Public Prosecutions in this case (p. 28 of the judgment).

7. That the test applicable is the burden of proof on the Crown to satisfy a jury beyond a reasonable doubt (p.29 of the judgment).

8. That the decision not to prosecute was not perverse or such that no reasonable prosecutor could have arrived at (p.29 of the judgment).

3. The Grounds of Appeal are:

(a) The learned judges of the Full Court erred in that they failed to appreciate that there was no relevant policy guideline or document applicable to the exercise of a discretion by the Director of Public Prosecutions. As such the duty of the learned Director of Public Prosecutions was to rule in favour of a Prosecution provided a Prima Facie case of homicide could be made out. The Full Court failed to appreciate that there was evidence capable of negativing self-defence.

(b) The learned judges of the Full court erred in law in that they failed to give any or any sufficient weight to the fact that a Coroner's jury had found persons criminally responsible and had therefore rejected the allegations of Self Defence. Prima facie therefore there were triable issues.

(c) The learned judges of the Full Court failed to appreciate that the absence of reasons is evidence of unreasonableness and/or unlawful conduct and a basis for Judicial Review of administrative action.

(d) The learned judges of the Full court failed to appreciate that in the absence of reasons it was not for the court when reviewing the learned Director of Public Prosecutions ruling to speculate as to what those reasons were or might have been.

(e) The learned judges of the Full Court failed to appreciate that in the absence of evidence it was not for the court of Judicial Review to assume that relevant matters were considered.

(f) The learned judges of the Full Court failed to pay any or any sufficient attention to the evidence that at the time of his ruling the learned Director of

Public Prosecutions had not considered all the Forensic evidence and in particular the evidence of Marcia Dunbar.

(g) The learned judges of the Full Court failed to appreciate that the refusal of Leave to Apply for Review of the Decision of the Director of Public Prosecutions not to give reasons was separate and distinct from, and did not preclude review of the decision of the Director of Public Prosecutions not to prosecute. The court failed to appreciate that the absence of reasons is evidence of the abdication of statutory and/or constitutional duties, unreasonableness and/or failure to act as required by law when deciding not to prosecute and in respect of which the complaint was made and Leave granted.

(h) The learned judges of the Full Court failed to appreciate that Section 94 (6) of the Constitution did not preclude the existence of a duty to give reasons. The court ignored Section 2 of the constitution which expressly granted a right of Judicial Review. The Full Court ignored the duty to give reasons, that is, rationality and not arbitrariness was required in law.

(i) That the Full Court erred in law and in fact in that it failed to pay any or any sufficient attention to the evidence of Marcia Dunbar the Forensic expert as to the absence of gunpowder residue on the back of the deceased hands.

(j) The Full Court erred in law and in fact in giving credence and evidential status to the learned Director of Public Prosecutions' submission with reference to a text on Forensic Science which postulating circumstances in which gunpowder residue may have been removed. The court failed to appreciate that the issue was whether the learned Director of Public Prosecutions had considered all relevant material at the time of the ruling.

(k) The Full Court further erred in that it failed to appreciate that questions pertaining to the circumstances in which gunpowder residue may have been removed were issues for a jury at trial.

(l) The Full Court erred in law and fact in that it failed to pay any or any sufficient regard to the injuries upon the deceased. The Court failed to appreciate that the several bullet wounds to the head were from behind and at an oblique angle. There was also a wound to the leg.

(m)The Full Court erred in law and fact in that it failed to appreciate that the retrieval of the bullet lodged in the skull of the deceased may have identified the officer who had fired it and thereby give important information which could corroborate or refute that officer's account of when he fired and his position in relation to the accused when he did fire. The decision not to direct exhumation deprived the Director of Public Prosecutions of potentially important evidential material.

(n) The Full Court erred in law when it made an Order for Costs against the Applicant in that it failed to pay any or any sufficient regard to the following:

(i) The learned Director of Public Prosecutions had failed, neglected and/or refused to explain his decision when requested so to do prior to the application to the court.

(ii) The remedy of Judicial Review was the only recourse open to the mother of the deceased who had seen and heard a coroner's jury declare the police officers criminally responsible and who had received no explanation for the failure to prosecute.

(iii) The issue was one of general public interest as the Office of the Director of Public Prosecutions is independent of all control

save only for the power of the court to judicially review its decisions".

