**6/95**

**SUPREME COURT OF VICTORIA**

# *BARCI & ASLING v HEFFEY*

**Beach J**

**1 February 1995**

**CORONER – INQUEST BEING CONDUCTED – DECEASED SHOT BY POLICE IN COURSE OF ARMED ROBBERY – DECEASED IN COMPANY OF TWO CO-OFFENDERS – "SUFFICIENT INTEREST" – REASONABLE PROSPECT THAT ADVERSE FINDING WOULD BE MADE AGAINST CO-OFFENDERS – WHETHER CO-OFFENDERS HAD "SUFFICIENT INTEREST" – WHETHER ENTITLED TO APPEAR AT INQUEST: *CORONERS ACT* 1985, SS19, 45(3).**

Section 45(3) of the *Coroners Act* 1985 provides (so far as relevant):

> "A person with a sufficient interest may appear or be represented by a barrister and solicitor..."

H., a coroner, was conducting an inquest into the death of L. who was shot dead by police officers during the course of an armed robbery. At the time of the shooting, L. was in company with two co-offenders, B. and A. As part of the coronial hearing, there was a reasonable prospect that B. and A. would be found to have contributed to the death of L. H. refused an application by B. and A. to appear at the inquest. Upon an application for Prohibition—

**HELD: Application granted.**
**(1) Whether a person has a "sufficient interest" is a question of fact to be determined after considering the circumstances surrounding the death. A person has a "sufficient interest" if there is a reasonable prospect that a finding may be made adverse to the interest of that person.**

**(2) In the circumstances, B and A had a sufficient interest and were entitled to appear having regard to:**
- **their involvement in the events leading to the death**
- **the reasonable prospect of an adverse finding against them**
- **whether the police officers involved in the shooting acted in lawful self-defence.**

***Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596; (1990) 97 ALR 177; (1990) 65 ALJR 167; (1990) 21 ALD 651, applied.**

**BEACH J: [1]** This is the return of a summons filed upon an originating motion whereby the plaintiffs seek an order that a writ issue prohibiting the defendant from continuing to conduct the inquest into the death of Norman Leung Lee until such time as she permits the plaintiffs to be represented pursuant to s45(3) of the *Coroners Act* 1985 (The Act). The defendant is a coroner appointed pursuant to the provisions of s8 of the Act. She is currently conducting an inquest into the death of Lee who was shot dead by two members of the Victoria Police Special Operations Group immediately following an armed robbery committed by the plaintiffs Steven Barci and Stephen Asling, and Lee at Tullamarine Airport on 28 July 1992. The matter is one of some urgency as the coroner has set aside some twenty sitting days for the hearing of the inquest and it cannot proceed further until I give my ruling in the matter.

To appreciate the basis upon which the application is made to the court it is necessary to say something of the circumstances surrounding the death of Lee. For at least some weeks prior to 28 July 1992 members of the Special Operations Group (SOG) had had Lee, Barci and Asling under surveillance in the belief that the three men intended to commit an armed robbery in Brunswick or at Tullamarine. As the days passed it became clear to the officers involved that the robbery was likely to occur at the Ansett Freight Terminal at Tullamarine. So sure were the police that the robbery was to occur on Tuesday 28 July that at about 9 clock on the morning of that day a large number of members of the SOG were deployed in the Essendon area on standby. What occurred at Tullamarine **[2]** later that day is set out in a summary exhibited to the affidavit of the plaintiffs' solicitor filed in support of the present application. *[His Honour set out the relevant section of the summary and continued]*...**[4]** The two shots fired at Lee struck him in the back of the head causing his death. The shots which struck Barci virtually blew away the top of his left shoulder leaving him with a severe permanent disability. In due course, Barci and Asling were

charged with a number of serious offences arising from the events of 28 July and also a number of offences arising from earlier armed robberies in which the two men had been involved.

