LOCAL COURT of NEW SOUTH WALES

Coronial Jurisdiction

Inquest:	**Inquest into the death of Mark Mason**
Hearing dates:	25 September 2013
Date of findings:	4 October 2013
Place of findings:	State Coroner's Court, Glebe
Coroner:	Deputy State Coroner H.C.B. Dillon
Orders:	The subpoena issued at the request of the legal representatives of the Mason family on 17 July 2013 to the Commissioner of Police is set aside.
File numbers:	2010/437444
Representation:	Ms A McCarthy assisting Coroner (Crown Solicitor's Office) Ms Dina Yehia SC instructed by Western Aboriginal Legal Service for Next of kin Mr R Hood instructed by Mr S Robinson for Commissioner of Police Mr B Haverfield instructed by Mr K Madden (Walter Madden Jenkins, Solicitors) for Sen Con Bobako

REASONS FOR DECISION

Introduction

1. Mr Mark Mason died in the course of a police operation in Collarenebri in November 2011. The Coroners Act requires that, when a person dies in the course of a police operation, an inquest must be held by a senior coroner.

2. The principal issues in this case are to do with the "manner" or circumstances of Mr Mason's death. Mr Mason was shot by a police officer. That officer and the other police witnesses to the shooting have stated that he did so as a last resort in self-defence after being attacked by Mr Mason. The Mason family questions the credibility of that account.

3. Among the issues raised by Mr Mason's family is the question whether the officer who shot him used excessive force. Counsel for the Mason family has foreshadowed that a submission to that effect will be made at the conclusion of the formal evidence.

4. She has also foreshadowed an intention to cross-examine the police officer who fired the fatal shot about general attitudes and approaches to policing the local community in which he and his colleagues worked at the time of Mr Mason's death.

5. At the request of the Western Aboriginal Legal Service, a subpoena under s 66 of the *Coroners Act* was issued to the Commissioner of Police requiring the production of a number of documents relating to allegations of use of excessive force by police officers in Lightning Ridge on 21 December 2010.

6. In summary, the documents sought include notebook entries by Sen Constable Bobako and other officers in relation to the alleged incident; police computer data-base entries; documents arising out of any police internal review of the allegations; documents brought into existence for the purposes of disciplinary hearings or action; and facts sheets or police evidentiary briefs relating to any criminal prosecution arising out of the allegations.

7. The complaint file material may contain evidence that will enable the family's counsel to test the police version of events. Evidence of general attitudes and propensity may be relevant for that purpose. Propensity evidence is not circumscribed by time. It may be substantially probative whether it arises before or after the event in question.

8. In my view, the Mason family has a legitimate forensic purpose in seeking access to the material. I also consider that it is "on the cards" that the material may provide some assistance to their counsel in examining police officers with a view to making the submissions foreshadowed. Some of that material may be relevant to the issues with which this inquest is concerned.

9. The Commissioner, however, relying on the interaction of s 66(4)(b) of the *Coroners Act,* s 170 of the *Police Act* and Pt 1.9 of the *Uniform Civil Procedure Rules,* and the decisions of the Court of Appeal in *Commissioner of Police v Hughes* [2009] NSWCA 306

and of Davies J in *Beckett v The State of New South Wales (No 3)* [2013] NSWSC 791, objects to producing the documents sought and seeks to have the subpoena set aside.

10. The issue, therefore, is whether the Commissioner is obliged to produce the subpoenaed documents for inspection or may resist doing so.

Is the Commissioner entitled to resist production?

11. Section 66(1)(a) of the *Coroners Act 2009* permits a coroner to issue a subpoena to produce. Section 66(4)(b), however, provides that the person subpoenaed is not bound to produce documents that he or she would be not be required to produce in the Supreme Court.

12. It is submitted by the Commissioner that the documents in question fall within the scope of s 170 of the *Police Act 1990* and are therefore "privileged". He contends that he would, therefore, by virtue of the combined operation of s 66(4)(b) and UCPR Pt 1.9, not be bound to produce the documents in the Supreme Court. It follows, so the argument goes, that he need not do so in these proceedings.

13. Ms Yehia SC for the Mason family argues that s 66(4)(b) does not, as the Commissioner asserts, pick up UCPR Pt 1.9 because coronial proceedings are neither civil nor criminal and therefore do not fall within the scope of the Supreme Rules concerning the application of the UCPRs. Consequently, she argues, the common law principles outlined by Hunt J in *R v Saleam* (1989) 16 NSWLR 14 remain good in coronial inquests and should be applied to allow access to the s 170 documents.

14. For the following reasons, however, I have come to the view that Commissioner is entitled to object to producing the documents sought on the basis of privilege.

15. Section 170 of the *Police Act* falls within Part 8A of the Act which is concerned with complaints against officers of the NSW Police Force. The section provides:

> **170 Certain documents privileged**
>
> (1) A document brought into existence for the purposes of this Part is not admissible in evidence in any proceedings other than proceedings:
>
> (a) that concern the conduct of police officers, and
>
> (b) that are dealt with by the Commissioner, by the Industrial Relations Commission or by the Supreme Court in the exercise of its jurisdiction to review administrative action.
>
> (2) Subsection (1) does not apply to or in respect of:
>
> (a) a document comprising a complaint, or
>
> (b) a document published by order of, or under the authority of, the Presiding Officer of a House of Parliament or either House, or both Houses, of Parliament, or
>
> (c) a document that a witness is willing to produce.

