Neutral Citation Number: [2014] EWHC 586 (Admin)

CO/580/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday 14 February 2014

B e f o r e:

MR JUSTICE MITTING

Between:
THE QUEEN ON THE APPLICATION OF COOPER

Claimant

v

HM CORONER FOR NORTH EAST KENT

Defendant

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(Official Shorthand Writers to the Court)

Mr Peter Smith (instructed by Plexus) appeared on behalf of the Claimant
Miss Debra Powell (instructed by Legal Department, Kent County Council) appeared on behalf of the Defendant

J U D G M E N T
(As Approved by the Court)
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1. MR JUSTICE MITTING: By this judicial review claim the claimant, Mr Cooper, seeks permission to apply for judicial review to challenge the decision of the Senior Coroner for North East Kent to leave a conclusion to the jury in an inquest which she is conducting of unlawful killing. This challenge is brought in the middle of the inquest. The circumstances of the inquest are unusual and, one hopes, not to be repeated. Callum Osborne died on 7 April 2011 when he was suffocated by earth in a trench into which he had fallen while carrying out work to excavate it. There was a police investigation. That resulted in a decision notified to the contractor who was working on the site - Mr Cooper - that he would not be prosecuted by police for any offence. The case was then referred to the Health and Safety Executive.

2. The inquest was opened before the Senior Coroner for North East Kent and a jury on 4 December 2012. The evidence concluded on 10 December 2012. On the same date the coroner, after considering the submissions from the properly interested parties (Mr Cooper, the family of the deceased man and the Health and Safety Executive), announced her decision that she would not leave a verdict of unlawful killing to the jury. She did not give reasons for that decision. She adjourned the inquest until the following day and then - because of other commitments - until 21 December. She then adjourned the inquest indefinitely. She referred the case to the Crown Prosecution Service under Rule 28 of the Coroners' Rules 1984.

3. In a note attached to a letter to the properly interested parties of 1 May 2013, the coroner told them that the Crown Prosecution Service was still considering the matter albeit doing so with all due expedition. In the next letter sent to the properly interested parties on 18 December 2013 the coroner told them that she would be leaving a conclusion of unlawful killing by gross negligence manslaughter to the jury, the Crown Prosecution Service having decided not to refer the case to the police for further investigation. She re-stated her decision in a letter of 23 January 2014 and, I am told, re-stated it orally at the resumed hearing before herself alone on 29 January 2014.

4. The inquest has been adjourned to three days - 10, 11 and 12 March 2014 - if the jury can be re-assembled to resume the hearing on those dates.

5. The coroner has not given reasons for her change of mind although through Miss Powell, for whose helpful submissions I am grateful, she has indicated that if permission to apply for judicial review is granted she will do so promptly to permit her decision and reasons to be scrutinised.

6. This is not the first challenge to a decision by a coroner to leave a particular verdict or conclusion to a jury. As far as I know, judicial review challenges have been entertained on such a decision in four modern cases: <u>Cash v HM Coroner for the County of Northamptonshire</u> [2007] 4 All ER 903; <u>Butler v HM Coroner for the Black Country District</u> [2010] EWHC 43 Admin; <u>Secretary of State for Justice v HM Deputy Coroner for the Eastern District of West Yorkshire</u> [2012] EWHC 1634 Admin; and <u>Chief Constable of Devon and Cornwall Police v HM Coroner for Plymouth, Torbay and South Devon</u> [2013] EWHC 3729 Admin. In none of the four cases was the

question argued as to whether or not the Administrative Court should, as a matter of settled practice or principle, entertain such an application.

