11/93

SUPREME COURT OF VICTORIA

MILITANO v THE STATE CORONER

Hayne J

9, 18 December 1992

CORONERS – INQUEST – POWERS OF MAKING FINDINGS AND COMMENTS – PROHIBITION AGAINST MAKING COMMENT AS TO PERSON/S CRIMINALLY RESPONSIBLE – WHETHER PROHIBITION EXTENDS TO DECEASED PERSONS – WHETHER EXTENDS TO INCLUDE ANY PERSON CONNECTED WITH THE INQUEST: *CORONERS ACT* 1985, SS19, 59.

Section 19(3) of the *Coroners Act* 1985 ('Act') provides:

"A coroner must not include in a finding or comment any statement that a person is or may be guilty of an offence."

1. S19(3) of the Act prohibits a coroner from making any finding or comment concerning who may be criminally responsible for the death under investigation, but does not prohibit a coroner from stating in a finding or comment that the deceased had committed an offence. The sub-section does not have a wider purpose of protecting the name of each and every person, alive or dead, having anything to do with the inquest.

2. Where a coroner made a finding that the deceased had been involved in several armed robberies and that the person who contributed to the death had acted reasonably, there were no grounds upon which the Supreme Court could declare that the finding was void.

HAYNE J: [1] In October 1987 the State Coroner held an inquest into the death of Mark Militano. Militano had been shot by a police officer. At the end of the inquest the Coroner said that his "formal findings" were that:

> "Mark Militano on 25 March 1987 in Edinburgh Street, Flemington approximately 15 metres east of Crown Street, died by cardio-respiratory failure consequent upon traumatic brain injuries received by a gunshot wound to the head in the following circumstances:..."

The Coroner then set out those circumstances in 29 numbered paragraphs of which the first read:

> Between 24 December 1986 and 19 March 1987 the deceased was personally and directly involved in nine armed robberies of four banks, three Tattslotto and newsagents and two TAB agencies of the total of approximately $120.000 taken, all at gunpoint and involving physical violence and real risk of serious injury or death to individuals, three involving him discharging a firearm and some involving him acting in concert with others."

(This paragraph was referred to in the proceedings as "Finding Number One"). After this lengthy recitation of circumstances the Coroner went on to say:

> "In the circumstance of the deceased's history as set out in these findings, his propensity as set out in these findings, with the matters set out in these findings being known to (W] and faced with the deceased's resort to a firearm at the time of his apprehension a reasonable and responsible policeman in [W's] position and confronted by the deceased as set out in these findings would have responded in a manner the same as [W]. I find that [W] has contributed to the cause of death in circumstances rendering his conduct reasonable."

The Coroner then introduced the final section of his remarks with the words "with respect to comments" and made comment on police eavesdropping and surveillance and on what were described as "the interests of the deceased **[2]** individual and his family" compared with "the interests of the community". On 2nd August 1991 (nearly four years after the Coroner concluded the inquest) Militano's mother instituted proceedings under s59 of the *Coroners Act* 1985 seeking an order "to declare void Finding Number One made on 14 October 1987 by the State Coroner

in his investigation into the death of Mark Militano". The originating motion alleged that three questions arose in the proceedings viz:

> "(a) Whether the State Coroner is precluded by s19(3) of the *Coroners Act* 1985 from including in a finding or comment any statement in substance that a person who is deceased is or may be guilty of an offence.
>
> (b) Whether in any case such a finding or comment by the State Coroner about a person who is deceased and thus unable to avail him or herself of the protections of the Criminal Justice System is necessarily against the evidence or based upon an insufficiency of inquiry, a failure to consider evidence or an irregularity of proceedings.
>
> (c) Whether in any case a finding such as Finding Number One misconceives the role of the State Coroner and so should be declared void as *ultra sires* the powers of the State Coroner by reason of his having failed to base the finding upon proper consideration of the evidence before him, his having failed to consider the evidence before him, or as a result of an irregularity of proceedings or an insufficiency of inquiry or simply because such a finding must be against the evidence."

