JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 83/06

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**THE CORONER OF KINGSTON & ST. ANDREW**	**1ST APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND APPELLANT**
AND	**DIONNE HOLNESS**	**RESPONDENT**

Patrick Foster, Deputy Solicitor General and Miss Tasha Manley instructed by Director of State Proceedings for the appellants

Mrs. Shawn Wilkinson for the respondent

12th, 14th March and 23rd November 2007

HARRISON, P.

This is an appeal from the decision of Campbell, J., on 18th September 2006 in which he ordered that in the interest of justice a new inquest be held and that the Coroner pay the costs of the application before the Court.

I have read the draft judgment of Harrison, J.A., in this matter. I agree with his reasoning and conclusion. These are my comments.

The relevant facts are that His Honour Mr. Patrick Murphy, Resident Magistrate, presided as Coroner, with a jury, at the Coroner's

Court for the Corporate Area between December 2004 and January 2005 to enquire into the death of one Dwayne Graham. As a consequence, on 10th January 2005, an inquisition issued by the Court found that the deceased met his death on 19th June 2003, as a result of multiple gunshot wounds in circumstances of justifiable homicide and no one was criminally responsible.

Dionne Holness ("the respondent"), his mother, being an "interested party", made an application in 2006, under section 21 of the Coroners Act (as amended), for an order that another inquest be held. The grounds in support of the application are –

(i) The Coroner refused to allow the applicant's attorney-at-law to address the jury;

(ii) the Coroner refused to allow an expert to be called to explain the findings of the independent pathologist which was read into evidence to the jury;

(iii) the Coroner failed to instruct the jury that they could have found both police officers guilty on the principle of common design; and

(iv) the Coroner used the same set of jurors which he used repeatedly in other inquests.

Campbell, J., decided the issues in (i), (ii) and (iii) in favour of the appellants, but found that the jury selection process was flawed

and ordered that a new inquest be held. He said at page 15 of the record:

> "There was nothing random or indiscriminate about the jury selection process. The process that maintained was repeated, regular and convenient. Convenience and justice are oftentimes not companions. This flawed selection process is aggravated by the involvement of agents of the State, being involved in the killing of the deceased.
>
> The defect in the selection process makes it desirable in the interest of justice that another inquest should be held. The Court is of the view that the new inquest should be held by the Coroner of an adjoining parish. The Coroner should pay the cost of the applicant at this hearing, and of the Coroners Inquest."

This appeal arose as a consequence.

The grounds of appeal are:

> "(a) The Learned Judge wrongly applied Section 18 of the Jury Act in his interpretation of section 11 (1) of the Coroners Act, on the basis that the Coroners Act must be read in conjunction with the relevant provisions of the Jury Act, when there was no requirement to do so.
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> (b) The Learned Judge erred in arriving at a decision that the jury selection process was flawed when there was no evidence before the court to support such a finding.
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> (c) The Learned Judge, in arriving at his decision failed to take into account factors which were relevant, and in particular failed to consider:

i. The inevitability/likelihood of a new inquest returning the same verdict;

ii. The public interest and expense involved in conducting a new inquest;

iii. The effect that the holding of a new inquest would have on the good administration of justice;

iv. Whether it is still possible to hold a fair inquiry into the facts, having regard to the lapse of time since the holding of the first inquest;

v. The broad purpose of an inquest and the extent to which, if at all, a new inquest will further those purposes.

(d) The Learned Judge wrongly exercised his discretion in awarding cost (sic) against the Coroner in circumstances where there was no finding of misconduct on the part of the Coroner."