The appellant seeks to set aside the decision of the Review Court.

The orders originally sought were amended and are now as follows:

"(a) An Order of Mandamus directing the Director of Public Prosecutions to reconsider his decision not to charge the three (3) police officers namely Det. Cpl. Ronald Francis, Det. Cpl. Claude James and Cpl. Earl Grant with murder.

(b) An Order of Certiorari to quash the ruling and/or determination of the D.P.P. that no criminal proceedings be brought against any or all of the said three (3) police officers.

(c) A Declaration that in all the circumstances of this case the three (3) police officers or any or all of them ought to be charged with murder and their respective guilt or innocence determined at trial.

(d) A Declaration that a prima facie case of murder or manslaughter is disclosed on the evidence before the court.

(e) A Declaration that where a prima facie case is disclosed in normal circumstances a prosecution should follow unless there are compelling reasons to the contrary.

(f) A Declaration that the D.P.P. ought to disclose his reasons for any decision not to prosecute where an aggrieved party asks to be provided with reasons and in particular where he decides not to prosecute where a prima facie case is disclosed. If the D.P.P. is of the view that there are reasons why his reasons should not be disclosed, he is under a duty to set out those reasons.

(g) Where the court grants leave for judicial review, there is a further duty to fully set out his reasons if he has already set out some reasons.

(h) An Order directing the D.P.P. to take such steps as will be necessary to have the body of Patrick Genius exhumed for the purpose of retrieving from his body the bullet or bullets lodged therein, or alternatively, a Declaration that this is an appropriate case for the D.P.P. to do so.

The grounds of appeal raise the following issues:

1. The duty of the D.P.P.
2. The effect of the presence of evidence of self defence.
3. The question of reasons.
4. The forensic evidence.
5. The order for costs.

The hearing of the matter lasted several days during which fulsome oral submissions amplified the written submissions of Mr. Small and numerous authorities were cited by him. Mrs. Fraser relied on some of the authorities cited by Mr. Small and referred the Court to others. Mr. Small was exhaustive in his treatment of the matter which is said to be one of the first of its kind in the Jamaican jurisdiction.

Findings of Law

Mr. Small contended that the Review Court erred in law and misapplied the decision in ***R v D.P.P. Ex Parte C*** [1995] 1 CR App. R.137 when it directed that the D.P.P's decision not to prosecute could only be reviewed on one of three grounds, namely:

1. because of some unlawful policy,

2. because of a failure by the D.P.P. to act in accordance with settled policy,

3. because the decision was perverse.

He argued that the Review Court failed to take into account that in the United Kingdom there are certain guidelines in place and the English decisions should therefore be read in that context.

Referring to the case of **R v Director of Public Prosecutions and others ex parte Jones** [2000] IRLR 373 and certain passages in the judgment of Lord Justice Buxton, counsel argued further that the D.P.P.'s actions must be reviewed in accordance with the ordinary principles of judicial review. The Court must consider whether he has come to a conclusion "so unreasonable that no reasonable authority could ever have come to it". (**Associated Provincial Picture House Limited vs. Wednesbury Corporation** [1947] 2 All E.R. 680). The test is whether the D.P.P. in deciding not to prosecute:

> "(a) made an error of law;
>
> (b) decided that there was no prima facie case in circumstances where that decision is unreasonable on the ***Wednesbury*** case;
>
> (c) considered irrelevant matters, or failed to consider relevant matters;
>
> (d) acted in circumstances which indicate bias or unfairness or otherwise acted unlawfully.

Mr. Small submitted that the D.P.P. is not entitled to act unreasonably in the ***Wednesbury*** sense, to ignore relevant material or to take into

account irrelevant consideration or abuse his power or act for a wrong purpose, for wrong reasons or to make an error of law.

He referred to the findings of the Coroner's jury and the affidavit evidence that the Coroner directed the jury not to name the persons whom they found to be responsible. He said that on the evidence the jury could only have been referring to the policemen who had testified that they had fired at the deceased.

Mr. Small made reference to the evidence of Marcia Dunbar at pages 39-40 of the record which reveals that no gunshot residue was found on the back of the hands of the deceased; that this is where she said one would have expected to have seen such deposits if a person had fired a firearm. Such residue as was found on the palm of his right hand, she testified, may have been transferred there by rubbing. He also made reference to the evidence of the forensic pathologist Dr. Murari Prescod Surangi as to the direction of and location of the injuries. He pointed out the lack of evidence of damage to the motor vehicle being driven by the police at the time of the incident.