At the outset of the proceedings counsel for the Coroner contended that because the proceedings had been instituted so long after the inquest, they should not be entertained. I declined to terminate the proceeding summarily, leaving open the question of the effect of any delay in their **[3]** institution for consideration at the same time as the merits of the application. Section 19 of the *Coroners Act* 1985 provides:

> "(1) A Coroner investigating a death must find if possible—
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> (a) the identity of the deceased: and
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> (b) how death occurred: and
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> (c) the cause of death: and
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> (d) the particulars needed to register the death under the *Registration of Births Deaths and Marriages Act* 1959: and
>
> (e) the identity of any person who contributed to the cause of death.
>
> (2) A Coroner may comment on any matter connected with the death including public health or safety or the administration of justice.
>
> (3) A Coroner must not include in a finding or comment any statement that a person is or may be guilty of an offence."

Section 59 provides:

> "(1) Any person may apply to the Supreme Court for an order that some or all of the findings of an inquest are void.
>
> (2) The Supreme Court may declare that some or all of the findings of the inquest are void and may order the State Coroner—
> (a) to hold a new inquest, or direct any coroner, other than the coroner who held the first inquest, to hold a new inquest: or
> (b) to re-open (or direct another coroner to re-open) the inquest and to re-examine any finding.
>
> (3) The Supreme Court may only make an order if it is satisfied that—
> (a) it is necessary or desirable because of fraud, consideration of evidence, failure to consider evidence, irregularity of proceedings or insufficiency of inquiry: or **[4]**
> (b) there is a mistake in the record of the findings; or
> (c) it is desirable because of new facts or evidence: or
> (d) the findings are against the evidence and the weight of the evidence:"

It is convenient to deal first with the question of whether the applicant's delay in instituting the proceedings bears upon whether any relief should go.

No material was placed before me which would explain why the applicant waited nearly

four years before instituting the present proceedings. The only relief that was sought was, as I have said, "to declare void" what is described as Finding Number One and the applicant expressly disavowed any claim to an order that the State Coroner hold a new inquest or re-open the inquest and re-examine his findings. If one of the grounds mentioned in s59(3) is made out it is clear that the Court retains a discretion about what, if any, relief should be ordered under s59(2). Where all that is claimed is a declaration and no claim is made for any consequential relief I consider that in exercising any such discretion, principles governing the exercise of the Court's power to grant declaratory relief will very likely provide useful guidance.

However, two things are to be noted about the jurisdiction under s59 of the *Coroners Act*. First, questions of standing do not arise – for the section makes plain that "any person" may apply for an order that a finding is void. Secondly, it is clear that the source of the jurisdiction is statutory and thus the jurisdiction is not to be seen as an exercise of equitable jurisdiction. It **[5]** follows from this second consideration that the equitable defences (and in particular the defence of laches) are not to be applied as if the Court were exercising equitable jurisdiction. (In any event it may be doubted that the Court granting declaratory relief is in any case exercising equitable jurisdiction. See *Mayfair Trading Co Pty Ltd v Drever* [1958] HCA 55; (1958) 101 CLR 428 at 450-6; [1959] ALR 104; 32 ALJR 326.)

Here it is said that the mother of the deceased seeks the declaration which she does in order to "correct the public record". However, by the present proceeding she does not seek to challenge directly the accuracy of the statement made by the Coroner, or say that it was not a conclusion open on the evidence called before the Coroner; she seeks to assert that the statement was made beyond his powers. Thus the "correction" which she seeks to have made is not by having the Coroner look again at the accuracy of what he said. Her complaint is a complaint that the Coroner exceeded his powers by making the statement that he did. In those circumstances, given the unexplained delay of nearly four years in instituting the proceedings, I doubt greatly that the discretion to make a declaration of the kind sought should be exercised in the applicant's favour, even if grounds for its making were made out. However I do not consider that any ground is shown for making the declaration sought.