The respondent filed a counter-notice of appeal. The grounds read:

(a) the learned judge erred in law in failing to rule that it was improper for the Coroner to have read to the jury the post mortem report of the independent pathologist, Dr. Odunfa, without it being submitted through another pathologist (or witness);

(b) the learned judge erred in law in failing to rule that it was improper for the Coroner to have read to the jury the post mortem report of the independent

pathologist, Dr. Odunfa, without having an expert explain its contents to the jury;

(c) the learned judge erred in law in failing to rule that the Coroner ought, in the absence of another independent pathologist, to have examined the government pathologist, Dr. Seshaiah, on the various discrepancies between the post mortem report of Dr. Seshaiah and the post mortem report of Dr. Odunfa;

(d) the learned judge erred in law in failing to consider whether, as a result of the failure to have another pathologist explain the contents of the post mortem report of Dr. Odunfa and/or to explain the discrepancies between the two post mortem reports to the jury, there was a sufficient inquiry."

The principal question involved in this appeal is, was the method employed in the selection of the jury flawed, in relation to the statutory provisions of the unamended section 11(1) of the Coroners Act ("the Act"). Section 11(1) reads:

> "11.-(1) Upon receipt of the medical and police reports the Coroner shall, except under the circumstances herein-after mentioned, as soon as practicable, issue his warrant for summoning not less than five nor more than thirty good and lawful persons to appear before him at a specified time and place, there to enquire as jurors touching the death of such person as aforesaid." (Emphasis added)

The institution of Coroner, described as the "ancient office of coroner" in early English legal history, probably existed from the 12th

century. The coroner, initially, sat as a judge at trial of cases, held inquests and also functioned as an agent of the Crown in matters of revenue collection. Later in time, the coroner only retained his duties of presiding at inquests into the deaths of persons, described as sudden, suspicious or unnatural deaths. It is an inquisitorial process.

Section 6 of the Act reads:

> "6. Where a Coroner, or Justice, or officer or sub-officer of Constabulary in charge of a parish is informed that the dead body or part thereof, of a person, is lying within the jurisdiction of such Coroner, or Justice, or within the parish of which such officer or sub-officer is in charge, and there is reasonable cause to suspect that such person has died, either a violent, or an unnatural death, or has died a sudden death, of which the cause is unknown ... or that such person has died in prison, or in such place, or under such circumstances, as to require an inquest in pursuance of any law, it shall be lawful for such Coroner ... in his discretion, to direct a ... *post mortem* examination of the dead body."

The statutory provisions which governed the selection and composition of the Coroner's Court, contained in section 11(1) of the Act, and are restricted to the power of the Coroner to –

(a) issue his warrant and

(b) to summon not less than five or more than thirty persons,

"to enquire as jurors."

The early cases assist to demonstrate the defining nature of the functions of the coroner's court. In ***Rex v Divine Walton, Ex parte*** [1930] 2 KB 29, the King Bench Division quashed the inquisition of the coroner's court on the ground inter alia, that the selection of the jury was irregular in that the coroner confined his selection of jurors to a small panel of sixteen or seventeen persons. In delivering the judgment of the Court, Talbot, J., at page 33 said:

> "Though it is, we believe, common to use the Voters' List as a list of jurors to be summoned for coroner's inquests, no list is prescribed by statute, and so long as the coroner obtains the attendance of the statutory number of duly qualified persons, the method by which he does it is left very much to his discretion. This is probably to be explained by the ancient history of these inquests. Originally the coroner's duty was to go to the place where a death which was to be inquired into had occurred, to summon the inhabitants of the neighbourhood, and inquire of them upon oath what they knew of the matter. Every one of twelve years old or upwards in the townships summoned was bound to attend:" (Emphasis added)

His Lordship emphasized the distinction by statute of the system of selection of jurors for a coroner's inquest as distinct from the selection from the jury list as is required in the trial of criminal cases. The English Juries Act 1926 was then in force, having superceded the Juries Act of 1898.