It is manifest, he argued, that the evidence supported a case of murder and/or manslaughter in that the wounds were primarily from behind and above and there was evidence that the deceased had not fired a firearm. He contended that there was evidence before the D.P.P.

which could negative the evidence of the police officers that the deceased was shot in self defence.

He said the Review Court erred in that it failed to pay any regard to the evidence that at the time of his ruling the learned D.P.P. had not considered all the forensic evidence and its import. It is therefore apparent that the learned D.P.P. had failed to take all the relevant evidence into account before arriving at his decision not to prosecute.

The judges of the Review Court failed to appreciate that in the absence of reasons, unreasonableness and/or unlawful conduct may be presumed. In the absence of reasons, the court is entitled on the evidence available to find that there were no good reasons for his ruling and to find that the learned D.P.P. acted unreasonably in the ***Wednesbury*** sense. The failure to give reasons, he said, coupled with the evidence to which he referred as well as the finding of the Coroner's jury leads inexorably to a finding of unreasonableness in the **Wednesbury** sense.

Mr. Small asserted that the issue is whether or not there is sufficient evidence to place before a jury so as to establish a prima facie case and it was not for the D.P.P. to decide whether or not an accused will be convicted. In the absence of a policy guideline applicable to the exercise of his discretion, his duty was to rule in favour of prosecution in instances where a prima facie case is demonstrated by the evidence. (**Re King's Application** (1988) 40 WIR 15). If the D.P.P. decides not to

prosecute then that would be an additional reason why he should set out his reasons for declining to do so.

Mr. Small relied on the case of **Danhai Williams v. The Attorney-General, The Ministry of National Security and the Superintendent of Police, St. Andrew Division** (1990) 27 J.L.R. 512 to support the principle that where a right is given the Court will read into that right all the necessary attendant rights and duties to give effect to it. He maintained that In the instant case since the appellant has a right to judicial review of the decision, it was the appellant's entitlement to have and the D.P.P.'s duty to give reasons for his decision as without those reasons it considerably handicaps the appellant's ability to exercise the right and the court's ability to carry out its duties.

Further, where a prima facie case is made out and no reasons are given a court should draw an inference of unreasonableness. The exclusive jurisdiction granted by the Constitution is not unfettered. He cited and relied on the case **of Padfield v. Minister of Agriculture, Fisheries and Food and Others** [1968] 1 All E.R. 694 in submitting that where a statute conferred a discretion to exercise or not to exercise a power, did not expressly limit or define the extent of that discretion and did not require reasons to be given for declining to exercise the power, the discretion might nevertheless be limited to the extent that it must not be

used, whether by misconstruction of the statute or other reason, so as to frustrate the objects of the statute which conferred it.

Mr. Small referred to numerous passages in the case of **R. v. Civil Service Appeal Board, ex parte Cunningham** [1991] 4 All ER 310 as to the approach of the judicial review court in that case. He referred to a passage at page 315 of the judgment, which states in part:

> " ... if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to...whatever the initial position, the fact that leave to apply for judicial review has been granted calls for some reply from the respondent...He does not have to justify the merits of his decision, but he does have to dispel the prima facie case that it was unlawful, something which could not arise if leave had been refused."

Mr. Small also argued that in the instant case the Review Court had been precluded from exercising its judicial review function in the absence of reasons being presented to that court by the D.P.P. He referred to several passages from the case of **R. v. Lancashire County Council, ex parte Huddleston** [1986] 2 All E R 941 in support of his submissions on the failure of the D.P.P. to explain fully what had occurred and why. He alluded to a passage at page 945 of the judgment where Sir John Donaldson said in part:

> "...certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands..."

Mrs. Fraser conceded that although the discretion conferred by the D.P.P. is unfettered, he must exercise it lawfully. However the Court should not usurp the functions of the D.P.P. The Appellant bears the burden of proof and there is a presumption that Authorities act in accordance with law. The Court of Appeal is entitled to examine the material which the Review Court had before it and make a determination as to the lawfulness of the Review Court's decision. The Court can rely on any evidence which was available to the decision maker.