7. As far as I know, the only case in which that issue has been addressed at all is Khan v HM coroner for West Hertfordshire [2002] EWHC 302 Admin when Richards J (as he then was) expressed the following doubts about the propriety and utility of the practice:

> "3 In adjourning to enable his ruling to be challenged, the coroner acted with great fairness and with a view to avoiding the unsatisfactory position that can arise where an inquest verdict is challenged after the event on the ground that the coroner erred in the verdicts that he left or did not leave to the jury. The course adopted, however, also has disadvantages. The inquest is due to resume on 14-15 March for the coroner to sum up and the jury to reach their verdict. By that time four months will have elapsed since the jury heard the evidence. It is highly undesirable for there to be so long a break at such a stage in the proceedings. A further disadvantage is that the court does not have the benefit of the coroner's summing up as a means of putting into perspective the pieces of evidence relied on by the parties and of gaining a better understanding of what the coroner regarded as important or unimportant.
>
> 4 That suggests to me that this court should entertain considerable caution about entertaining a challenge to an interlocutory ruling of this kind. My concern is heightened by the possibility of further delay if this court's decision is appealed ..... "

8. I share Richards J's reluctance to intervene in such a case; and although the facts of this case are unusual, I remain reluctant to intervene in this case as in a more normal case where the inquest may be adjourned only for a short period to permit a ruling to be given.

9. In other contexts, not that far removed from an inquest, there is either no power to intervene or a settled practice that the High Court should not intervene. The practice of the court in relation to Magistrates' Courts was examined and authoritatively clarified in R v Hereford Crown Court ex p Rowlands [1998] QB 110 at 125E and 127H. The High Court will intervene to put right something which will vitiate proceedings or cause substantial unfairness to one of the parties. A classic instance is a refusal to adjourn to permit a party to call a vital witness who is absent through no fault of that party. Another instance - thankfully far more rare - is where the court misconducts itself or shows actual or apparent bias during the course of proceedings. As it happens, in one of the four cases involving coroners to which I referred - Butler v HM Coroner for the Black Country District - there was such an allegation and that afforded one of the grounds on which Beatson J (as he then was) decided that the inquest should be conducted before another coroner and jury even though it had not yet concluded.

10. The High Court does not intervene in the middle of criminal cases proceeding before magistrates to permit a challenge to a magistrate's decision that there is a case to be

answered. The Court of Appeal (Criminal Division) does not intervene in the middle of a criminal trial to set aside a judge's ruling that there is a case to answer. By recent statute - Sections 58 to 61 of the Criminal Justice Act 2003 - the court has been given the power to set aside a terminating ruling on the application (for which permission is required) of the prosecution. That is, as far as I am aware, the only circumstance in which, in criminal proceedings, the High Court or the Court of Appeal will interfere to set aside a judgment at the conclusion of the prosecution case on the issue whether or not there is a case to leave to the jury or to the fact finder if there is no jury.

11. Mr Smith submits that inquests are different. To a limited extent, I accept his submission. It can of course be distressing for a properly interested party to be the subject of a conclusion by a jury that there has been unlawful killing even though that interested party may not be named in the conclusion of the jury, because it will be apparent to all the world in some cases that he or she is the individual affected by it. But the competing disadvantages of allowing this burgeoning practice to continue, in my judgment, heavily outweigh the possible advantages of allowing it to do so.

12. First, in the ordinary case, it would inevitably interrupt the hearing of the inquest. That is undesirable when heard by a coroner alone. It is especially undesirable when heard by a coroner and a jury. The jury comprises laymen. In a case which may well turn to some extent on the truthfulness and reliability of witnesses giving evidence about certain events, it may be difficult or impossible for a jury fairly to remember what has happened weeks or months before they are required to return a conclusion.

13. Secondly, it may not be necessary in a case in which the question whether or not a particular conclusion can be left to a jury is borderline. The common sense of the jury may well lead them, applying a proper standard of proof, not to reach the conclusion, the leaving of which to the jury is sought to be challenged. In that event, although it may arguably have been wrong to leave the conclusion to the jury, no harm would have been done and no judicial review proceedings would be required. There is a substantial saving in costs to everybody.