In ***Regina v Merseyside Coroner, Ex parte Carr*** [1994] 1 WLR 578, the Divisional Court of the Queen's Bench Division ordered that certiorari should go to quash the decision of the Coroner. The reason was that the coroner held an inquest with a jury that was not empanelled under the provisions of the Coroners Act 1988 and the Coroners Rules 1984. The Coroner had ordered the clerk to summon a jury from a list which had been compiled pursuant to the Juries Act for the purposes of the Crown Court, "as a matter of expediency." The Divisional Court in granting certiorari and mandamus to order a new inquest to be held, at page 586, (per Neil, L.J), said:

> "It seems clear that at one time it was the practice of some coroners at least to assemble a jury formally from among those who were present when he arrived in the town or village where the death had occurred. Indeed for a long time no clear distinction was drawn between the role of juror and the role of witness. *Atkinson, Considerations on Some of the Laws relating to the Office of a Coroner* (1776) made this comment about juries at coroners' inquests:
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> > 'A particular precept to the constable, or other officer, for the summoning of a jury, is very seldom issued by coroners. They generally repair to the place where they are to make their inquiries without any preparation, and after their arrival muster a jury out of the idle and vagrant which they can first lay hold of, or accept such as are presented by the friends of the parties without any regard to their qualifications or otherwise: the number is the only object sought.' ...

> It seems clear, however, that since the enactment of the Coroners Act 1887 the procedure for the summoning of jurors at coroners' inquests has been governed by statute. ...
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> When one turns to section 3 of the Act of 1887 the statutory obligation placed on the coroner is quite clear. Section 3 provided that on the happening of one of the specified events
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> > 'the coroner ... shall, as soon as practicable, issue his warrant for summoning not less than 12 nor more than 23 good and lawful men to appear before him at a specified time and place, there to inquire as jurors touching the death of such person as aforesaid.' ...
> >
> > I have therefore had to consider whether the requirements of the Act of 1988 and the Rules of 1984 can be treated as directory rather than mandatory and whether in the circumstances the summoning of suitably qualified jurors by the coroner could be treated as a sufficient compliance with the statutory requirements. I have come to the conclusion, however, that the procedure prescribed by the Act of 1988 and the Rules of 1984 cannot be regarded as merely directory. The procedure is concerned with the method whereby a tribunal of coroner and jury is to be set up. The formalities which have to be observed are therefore of importance."

Their Lordships concluded that the use of the jury summoned under the Juries Act 1974 for trial of criminal cases, was not lawfully summoned for the purpose of the inquest. The proceeding was therefore a nullity.

In the instant case, the Coroner, His Hon. Mr. Patrick Murphy, issued his warrant, in 2004, under section 11(i) of the Coroners Act, (as unamended),

> "... for summoning not less than five nor more than thirty good and lawful persons to appear before him ... to enquire as jurors. ..." (Emphasis added)

Section 11 (i) of Act makes no reference to and has no relevance to the Jury Act, which embraces,

(a) a jury list, settled and certified in Petty Sessions (section 13)

(b) the striking of a panel of jurors by the Registrar of the Supreme Court (section 16)

(c) the venire facias sent to the Commissioner of Police (section 16) and

(d) the notices served by the police on such jurors to attend court (section 19)

The procedure involved in the summoning of "good and lawful persons" who are required "to enquire as jurors" is effected by the warrant of the Coroner. This process is peculiar to the Coroners Act. It is distinctly different from the procedure concerned with the summoning of jurors in civil or criminal trials.

The provisions of the Jury Act are irrelevant to section 11(1) of the Coroners Act, in relation to its provisions which existed at the relevant time, in 2004, in the instant case.

The functions and powers of the Coroner under section 11(1) of the Act, as amended, and in force as from 11th March 2005, cannot be construed retroactively, so as to govern the Coroner's actions in 2004.

Where the words of the statute are clear, revealing the intention of the legislature, the statute should be so construed. It is impermissible to engraft into a statute the words of another statute, where there is no statutory provision to do so.

In so far as Campbell, J., found that:

> "The Coroners Act is to be read in this context, in conjunction with the relevant provisions of the Jury Act ..."

and that the provisions of the Jury Act, in particular, section 18 thereof, applied in the instant case, he was in error.