Mrs. Fraser submitted further that on the available evidence a prima facie case has not been made out. She argued that the D.P.P. was obliged to address his mind to the strengths or weaknesses of the case in light of the presumption of innocence. He had to consider an interpretation which is favourable to an accused person and also what inferences are to be drawn from the evidence. She said that the forensic evidence is capable of several interpretations and the doctor's evidence is not conclusive in establishing that the deceased was in a position where he was not firing at the police officers. The situation described by the

police officers was a dynamic one and there is no evidence as to whether or not the police service vehicle was damaged.

If the evidence which is capable of negativing self-defence is not of a standard which is capable of discharging the burden of proof, the D.P.P. was correct in saying that it was not sufficient. The D.P.P. must have considered the question of self defence as he had the deposition and forensic evidence before him. In considering the evidence which was capable of negativing self defence the D.P.P. also had to consider the public interest, the interest of the deceased as well as that of potential accused persons likely to be subjected to the grave circumstances of a criminal charge. It does not behove the D.P.P. to embark on a trial if there is no likely prospect of securing a conviction.

Mrs. Fraser urged that the approach taken in **Re Kings Application** (supra) is too restrictive. Referring to the case of **Regina v Director of Public Prosecutions, Ex parte Manning** [2000] 3 W.L.R. 467 cited by defence counsel, she noted that that case came from a jurisdiction without any written constitution where prosecution is governed by Crown Prosecution Service and the court ought not to accept the decision wholesale without regard to those special considerations.

Mrs. Fraser contended that the evidence which the D.P.P. considered did not establish a prima facie case because on the totality of the evidence taken at the Coroner's Inquisition the very obvious and live

issue of self defence was not negatived by the independent evidence of the analyst and the pathologist. She said that the evidence of the analyst is capable of an interpretation that gunpowder residue may or may not be deposited on the hand depending on how the firearm is held. Also, there is no evidence as to what was done in relation to the body of the deceased subsequent to its removal from where it was found. The evidence of the analyst does not clearly rebut the issue of self defence as it is also capable of an interpretation that the deceased might have fired a weapon and if accorded that favourable interpretation it cannot be said that there was sufficient evidence for the D.P.P. to initiate criminal proceedings.

Mrs. Fraser also submitted that the evidence of the pathologist is inconclusive as he said that skull bone could change the trajectory and speed of a bullet. He also said that a person could sustain fatal injuries and based on the volition power and act of that person, he could perform up to five minutes afterwards. Fatal injuries could have been sustained early and there is therefore no evidence to support the assertion that fatal injuries were inflicted from behind and above. On the evidence one could not say that the deceased was not in possession of a firearm and that he had not fired it. Accordingly, there would be no evidence capable of negativing self defence. In this case unlike the case of

Manning (supra) the deceased was not in the custody of State agents but was being pursued by agents of the State.

Referring to the case of **Danhai Williams** (supra) Mrs. Fraser submitted that that case is distinguishable. She said that in the instant case the need to give reasons did not arise as it was clear on the evidence that there was no sufficient evidence to form the basis of a prosecution. She said further that the D.P.P.'s need to give reasons would only arise if the Appellant had established that he had exercised his discretion unlawfully. No leave had been granted for the D.P.P.'s failure to give reasons and although he had no obligation to do so, he gave reasons which, in the circumstances, were adequate. Mrs. Fraser made reference to the case of **Minister of National Revenue and Wrights' Canadian Ropes, Limited** [1947] A.C. 109 where with reference to discretion conferred on the Minister of National Revenue, it was held in part that:

> "...the reference to "discretion"... does not mean more than that the Minister is the judge of what is reasonable and normal. While the court is entitled to examine the determination of the Minister, the limit within which it is entitled to interfere is circumscribed.... The Court is always entitled to examine the facts which are shown by the evidence to have been before the Minister when he made his determination, and if in the opinion of the court they are insufficient in law to support it, the determination cannot stand. If on the other hand there was sufficient material before the Minister to support his determination, the court is not at liberty to

> overrule it merely because it would itself on those facts have come to a different conclusion..."