As is apparent from the statement in the applicant's originating motion of the questions that are said to arise in this matter, the first, and perhaps principal point made on behalf of the applicant is that s19(3) of the Act forbade the Coroner from making the statement that he did in the first of the paragraphs **[6]** setting out the circumstances in which Mark Militano met his death. It was said that that statement was a statement that he was or might have been guilty of offences of armed robbery and that the prohibition in sub-s.(3) when it refers to "a person" is perfectly general, and extends to precluding the Coroner from stating that the deceased whose death is being investigated was or might have been guilty of any offence.

For a number of reasons I do not consider that s19(3) is directed to prohibiting the Coroner, if otherwise appropriate, from stating in a finding or comment that the deceased had committed an offence. The purpose of the sub-section is to mark the significant change to coronial powers made by the 1985 Act and as a result of which the Coroner was no longer permitted to commit persons for trial. The prohibition in s19(3) was intended to preclude the Coroner from making findings or making any comment concerning who was criminally responsible for the death under investigation. In the Second Reading Speech in support of the Bill that became the *Coroners Act* 1985 it was said that this sub-section required "that a Coroner's findings and any ancillary comments which the Coroner sees fit to make, must not include any statement that a person is or may be guilty of an offence <u>in relation to the death or fire under investigation</u>." (Second Reading Speech Parliamentary Debates, Legislative Council, 16 October 1985, p371, emphasis added; cf. Explanatory Memorandum "Clause 19 requires a Coroner investigating a death to make certain findings, and permits a Coroner to comment on matters connected with the death, provided that no finding or **[7]** comment is made that a person is or may be guilty of an offence <u>in relation to the death</u>.")

Construing the sub-section as limited in its operation to precluding a Coroner from making findings or comments about criminal responsibility for the death being investigated fits with the general framework of s19. The focus of the section is upon the Coroner making findings about the death being investigated and I do not consider that sub-s.(3) should then be interpreted as

having some wider purpose of protecting the name of each and every person, alive or dead, having anything to do with the inquest. There are two separate verbal indications contained within the legislation which also support the construction which I favour.

First, by casting the prohibition in terms of whether a person "is or may be guilty of an offence" it may be said that the legislature is looking towards future criminal proceedings and that that could have no application where it is the deceased of whom the Coroner speaks. Secondly, it may be said that the one section uses both the term "a person" and the term "the deceased" in a way that suggests that "a person" does not include "the deceased". Some limited support for this second proposition may be gained from other provisions of the Act such as s13(5) which may, perhaps, be said to suggest that the draftsman uses the word "person" to refer only to the living and not to the dead. However even apart from these verbal indications, I consider that the construction urged by the appellant is a construction that runs contrary to the evident legislative intention of **[8]** regulating what findings are to be made by the Coroner when he investigates a death.

The other attacks made upon "Finding Number One" invited attention to the nature of the Coroner's task. It was said that making a finding that the deceased had committed armed robberies was necessarily contrary to requirements of natural justice or procedural fairness, or beyond power because the finding was made otherwise than after a criminal trial with all its attendant procedural safeguards for the accused. The submission was put as one based on requirements of natural justice or procedural fairness and as one based on considerations of power. So far as questions of power are concerned, it is clear that the Coroner's task is to find the matters prescribed by s19(1) and that the inquest must be directed to those ends, not any wider or more general end. Thus although the Coroner is permitted to comment "on any matter connected with the death including public health or safety or the administration of justice" the power to comment is a power to comment on any matter "connected with the death" and the Coroner has no power to investigate a death save a power to investigate with a view to making the findings required by s19(1). (See *Harmsworth v The State Coroner* [1989] VicRp 87; [1989] VR 989.)

One of the findings that a Coroner investigating a death must make, if possible, is a finding of how death occurred. Were he to sit with a jury pursuant to s49, the jury would have to answer that question (s55(1)) and it might be expected that the answer would be quite brief – perhaps of a kind similar to the findings recommended to Coroners in the United Kingdom such as "death through want **[9]** of care" or "justifiable homicide".