In all the circumstances, the appellants are entitled to succeed in respect of grounds (a) and (b). Ground (c) need not detain this Court, as a consequence. The counter notice should be dismissed.

This appeal ought to be allowed and the counter notice dismissed with costs to the appellants.

K. HARRISON, J.A.

Introduction:

This is an appeal from the judgment of Campbell J who on the 18th September 2006 delivered judgment in favour of the Respondent and ordered that a new inquest should be held into the death of Dwayne Graham and that the Coroner should bear the costs of the hearing before him and at the Inquest.

In my view, four issues arise for consideration in this appeal. Firstly, should the provision in section 11(1) of the Coroners Act prior to March 11, 2005, be read in conjunction with section 18 of the Jury Act? Secondly, was the process for the selection of jurors by the Coroner flawed? Thirdly, should the Coroner be condemned in costs when the learned judge finds that he is not guilty of any misconduct in the holding of the Inquest? Fourthly, what are the powers of the Coroner in relation to the calling of witnesses at the Inquest?

The relevant statutory provisions

The following legislative provisions are relevant for the determination of the issues in this appeal. Section 11(1) of the Coroners Act which deals with the summoning of jurors provides:

> "11. (1) Upon receipt of the medical and police reports the Coroner shall, except under the circumstances herein-after mentioned, as soon as practicable, issue his warrant for summoning not less than five nor more than thirty good and lawful persons to appear before him at a specified time and place, there to enquire as jurors

> touching the death of such person as aforesaid."

The examination of witnesses is provided for in section 19(2) and it states as follows:

> "19(2) At the inquest the Coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine."

Section 21 of the Coroners Act which deals with costs states as follows:

> "21. (1) Where a Judge of the Supreme Court upon application made by or under the authority of the Director of Public Prosecutions, is satisfied either -
>
> (a) that a Coroner refuses or neglects to hold an inquest which ought to be held, or which he has been directed by the Director of Public Prosecutions to hold; or
>
> (b) where an inquest has been held by a Coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or any other circumstances or considerations, whether similar to the foregoing or not, it is necessary or desirable in the interests of justice, that another inquest should be held,
>
> the Judge may order an inquest to be held touching the said death, and may, if he think it just, order the said Coroner to pay such costs of and incident to the application as he thinks just, and where an inquest has already been held may quash the inquisition on that inquest."

ISSUES NOS. 1 AND 2

Grounds of appeal (a) and (b) – The jury selection process and whether it was flawed?

Issues 1 and 2 can be conveniently dealt with together. Up and until March 11, 2005 the selection process for jurors serving in Coroners' Inquests was governed by section 11(1) of the Coroners Act (supra). This section was amended by section 7 of the Coroners (Amendment Act) 2005 on March 11, 2005 which states inter alia:

> "7. Section 11 of the principal Act is amended –
> (a) in subsection (1) by deleting the words "good and lawful persons" and substituting therefor the words "persons, selected indiscriminately from among the persons whose names appear on the jury list certified under section 13 of the Jury Act."

What this means, is that as of March 11, 2005 sections 13 and 18 of the Jury Act must be strictly complied with in the summoning of jurors for Coroners' Inquests.

Now, the inquest in this appeal was held between December 8, 2004 and January 10, 2005. How then should the Coroner have proceeded in the summoning of jurors for the Inquest? In order to answer this question, it will be necessary to examine some background facts. Tasha Rodney deposed inter alia, that for over a period of nine months, she had noticed that the Coroners Court for the Corporate Area had used a number of jurors repeatedly, and that the jurors used in Dwayne Graham's Inquest, were used on several panels previously.