In September 1993 Asling and Barci appeared before the County Court at Melbourne in relation to the charges. Asling pleaded guilty to all counts and was sentenced to an effective term of 15 years' imprisonment with a non-parole period of 10 years being fixed. Barci pleaded **[5]** guilty to all but two of the counts and was also sentenced to an effective term of 15 years' imprisonment. A similar non-parole period of 10 years was fixed. In February 1994 Barci appeared before the County Court at Melbourne where he pleaded guilty to the two remaining counts. The sentence imposed on him on that occasion did not alter the effective term of imprisonment imposed upon him in September 1993. Both Barci and Asling applied to the Court of Criminal Appeal for leave to appeal against the sentences imposed on them. On 3 November 1994 Asling's appeal was dismissed. On the same day the Court of Criminal Appeal granted Barci's application, treated the appeal as instituted, and heard instanter, and allowed the appeal. The court then imposed an effective sentence of 12 years' imprisonment on Barci and fixed a non-parole period of 7 years. I think it is fair to say that Barci's sentence was reduced by reason of the disabilities now suffered by him as a consequence of the injuries he received on 28 July 1992. I have drawn attention to the fact that Barci and Asling have been dealt with in respect of the offences they committed on 28 July 1992 because different considerations may well have applied in the event that they were still to face trial in respect of those offences.

On Monday last the inquest into the death of Lee commenced before the Coroner. Counsel sought leave to appear for Barci and Asling pursuant to the provisions of s45(3) of the Act which reads: **[6]**

> "A person with a sufficient interest may appear or be represented by a barrister and solicitor or, with permission of the coroner, by any other person, and may call and examine or cross-examine witnesses and make submissions."

The Coroner refused the application on the ground that Barci and Asling had not demonstrated that they had a sufficient interest in the inquest or the outcome of the inquest to justify granting the application. Nowhere in the Act is there a definition of "sufficient interest", nor in the limited time available to me have I been able to find any authority directly in point. However, during the course of discussion, counsel referred me to the decision of the High Court in *Annetts & Anor v McCann & Ors* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651 and certain of the observations their Honours there made in relation to a somewhat similar provision in the *Coroners Act* 1920 of Western Australia. Section 24(1) of that Act reads:

> "At any inquest, any person who, in the opinion of the coroner, has a sufficient interest in the subject or result of the inquest—
> (a) may attend personally or by counsel; and
> (b) may examine and cross-examine witnesses; provided that such examination and cross-examination—
> (c) is relevant to the subject of the inquest; and
> (d) is conducted according to the law and practice of coroners' inquests,
> and the coroner shall disallow any question which, in his opinion, is not relevant or is otherwise not a proper question."

It will be noted that unlike the provision in the Victorian Act there is a reference in the sub-section to the coroner forming an opinion. In considering s24 of the Western Australian Act the majority of the court (Mason CJ, Deane and McHugh JJ) **[7]** said at CLR p600:

> "Against this background, the terms of s24 of the Act provide no ground for concluding that the Act evinces any intention to exclude the operation of the principles of natural justice. The evident purpose of the section was to abolish a coroner's discretion and to give interested parties the absolute right to attend the inquest, to examine and cross-examine witnesses, and to be represented by counsel. The terms of s.24, therefore, are explicable on historical grounds and provide no basis for concluding that the legislature intended to exclude the rules of procedural fairness except to the extent specified in that section. But, independently of the historical background of s.24, it is impossible to accept that the legislature, in enacting that section, intended to exclude the rules of natural justice. It simply would not have occurred to anyone in the legal profession in 1920 that the

common law rules of natural justice applied to an inquiry whose findings could not alter legal rights or obligations. No doubt the legislature assumed that the rights of natural justice did not apply to coronial inquiries. But that is no ground for concluding that the legislature intended to exclude those rights if they were otherwise held to apply. Apart from s24, nothing else in the Act provides any support for the proposition that the Act excludes the rules of natural justice. Accordingly, the rules of natural justice are applicable to the present inquest. That being so, the Coroner cannot lawfully make any findings adverse to the interests of the appellants without first giving them the opportunity to make submissions against the making of such a finding."