Again, as in the United Kingdom, such a finding could not extend to including any statement about criminal responsibility (or in the UK, civil responsibility) for the death under investigation. (See e.g. *R v Surrey Coroner ex parte Campbell* [1982] QB 661; [1982] 2 All ER 545; [1982] 2 WLR 626; *R v Southwark Coroner ex parte Hicks* [1987] 2 All ER 140; [1987] 1 WLR 1624; (1987) 151 JP 441; *R v Portsmouth Coroner ex parte Anderson* [1987] 1 WLR 1640.) However this is not to say that the Coroner under the Victorian legislation is limited to adopting such a formulaic answer to the question presented by s19(1)(b) of how death occurred. He is however limited in his findings to addressing the several questions presented by s19(1). In many cases the findings will therefore be brief. If in the course of answering the questions posed by s19(1) it is necessary to express a view on whether the evidence reveals that the deceased had committed a crime then that finding must be made.

Here, in finding how death occurred, the Coroner considered it necessary to express a view on whether the shooting of Militano was reasonable, and neither at the inquest nor at the hearing of the present application was it suggested that in doing so the Coroner acted beyond power. Indeed it was expressly accepted on the present hearing, and at the inquest, that it was open to the Coroner to make findings about whether police believed that Militano had committed armed robberies in the past and about whether police believed that he was dangerous. The submission that was made on the present hearing was that although the Coroner might make findings about the belief of the police, and indeed might go on to make **[10]** findings about whether those beliefs were reasonably held, he was precluded from saying that on the evidence called at the inquest he was satisfied as a matter of fact that Militano had committed the robberies.

When the point is exposed in this way, it is apparent that it is a point depending upon

the way in which the Coroner chooses to frame his finding rather than upon the nature or extent of the Coroner's powers or the nature or extent of the procedures adopted at the inquest. If it is accepted that it is within power to inquire whether the killing was justified, and to that end explore whether police reasonably believed that Militano was guilty of previous armed robberies, then the inquiry conducted will necessarily explore the facts surrounding those alleged armed robberies. The complaint now made is not about that inquiry occurring, it is a complaint about the way in which the Coroner phrases his conclusions following that inquiry.

It is of course by no means unknown for judicial or quasi judicial proceedings to require conclusions about whether a crime has been committed. One need only mention two examples. There have been numerous civil actions where a principal question for determination has been whether the beneficiary's interest under a will is forfeit because the beneficiary murdered the testator. There are cases such as inquiries by professional boards whether a practitioner has misapplied a client's funds and therefore the question is whether there has been a theft. The procedural safeguards surrounding such proceedings are not those of the criminal trial. Indeed, to take the clearest example of that, the standard of persuasion to be applied **[11]** in such proceedings is not the standard of proof beyond reasonable doubt, it is the civil standard. Yet it cannot be suggested that because there are not in such cases the same procedural safeguards as attend the criminal justice system, the inquiry cannot proceed.

In the end the submission of the applicant both in terms of power and the requirements of procedural fairness, assumed, sometimes explicitly, that the Coroner by his finding was to be taken as in some way "convicting" the deceased of the offences mentioned in his finding. That is simply not what occurred. The Magistrate sought to find how the deceased's death occurred. It being conceded that he might properly consider whether the killing was justified and for that purpose determine whether the police believed on reasonable grounds that Militano had committed armed robberies, the differences in procedure applicable at the inquest from those that would be applicable on the hearing of a criminal trial do not lead to the conclusion that there has been any denial of procedural fairness. The relatives of the deceased were heard at the inquest. No question of the kind dealt with in *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651 arises in the present matter.

What was described as "Finding Number One" was not demonstrated to be arrived at in circumstances where it is necessary or desirable to make an order under s59 of the *Coroners Act* because of "consideration of evidence, failure to consider evidence, irregularity of proceedings or insufficiency of inquiry". The application should be dismissed.

APPEARANCES: For the plaintiff Militano: Mr IRL Freckleton, counsel. Flemington/Kensington Legal Service. For the defendant The State Coroner: Mr PN Rose, counsel. Victorian Government Solicitor.