The Coroner had deposed at paragraph 8 of his affidavit in response to Rodney's affidavit as follows:

> "8. I would not agree that in every inquest all of the jurors are the same jurors. It is correct that in some cases some jurors are repeated due to the perennial difficulty in securing the attendance of suitable persons to serve as jurors. I am not aware and it was not alleged by Counsel for the deceased family that any of the jurors in this particular inquest behaved improperly, corruptly or perversely. Had this allegation been raised and I was satisfied that it was true, I would have discharged the jury."

Campbell J., held however, that the Coroner had erred in law and/or acted unreasonably when he used a number of the same jurors repeatedly at the Coroners' Inquests. This is what the learned judge said at paragraph 32 of his judgment:

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

The learned judge then concluded that the defect in the selection process made it "desirable in the interest of justice that another inquest should be held."

I now turn to examine two relevant English cases that deal with the jury selection process in Coroners Inquests. In ***Re Dutton*** [1892] 1 QB 486 section 3 of

the English Coroners Act, 1887 came up for consideration. The words in this section are *mutatis mutandis* to section 11(1) of the Jamaican Coroners Act. It was the Coroners duty, on notice of a suspicious death, "as soon as practicable, to issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men". Hawkins J, delivering the main judgment said at page 488:

> "Coroners' juries have to be called together in haste, and for this reason the ordinary rules for summoning juries do not apply to them . . ."

In ***Reg. v Surrey Coroner, Ex p. Campbell*** (D.C.) [1982] 2 WLR 626, ground (iv) of an amended notice of motion was that the decision of the jury should be quashed because the jury was summoned with partiality. The Coroners officer had deposed as follows:

> "I do not generally ask women to serve as it has always been my practice and habit to call at a house and ask for the husband."

A Mrs. Newsome was the only woman on the jury of 10 who sat on the Inquest. In the course of his judgment Watkins L.J. said at page 639:

> "We are prepared to assume that this is an issue which falls within the control of this court at common law. The statutory requirement for - membership of a Coroners jury is in section 3 of the Coroners Act 1887: they shall be not less than 7 nor more than 11 "good and lawful men." The word "men" clearly includes "women" under the Interpretation Act 1889 and as a result of the Sex Disqualification (1) Removal Act 1919. <u>The Juries Act 1974 does not apply to coroners' juries</u>.
>
> There are very few authorities as to the criteria to be used in the choice of such a jury. ***Rex v. Divine, Ex parte Walton*** [1930] 2 K.B. 29 established that the

> practice of summoning juries from a small panel of regular jurymen is improper. A Coroners jury is not, however, to be equated with a jury in the Crown Court, and the procedure for selection of such a jury does not apply to a Coroners inquest. Hawkins J. said in In ***re Dutton*** [1892] 1 Q.B. 486, 488: "Coroners' juries have to be called together in haste, and for this reason the ordinary rules for summoning juries do not apply to them."
>
> But the practice of excluding, by prior decision or custom women from a Coroners jury is nowadays wrong. Thus we have no doubt that Mr. Scott's custom of not asking women to serve on the jury, no matter what his motives for this were, was misguided and incorrect in law. If such a practice is adopted elsewhere, it should cease. Does that invalidate the decision of this jury? In our judgment it does not . . ."
>
> (emphasis supplied)

I have given careful consideration to the arguments and submissions of both Mrs. Wilkinson and Mr. Foster and I do agree with Mr. Foster when he submitted that it was not open to anyone interpreting the Coroners Act, to attempt to fill what may be regarded as a void in the legislation prior to March 11, 2005 by incorporating the Jury Act. In my judgment, the Coroner was not obliged to adopt the procedure laid down under section 18 of the Jury Act. It was left to his discretion to summon the required "good and lawful persons" in fulfilment of section 11(1) of the Coroners Act and this is exactly what he did.

