

22/89

SUPREME COURT OF VICTORIA

HARMSWORTH v THE STATE CORONER

Nathan J

28 February, 1, 9 March 1989 — [1989] VicRp 87; [1989] VR 989

PRACTICE AND PROCEDURE – CORONERS – INVESTIGATIONS OF DEATHS – WHETHER CORONERS' POWERS ARE INQUISITORIAL OR CURIAL – WHETHER CORONERS SUBJECT TO JUDICIAL REVIEW – WHETHER CORONERS' POWERS TO MAKE FINDINGS/COMMENTS LIMITED TO ANY EXTENT: CORONERS ACT 1985, SS4, 7, 15, 17, 19, 21.

1. Notwithstanding that a Coroner's powers are inquisitorial rather than curial, a Coroner is subject to judicial review by the Supreme Court and has a duty to comply with the rules of natural justice and to act judicially.

2. A Coroner's power to investigate a death is not a general power of enquiry but is limited to the making of relevant enquiries specifically directed to the prime function of the making of findings. The Coroner's power to make comments or recommendations is incidental and subordinate to the prime function but is limited to any matter connected with the death being investigated.

NATHAN J: *[After setting out briefly the circumstances surrounding the deaths of five prisoners, the proceedings at the subsequent inquest and the grounds of the order to review His Honour continued] ... [7] I am satisfied that when conducting an inquest or making investigations, the State Coroner is not a Court. The Act is specific in its omission. A Coroner's Court has not been established. In its place the offices of State and Deputy Coroners have been created. (Part 2 S.6-8). The common law is to cease to have effect, viz. s.4:*

"A rule of the common law that, immediately before the commencement of this section, conferred a power or imposed a duty on a coroner or a coroner's court ceases to have effect."

The second reading speech of the Attorney-General requoted in the Assembly by the Minister for the Arts (see *Hansard*, 21 Nov, 1985), while making it apparent the Bill largely reflected the recommendations of the report into the *Coroners Act* 1958 prepared by the Honourable J Norris QC formerly of this bench, did not set up the Coroners Court as suggested by him.

A coroner's powers set out in s7 are inquisitorial and not curial. A coroner does not have the power, formerly exercised, of committing persons for trial. Despite the fact that the proceedings presently being conducted by the defendant have been referred to as "the Coroners Court", it is not. The previous cases and the common law which presumed the coroner to be exercising a curial role, no longer have any application.

[8] But this conclusion does not dispose of the issue of whether the State Coroner's proceedings are amenable to declaration. There is authority for the conclusion that an administrative or ministerial body bound to observe the rules of natural justice can have its functions reviewed pursuant to O56, for example *Heatley v Tasmanian Dairy Authority* [1977] HCA 39; (1977) 137 CLR 487; (1977) 14 ALR 519; (1977) 51 ALJR 703 and *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378; (1987) 73 ALR 1; 26 A Crim R 447; 61 ALJR 477.

I must now consider the actual inquisitorial functions performed. They are set out in Parts 5 and 6 of the Act. For these purposes there is no need to distinguish between the powers in relation to deaths or fires. They are as follows:

1. Power to Investigate

(a) Section 15(1): a general power, if it appears to a coroner to be a reportable death (as defined in sub-s3).

(b) Section 15(2): an obligation where the death is in fact reported to a coroner and appears to be a

reportable death, or alternatively a coroner may report that death to the State Coroner—
 "A coroner to whom a death is reported *must*, if it appears to the coroner that the death is or may be a reportable death, *investigate* it or report it to the State Coroner." (My emphasis).

2. Power to Hold an Inquest

This power is a separate source of authority and of obligations, because not all investigations will lead to an inquest. The power is bifurcated between those circumstances set out in s17(1) where an inquest "*must be held*" (my emphasis), viz.

- "(a) the coroner suspects homicide; or [9]
- (b) the deceased was immediately before death a person held in care; or
- (c) the identity of the deceased is not known; or
- (d) the death occurred in prescribed circumstances; or
- (e) the Attorney-General directs; or
- (f) the State Coroner directs."

and other cases where a coroner *believes it desirable* (s17(2)). Further a coroner may, *if requested* hold an inquest (s18). (again my emphasis)

Results of Investigation or Inquest

The Act sets out three consequences which may ensue from either an investigation or an inquest. They are the making of "findings" and "comments" and the delivery of "reports".