Mrs. Fraser argued that if the decision maker did not present reasons, the court could not automatically say that he had none. She also sought to distinguish the case of **Cunningham** (supra) in saying that the D.P.P. is bound to give reasons only if reasons were not readily apparent. The court could determine the lawfulness or otherwise of the decision from an examination of the evidence and an application of the law.

The Constitutional Provisions

It is not disputed that the court has jurisdiction to review the exercise of the discretion of the D.P.P. under the Constitution. In approaching this matter the obvious starting point ought then to be section 94 of the Jamaican Constitution Order-in-Council which governs the powers of the D.P.P. The constitutional provisions establish the D.P.P.'s office as a public one whereby under section 94(3), he is empowered in any case in which he considers it desirable:

> "(a) to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence against the laws of Jamaica."

In the exercise of the powers conferred on him by the abovementioned section, the D.P.P. is not subject to the direction or control of any person or authority (Section 94 (6)).

Section 1 (9) of the Constitution states:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any function under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the Constitution or any other law."

It is now well settled that the D.P.P.'s actions are subject to judicial review. Inasmuch as it is the function of Courts to review decisions of other Courts so also is the D.P.P. subject to his decisions being reviewed and the constitutional protection accorded to his office is in no way affected. The burden of proof is on the Appellant to establish that the D.P.P.'s decision is irrational, unreasonable or unlawful. The Appellant poses for the consideration of this court the question as to the extent to which the decision of the D.P.P. can be challenged or reviewed if there is no obligation to give reasons or if the reasons given are inadequate.

The question of reasons

The question of the absence or inadequacy of reasons for the D.P.P.'s decision is central to the submissions advanced by Mr. Small. In my view the fact that the Leave Court refused the application for the D.P.P. to provide reasons for his decision **to the Applicant** (emphasis supplied) did not preclude him from providing amplified reasons to the Review Court. This would accord with the usual court procedures. The giving of such reasons would not in any way be inconsistent with the constitutional

provisions which govern his functions. The **Ministry of National Revenue** case (supra) is relevant to the instant case. Indeed, the fact that the Court had granted leave for a decision to be reviewed could result in such decision being quashed if no reasons or no sufficient reasons had been given. The giving of such reasons would be necessary to enable the court to carry out its function in accordance with the constitutional provisions. If reasons were readily apparent as Mrs. Fraser submitted, then certainly the Leave Court would not have granted the application for judicial review even to the limited extent it did. In **Manning** (supra) it was held in part that:

> "...there was no absolute obligation imposed on the Director to give reasons for a decision not to prosecute; but that since the right to life was the most fundamental of all human rights...and since the death of a person in the State's custody which resulted from violence inflicted by its agents necessarily aroused concern, the Director would be expected, in the absence of compelling grounds to the contrary, to give reasons for such a decision where it related to a death in custody in respect of which an Inquest jury had returned a lawful verdict of unlawful killing implicating an identifiable person against whom there was prima facie evidence, in order to meet the expectation that, if a prosecution did not follow a plausible explanation would be provided and to vindicate the decision by showing the existence of solid grounds to support it; that skill and care would be required to draft such reasons in order to protect public and third party interests, but that in any event a citizen should not be obliged to challenge the lawfulness of the decision, in order to seek, in judicial review

> proceedings, the response which good administrative practice ordinarily required..."

Likewise, I believe that in a case such as the present one, where:

a) the deceased was shot and killed by the police,

b) there were no independent witnesses on the scene,

c) a Coroner's jury had found that persons were criminally responsible for the death of the deceased,

d) such persons were identifiable,

e) a court had granted leave for review of the decision having made a finding that there was evidence which could negative self defence,

I do not think that it would be an unreasonable expectation that in the interest of exercising his public function in a transparent manner, the D.P.P. would have given full reasons for his decision even before the leave Court had handed down its judgment.

In his submissions before the Review Court the D.P.P. made reference to a publication which dealt with the examination and interpretation of forensic evidence. The opinion of the author Brian J. Heard is that if a person is sweating heavily at the time of firing, the result of a swab test might be negative. I am of the view that such reference ought to have been made in the context of a further affidavit placed before the Review Court, in which the D.P.P. fully revealed his thought

processes in arriving at his decision. There was nothing to preclude him from doing so.