Clearly, their Honours were emphasizing the following points.

1. A coroner is bound to observe the rules of natural justice.

2. An interested party (referred to in the Victorian Act as "a person with a sufficient interest") has an absolute right to attend the inquest, to examine and cross-examine witnesses, and to be represented by counsel.

3. A coroner cannot lawfully make any finding adverse to the interests of a person without first **[8]** giving that person the opportunity to make submissions against the making of such a finding.

However, their Honours did not consider the criteria for determining who may or may not be an interested party. It would seem to me that whether a person has a sufficient interest in an inquest or the outcome of an inquest is a question of fact to be determined after a consideration of the circumstances surrounding the death of the deceased. If a person is closely related to the deceased by birth or marriage or by having lived in a *de facto* relationship with the deceased, then, in my view, that person would have a sufficient interest. Similarly, if the deceased met his death during the course of his employment, his employer would have a sufficient interest justifying the grant of leave to appear and to be represented. One can envisage many relationships between the deceased and other persons which may entitle those other persons to appear at the inquest and be represented by counsel, e.g. the teacher of a student killed whilst on a school excursion, the commanding officer of a soldier killed on a peacetime manoeuvre. Any person whose actions may have caused or contributed to the death of the deceased would be entitled to representation. Clearly, a person has a sufficient interest in an inquest or the outcome of an inquest if there is a reasonable prospect that the coroner may make a finding adverse to the interests of that person.

It is clear from the summary to which I earlier referred that the case for the police officers involved in the shooting will be that they acted in lawful self-defence. There can be little doubt that that will be **[9]** challenged by the relatives of Lee and by Barci and Asling. In my opinion, it is arguable that it would be adverse to the interests of Barci and Asling if the coroner made any such finding. Clearly, there must be a reasonable prospect of such a finding being made.

In the reasons for her ruling, the coroner adverted to the fact that she is not concerned with the manner in which Barci sustained his injury as, in her view, that was a separate incident. While, strictly speaking, that is correct, it would seem to me to be difficult in the circumstances of this case for the coroner to isolate the two incidents. They occurred in such close proximity to each other, both in time and space, that both incidents will be the subject of evidence before the coroner and it would be surprising if the coroner did not make findings in relation to them. On that ground alone I consider Barci and Asling are entitled to be represented. However, the matter does not rest there.

Section 19(1) of the Act provides:

"A coroner investigating a death must find if possible—

(a) the identity of the deceased; and
(b) how death occurred; and
(c) the cause of death; and
(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."

One asks – is there a reasonable prospect of the coroner finding that Barci and Asling contributed to the death of Lee? In my opinion, the answer to the question posed is - Yes. In

the circumstances of this case it may **[10]** be open to the coroner to find that by their actions that day Barci and Asling contributed to Lee's death. I do not for one moment suggest that the coroner will make such a finding. I simply say that, in my view, there is a reasonable prospect that she might. In my opinion, Barci and Asling were so inextricably involved in the events which led to the death of Lee as to qualify as persons with a sufficient interest within the meaning of s45(3). I can see no reason why any distinction should be made between them and the members of the National Crime Authority involved in the surveillance of Lee, Barci and Asling, and those members of the SOG who did not fire the shots which killed Lee but were members of the team which handled the police operation that day, all of whom have been given leave by the coroner to be legally represented. (Discussion ensued) In my view, the plaintiffs are entitled to their costs of the application. I order that the plaintiffs' costs of the application be taxed and paid by the defendant, and I reserve to the parties liberty to apply.

**APPEARANCES:** For the plaintiffs: Mr D Hore-Lacy, counsel. Slater & Gordon, solicitors. For the defendant Ms Heffey: Mr R Ray, counsel. Phillips Fox, solicitors.

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