I am also in agreement with Mr. Foster when he submitted that the Coroner was in error to have concluded that the selection process was flawed. Miss Rodney's affidavit, which the learned judge relied upon, was certainly deficient and vague in

material respects. Even though the Coroner had acknowledged that in some cases some jurors were repeated due to the difficulty in securing the attendance of suitable persons to serve as jurors, this could not by itself have flawed the selection process. In the absence of any evidence showing the number of jurors who served on previous inquests, the number of jurors who were repeated and the inquests on which they sat, the learned judge could not have properly concluded that the jurors in Dwayne Graham's case were repeatedly used in other inquests.

In my judgment, the case of ***R v Divine, ex parte Walton***, (supra) which was relied on by Mrs. Wilkinson is clearly distinguishable from the instant case. In the ***Divine*** case the court had before it evidence of the selection process undertaken by the Coroner who had admitted in his affidavit that the practice of the court was to summon eleven jurymen from a list or panel of sixteen or seventeen persons only. The court said: "... to confine the area of selection to sixteen or seventeen persons out of a great city appears to us to be very objectionable." There was no evidence in this case that the Coroner had confined the area of selection to a limited number of persons or that there was a repeated and regular practice of using the same jurors in all inquests.

It is therefore my view that the learned judge was in error when he held that section 18 of the Jury Act must be read in conjunction with section 11(1) of the Coroners Act. There was no express provision in the law at the relevant time for such an interpretation to be made.

There is merit in the submissions of Mr. Foster in respect of grounds (a) and (b), so there is really no need to consider ground (c).

ISSUE NO. 3

Ground of Appeal (d) – The Costs Issue

R v Liverpool Justices ex p Roberts [1960] 1 WLR 587 held that it has been the general practice of the court to award costs against a party who has acted improperly, that is to say,

> "perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance."

The learned judge, in the instant case, said he had found no fault with the Coroners handling of the Inquest and that the statutory award of costs was no reflection on his competence. It is therefore very strange to me that the learned judge made an order for costs against the Coroner. Looking at the overall picture, it seems to me, that the Coroner had merely responded to legal proceedings that had sought to challenge the decision of the jury. In the circumstances, the award of costs against him would be deemed unreasonable. In my view, ground of appeal (d) should also succeed.

THE COUNTER NOTICE OF APPEAL

It was submitted by Mr. Foster that the grounds of appeal in support of the counter notice of appeal bore no relation to the findings of facts and law relied on by the Respondent in paragraph 2 of the counter notice. The question is this: Was it

incumbent upon the Coroner to have another expert called, in order to explain the medical report of Dr. Odunfa, since he could not be located to testify at the Inquest?

Section 19 (2) of the Coroners Act (supra) gives the Coroner the discretion to call the witnesses whom he thinks it is expedient to examine. The section states:

> "19(2) At the inquest the Coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine."

One ought to be bear in mind that a Coroner's Inquest is an inquisitorial process. It was designed to attempt to find the facts in relation to the death of an individual and it was for the coroner to decide what witnesses should be summoned to give evidence. The compellability of a witness is essentially a matter for him when he comes to the exercise of his powers under section 19 of the Coroners Act.

In my judgment, the Coroner cannot be faulted for refusing the request to call an expert to explain the evidence of Dr. Odunfa. The doctor's report was read into evidence at the request of Counsel for the Respondent and Dr. Ere Seshaiah, the Government Pathologist, was examined upon oath on his report and that of Dr. Odunfa. In the circumstances, it is my view, that the learned judge was correct when he said that there was sufficient opportunity provided to the jury and to Counsel "to seek such clarification as they needed."

Conclusion

I would allow the appeal, and dismiss the counter-notice of appeal with costs on both the appeal and counter notice of appeal to the Appellants.

McCALLA, J.A:

I have read in draft the judgments of Harrison, P. and Harrison, J.A. I agree with their reasoning and conclusions. There is nothing further I wish to add.

HARRISON, P.

ORDER:

The appeal is allowed. The counter-notice of appeal is dismissed. Costs on both the appeal and the counter-notice of appeal are awarded to the appellants to be agreed or taxed.