1. Findings

"19(1) 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." (my emphasis)

It is mandatory, after investigation, and by necessary inference, inquest, to make these findings if possible. The obligation is constrained by sub-s(3).

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

[10] 2. Comments

A coroner is not restricted to making findings but is specifically given the power to make comments. However that power is limited to being "upon material connected with the death", viz. s19(2):

"A coroner may comment on any matter connected with the death including public health or safety or the administration of justice."

3. Reports

Having made findings or delivered comment a coroner must proceed to report if he believes an indictable offence has occurred - viz. s21(3):

"(3) A coroner must report to the Director of Public Prosecutions if the coroner believes that an indictable offence has been committed in connection with a death which the coroner investigated".

This is really an obligation common to all citizens. However a coroner has further discretions arising out of an enquiry or inquest. A report may be made to the Attorney General and/or recommendations may be proffered, viz. s21(1) and (2):

- "(1) A coroner may report to the Attorney-General on a death which the coroner investigated.
- (2) A coroner may make recommendations to the AttorneyGeneral on any matter connected with a death which the coroner investigated, including public health or safety or the administration of justice."

The power to make findings, deliver comment and render reports is supported by an immense range of powers relating to the investigations upon which they are founded. The investigatory powers are set out in Division 2 s26 and do not need to be quoted in full other than

to say a coroner may, if it is believed necessary, enter and inspect any place and take possession of anything found.

[11] I turn now to consider the legislative matrix which governs inquests. A coroner is not bound by the rules of evidence (s44) but interested parties or the Attorney-General may be represented by counsel (s45) or the coroner may also be assisted by counsel (s46(2)). A coroner has the authority to summon witnesses (s46(1)) or exclude persons in the interests of justice (s47(1)). A coroner retains the power to sit with a jury. A record of evidence must be kept but it is not evidence in any court of any fact asserted in it (s51(1) and (3)).

Although there are no parties as such appearing before a coroner, he has the power to admit the representation by counsel of "interested persons". No issues as defined by pleadings are "triable" but there are clear contested contentions as to facts, upon which findings and possibly further comment or reports may be made. Although there is no decision as such, the coroner must report to the DPP if it is believed indictable offences have occurred and this means coroners must define those offences. Further reports of findings may also be made. Therefore conclusions with almost certain juridical consequences are commonly made.

The above rehearsal of the powers duties and discretions given to a coroner lead inevitably to the conclusion that the coroner also has a duty to comply with the rules of natural justice and to act judicially (*Rex v Electricity Commission; Ex Parte London Electricity Joint Committee Co Ltd* (1920) (1924) KB 205).

This matrix reveals, in my view, no doubt that a coroner is also amenable to judicial review. It is not now relevant that former coroners were also subject to the [12] prerogative courts, *R v Registrar-General, ex parte Lange* [1950] VicLawRp 12; (1950) VLR 45 because s4 has removed the application of common law rules. I add some observations about this inquest. Power to conduct it could derive from s17(1)(b), namely, that the prisoners were "in care". Plainly, even those persons who are in the custody of the State, albeit against their will, should not be subjected to any unnecessary risk by fire or of death. The coroner could also be of the view that the deaths were "reportable" and this warranted an investigation and inquest. It is appropriate, however, for this inquest to proceed under the terms of s17(1)(b) rather than s17(2).

I am now able to return to the declarations sought. They fall into two classes. First, the State Coroner exceeded his power of investigation: this remedy is sought on the grounds that the proper characterization of his enquiries and requirements show he is investigating the corrections or prison system generally, and is not limiting himself to the relevant causes or issues surrounding the first and subsequent deaths of the prisoners. These are grounds 1 to 6. The second class is that he has misconceived his power to make comments and is using or is likely to use his investigations to proffer a commentary upon the prison system generally or the management of the Coburg Complex in particular. This is ground 7(i) and (ii).

Before turning to the particulars, I shall dispose of the legal issues raised. Mr Black has contended the power to investigate is limited to relevant enquiries relating to the causes or circumstances of the fire and [13] deaths. Mr Gillard contends the coroner's enquiries and requirements do, in fact, fall within that class. He contends the class of enquiries must be broadly construed, because a coroner will not know whether an enquiry is relevant, or whether it is likely to lead to the discovery of material likely to assist him in making his findings, until it is made.