> (3) Subsections (1) and (2) do not operate to render admissible in evidence in any proceedings any document that would not have been so admissible if this section had not been enacted.

16. The *Supreme Court Act 1970* governs the operations of the Supreme Court. Under that Act, the court can make its own rules: ss 17, 122-124. It has done so. Apart from its own rules, the Supreme Court applies the Uniform Civil Procedure Rules in its civil proceedings: *Civil Procedure Act 2005* s 4 and Schedule 1 of that Act.

17. Rule 75.3 of the Supreme Court Rules also applies the UCPRs in a limited fashion in criminal proceedings: s 17 and Schedule 3 of the Supreme Court Act. Part 1 of the UCPRs applies in criminal proceedings. Pt 1.9 therefore covers the field of the Supreme Court's jurisdiction. There is no reference to coronial proceedings in Schedule 3 of the *Supreme Court Act* because that court does not exercise coronial jurisdiction.

18. Coronial proceedings are *sui generis*: see *Green v State Coroner* NSWSC Sully J (unrepd) 19 November 1997. They are neither criminal nor civil in nature but inquisitorial. The questions involved in coronial cases have no direct connection with civil or criminal liability. Coroners are specifically enjoined from making findings that purport to decide issues of criminal liability: ss 81(3) and 82(3) of the *Coroners Act*. Neither is a coroner empowered to enter judgment for a party or award damages or costs – key indicia of civil proceedings. There are no "parties" as courts of law know them in an inquest nor are disputes between parties resolved by verdicts or judgment at inquests.

19. The authors of *Waller's Coronial Law and Practice in New South Wales* remark in their commentary on s 66(4)(b), "Given that inquests are neither civil nor criminal in nature, it is difficult to ascertain what is intended by the Act in this regard." The authors point out that the provision can be interpreted purposively in at least two ways. First, "the reference to production in the Supreme Court [could be] simply intended to pick up the common law rules of privilege."[1]

20. Secondly, they suggest that "as the majority of the subpoena provisions of the Uniform Civil Procedure Rules (UCPR) apply to criminal as well as civil proceedings (by virtue of Pt 75, r 3 of the Supreme Court Rules)" it may have been intended that the UCPRs relating to subpoenae issued by the Supreme Court would have analogous application to coronial subpoenae.

21. The *Civil Procedure Act* and UCPRs are not generally applicable to coronial proceedings: s 58 *Coroners Act*. When read with the Supreme Court Rules, s 66(4)(b) seems an exception to that general rule and to be intended to apply, *mutatis mutandis,* the Supreme Court's procedural rules as they apply to objections to subpoenae on grounds of privilege.

22. The Commissioner is entitled under UCPR Pt 1.9(3) to object to production and to refuse to produce s 170 documents in the Supreme Court, at least until the objection is overruled: UCPR Pt 1.9(4). "Privileged documents", for the purposes of UCPR Pt 1.9 include documents that contain information that would be inadmissible in a court of law: UCPR Dictionary. Although the s 170 "privilege" is expressed in terms only of

[1] *Waller* (2010) p.186

admissibility, the wide definition of "privileged document" is sufficient to capture s170 documents.

23. The Commissioner relies on the decisions of the Court of Appeal in *Commissioner of Police v Hughes* [2009] NSWCA 306 and the decision of Davies J in *Beckett v The State of New South Wales (No 3)* [2013] NSWSC 791.

24. *Hughes* was an appeal against an interlocutory decision of a District Court judge who had decided that documents caught within the scope of s 170 should be produced and access given to a police officer who was suing the Commissioner. The Court of Appeal upheld the appeal, set aside the orders of the trial judge and the subpoena issued to the Commissioner.

25. It should be observed that (at [36]-[37]) Young JA, with whom Ipp JA and Handley AJA agreed, specifically rejected the suggestion that *Hughes* was "a proper vehicle as a test case". This was a case in which the Court of Appeal was dealing urgently with appeal from interlocutory rulings by the trial judge. Nor was the Court of Appeal asked to address itself to the proper interpretation of UCPR Pt 1.9(3) in relation to s 170. Its comments on that issue were, therefore, obiter dicta.

26. The first issue for the Court of Appeal to decide was whether the plaintiff, Mr Hughes, had demonstrated a legitimate forensic purpose for seeking access to the s 170 documents. In the course of his discussion of that question, Young JA referred to the "statutory privilege" under s 170, noted the right of the Commissioner to object under UCPR Pt 1.9(3) to producing the material sought and said at [48] "Thus, if s 170(1) of the Police Act makes a document inadmissible at the trial, it is the subject of statutory privilege which is an answer to its production on subpoena."

27. In *Beckett* Davies J followed the decision in *Hughes* on that point. Although he was concerned about the scope of the privilege, noting that it was expressed only in terms of admissibility, he felt obliged to follow the Court of Appeal's approach concluding (at [36]) that "to the extent that the documents are inadmissible by virtue of either or both s 59 and s 170 the [Commissioner] cannot be compelled to produce them whether through discovery or by Notice to Produce or subpoena."

Conclusion

28. In my view, I am bound to follow the two Supreme Court decisions. The Commissioner's objection to production is therefore upheld.

Order

29. The subpoena issued at the request of the legal representatives of the Mason family on 17 July 2013 to the Commissioner of Police is set aside.

Magistrate Hugh Dillon
Deputy State Coroner