14. Thirdly, investigating the issue whether or not a conclusion should be left of the jury is likely in most cases to involve a careful examination of the evidence. But the High Court would not have the advantage that the coroner had of having heard the evidence. It would have to proceed on the basis of pre-2009 Act inquests on an uncertain basis as to the oral evidence that has been given. There was no requirement that it should be tape-recorded and transcribed. Even in a case under the current rules when the inquest would be recorded and a transcript may be ordered, the High Court will inevitably lack the advantage that the coroner has of hearing the evidence live. Furthermore, the need to prepare a transcript, especially in a substantial case, is likely to lead to lengthy delays.

15. Fourthly, if a challenge is to be made to the coroner's decision, there will have to be a reliable statement of the reasons which she has given for her decision. That too will impose, in some cases, some additional delay and a further burden on an already busy coroner. That however is a minor consideration.

16. Fifthly, if the conclusion should not have been left to the jury and if a jury reached that conclusion and does so on an erroneous basis of law or of fact - in the latter case such that no jury could reasonably have reached that conclusion - then the conclusion can be quashed and justice achieved eventually.

17. Accordingly, in my judgment, challenges of this kind should not in the ordinary case be entertained by the High Court. No judge sitting in this court, having, as this court does, jurisdiction to entertain a challenge, can ever confidently say that there should never be one. But I find it difficult to envisage circumstances in which this court should ever entertain such a challenge.

18. On the facts of this case, the first of the grounds which I have given for reluctance to entertain a challenge does not apply. There has already been inordinate delay in the completion of his inquest. It is possible that with co-operation on all sides the case could be put into such order so that it can finally be determined this month, thereby permitting the inquest to proceed on the intended dates. But all of the other difficulties remain, and in particular the difficulty of determining, on the basis of incomplete material, whether or not the coroner would be right in leaving the conclusion of unlawful killing to the jury.

19. For those reasons I refuse permission to apply for judicial review to challenge the coroner's intended ruling.

20. I do however wish to add an observation about a step indicated by the coroner that has not been the subject of this challenge. As I have noted, she has changed her mind about whether or not to leave unlawful killing to the jury. She has not yet given reasons for her change of mind. Mr Smith, for Mr Cooper, submits that she may have fallen into significant legal error. Given the history of this case, it would seem to me to be desirable that the coroner should review her decision to refuse to entertain further submissions about whether or not to leave unlawful killing to the jury, and given her change of mind would be well advised to offer a provisional explanation for that change beyond merely explaining that she had considered the facts more carefully than she had done initially.

21. It would, it seems to me, be of benefit to all concerned that the coroner should notify the properly interested parties, preferably in writing, of her provisional reasons for intending to leave a conclusion of unlawful killing to the jury. If she were to do that, and Mr Smith is able to identify any seriously arguable error of law in her approach then he could make submissions to her with a view to persuading her to change her mind. That is not a direction from me because there is no challenge to that aspect of the decision-making process. It is a suggestion, and it is one I commend to the coroner for her consideration.

22. I am going to direct that a transcript of my judgment is prepared at public expense. I intend that it should be posted on the BAILII website and give permission for it to be cited in future.

23. MISS POWELL: Costs - - - - -

24. MR JUSTICE MITTING: You have prepared an acknowledgement of service, I anticipate, at no expense. This is a permission application. The ordinary rule is that the unsuccessful party only pays for the costs of preparing and filing the acknowledgement of service. I anticipate, given that the coroner has put in a blank acknowledgement of service, that is trivial.

25. MISS POWELL: I would have to take instructions on that. I do not know the costs of the acknowledgement of service.

26. MR JUSTICE MITTING: One of the balances for the protection of someone who comes to help and assist the court against an adverse order for costs is that the coroner cannot expect to have an order for costs in her favour if the assistance results in an outcome that is satisfactory for her.

27. MISS POWELL: Thank you.

28. MR SMITH: I am grateful. There is authority on that as well.

29. MR JUSTICE MITTING: There is no point in making submissions about payment of the acknowledgement of service.

30. MR SMITH: I am grateful.