The issue of causation as exemplified by the above arguments has vexed philosophers and judges since Socrates was obliged to drink the hemlock. I deal with this issue of causation, not by way of assessing the correctness or otherwise of the coroner's questions or requirements, but by dealing with the issue as being one of jurisdictional error of law. That is whether or not he had the ministerial power, to be exercised judicially, to investigate the issues he characterized as causative? For discussion of this question see *Ex parte Minister of Justice Re Malcolm & Anor* [1965] NSWLR 1598 per McClellens J at 1604 and *John Fairfax & Sons Ltd v Gill* [1988] 12 NSWLR 77.

The coroner's source of power of investigation arises from the particular death or fire. A coroner does not have general powers of enquiry or detection (see s15(1) and s17(1)). The enquiry must be relevant, in the legal sense to the death or fire, this brings into focus the concept of "remoteness". Of course the prisoners would not have died, if they had not been in prison. The sociological factors

which related to the causes of their imprisonment could not be remotely relevant. This can be tested by considering how wide, prolix and indeterminate the Inquest might be if each of the many facets of the individual personalities, of all [14] those involved were to be considered. A coroner would be confronted with a need to enquire into the personal peculiarities of all of the prisoners who barricaded themselves in. Both those who relented and those who did not. Whether for example, one group or person suborned others, and if so why and how. The personalities of all of the prison officers who interacted with all of the prisoners could also be investigated. Even the interaction of all of the other prisoners at any time in Jiki with the deceased. Such an inquest would never end, but worse it could never arrive at the coherent, let alone concise, findings required by the Act, which are the causes of death etc. Such an inquest could certainly provide material for much comment. Such discursive investigations are not envisaged nor empowered by the Act. They are not within jurisdictional power.

Enquiries must be directed to specific ends. That is the making of the findings as required and set out in s19(1). The power to comment, arises as a consequence of the obligation to make findings. (See s19(2)). It is not free-ranging. It must be comment "on any matter connected with the death". The powers to comment and also to make recommendations pursuant to s21(2) are inextricably connected with, but not independent of the power to enquire into a death or fire for the purposes of making findings. They are not separate or distinct sources of power enabling a coroner to enquire for the sole or dominant reason of making comment or recommendation. It arises as a consequence of the exercise of a coroner's prime function, that is to make "findings".

[15] The extensive powers of investigation and enquiry which I have already noted attach to the purpose of making the "findings" which the coroner must, if possible do, pursuant to s19(1). Not only does the Act speak for itself in this respect, it is impossible to conceive the legislature would consider otherwise. Mr Gillard contended the coroner would be emasculated if the investigatory power was narrowly construed. A curious use of the subjunctive given its "plain English" gender-neutral language. He contended the verb "to investigate" carried its usual meaning of gathering and collating evidence or material and that the best person to judge its relevance was a coroner. A coroner not being able to assess its relevance until after the enquiry was completed. The verb is used in its ordinary "plain English" way, but that does not expand or illuminate the concept of relevance or causation.

An inquest into particular deaths in a prison, is not and should not be permitted to become an investigation into prisons in which deaths may occur. A comment on the particular deaths may be pertinent, especially so if the prison facilities were found to be inadequate. It could even be that a comment could have general application, and so much is envisaged by the Act which gives commentary and recommendatory powers in matters of public safety. But the power to comment is incidental and subordinate to, the mandatory power to make findings relating to how the deaths occurred, their causes and the identity of any contributory persons.

[16] Part 8, the miscellaneous provisions, contains in s61 provisions protecting the coroner from legal proceedings unless acting *mala fide*. Sub-section (2) requires the consent of the Director of Public Prosecutions to initiate such proceedings and that permission should not be given unless there is substantial evidence of bad faith. This provision does not inhibit or expand the investigatory powers. It does not confer immunity from judicial review defining the limits of jurisdictional power. It is plainly directed at giving the coroner immunity from civil process arising out of his conduct of investigations and inquests.

The Supreme Court may declare that some or all of the findings of an inquest are void s59, but there is no similar power of oversight in respect of comments made after investigations which did not take the form of an inquest. This provision has no application in characterizing the power to comment or make recommendations.

[His Honour then dealt with each particular of the order to review and declined to make the declarations sought].

Solicitor for the plaintiff: Victorian Government Solicitor.
Solicitors for the defendant: Phillips Fox.