The question now arises as to whether the D.P.P. was obliged to give reasons for his decision and if he did, whether or not those reasons are sufficient. I have given very careful consideration to these matters bearing in mind that the appellant bears the burden of proof. It is accepted that the D.P.P. is not obliged to give reasons for his decision. I find that the D.P.P. gave succinct reasons for the decision he arrived at. However, the Appellant having obtained leave for judicial review and the D.P.P. not having furnished further reasons for his decision, it is for this court to consider the sufficiency of the evidence.

The sufficiency or otherwise of the evidence

In his affidavit the D.P.P. stated that on a careful examination of all the material available to him, including medical and forensic evidence he came to the decision that there was not sufficient evidence in law to charge anyone. The question now arises as to whether or not on the depositions before him the D.P.P.'s decision not to prefer criminal charges was in excess of his constitutional powers.

In considering this question I have regard to the words of Lord Bingham of Cornhill in the case of **Manning** (supra) where at page 474 he said:

> "... in most cases the decision will turn not on any analysis of 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 likely defenses. It will often be impossible to stigmatize 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..."

Even if the Review Court was incorrect in its decision as to the bases on which the D.P.P.s' decision could be reviewed, the crucial question is whether or not on the evidence before the D.P.P. it was open to him to arrive at a decision not to prosecute, and whether or not it has been shown that he exercised his discretion" in a manner that was not reasonable, proper or regular" (**Re Kings Application**) (supra). The court cannot substitute its own discretion for the discretion conferred on the D.P.P. by the Constitution.

The evidence shows that the hands of the deceased were swabbed several hours after the removal of the body from the scene, after it had been taken to the hospital and eventually to the morgue. There is no evidence as to the state of the deceased's body prior to the swabbing of his hands. Such evidence which would have been relevant was not obtained. The D.P.P. could have set in motion a procedure to have the body of the deceased exhumed in order to determine from which firearm, the bullet said to be lodged in the body of the deceased,

had been discharged. He could have considered that evidence in the light of the depositions given. The question of common design would not arise, as, according to the depositions of the police officers they were acting in the execution of their duties and had fired their weapons in self defence. However, it is doubtful whether any useful purpose would be served in exhuming the body of the deceased. This is because there is no evidence of any witness on the scene who could refute the account given by the police officers that the deceased had fired at them. The Leave Court had found that the pathologist's evidence "as to the relative positions of the persons inflicting the wounds upon the deceased is at its highest equivocal". The order which sought exhumation of the deceased's body was not granted.

There is no evidence as to whether or not there was damage to the police vehicle during the exchange of gunfire referred to in the depositions of the police officers. The lack of such evidence is of no assistance in this matter.

On the state of the medical and forensic evidence, if criminal charges were to be instituted by the D.P.P. such evidence would not be capable of rebutting the defence of self defence which is raised in the depositions of the police officers. It was therefore open to the D.P.P. to exercise his discretion in finding that there was not sufficient evidence to initiate a prosecution as there are no independent witnesses and the

medical and forensic evidence, is inconclusive. In my view it is desirable in such circumstances that the hands of the deceased be swabbed on the scene, or otherwise protected, before the body is removed. If that procedure had been followed the position might well have been different.

I am of the opinion that It has not been shown that the D.P.P.'s decision not to prosecute is unlawful or unreasonable in light of the **Wednesbury** principles and his reason of insufficiency of evidence, in the circumstances of this case, would stand.

The circumstances in which this matter has come before this court are unfortunate. I use the word "unfortunate" because of my view that in this case, the D.P.P. could have given full reasons for his decision, even if he had no obligation to do so, as transparency ought to be a feature of due process. However having regard to the absence of evidence to which I have alluded and the state of the medical and forensic evidence, I would uphold the decision of the Review Court.

Accordingly, I would decline to make the mandatory orders sought. With regard to the declarations urged by Mr. Small, I do not think that it is appropriate for this court to make those declarations having regard to the state of the evidence and the constitutional powers conferred on the D.P.P. I would dismiss the appeal.

The question of costs

I would also vary the order for costs made against the appellant below, as, notwithstanding the Review Court's decision, I find that the appellant was not unreasonable to have sought judicial review of the D.P.P.'s decision. I would make no order as to costs both here and below.

HARRISON, J.A.

ORDER

1. The appeal is dismissed.
2. The judgment of the court below is affirmed.
3. Costs of these proceedings to the Respondent, to be agreed or taxed.