SUPREME COURT OF QUEENSLAND

CITATION:	*Atkinson v Morrow & Anor* [2005] QCA 353
PARTIES:	**ROBERT ATKINSON** (applicant/appellant) **v** **MARK MORROW** (respondent/first respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 4253 of 2005 SC No 9027 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2005
JUDGES:	McPherson JA and Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs against the applicant**
CATCHWORDS:	MAGISTRATES – CORONERS – THE CORONER AND THE CORONER'S COURT – PROCEEDINGS AT INQUEST OR INQUIRY – inquest into the death of person who died shortly after being left by police in a remote area – whether coroner exceeded his jurisdiction – whether evidence of senior police officer should have been admitted – whether senior police officer required to give evidence at inquest *Coroners Act* 1958 (Qld), s 7, s 7B, s 24, s 34, s 43 *Judicial Review Act* 1991 (Qld), s 51 *Keown v Kahn* [1999] 1 VR 69, considered *R v Graham* (1905) 93 LT 371, considered *R v James Courtney* (1856) 17 Cox CC 111, considered *R v North Humberside Coroner, ex p Jamieson* [1995] QB 1, distinguished *R (Middleton) v West Somerset Coroner* [2004] AC 182, considered

COUNSEL:	G C Martin SC, with J B Rolls, for the appellant A Fiddes (sol) for the first respondent M D Hinson SC for the second respondent
SOLICITORS:	Queensland Police Service Solicitor for the appellant C W Lohe, Crown Solicitor for the first and second respondents

[1] **McPHERSON JA:** In the course of an inquest being held at Gladstone into the death of Rodney Michael O'Sullivan, the applicant, who is the Commissioner of Police, sought a judicial order to review a decision given by the acting coroner on 20 September 2004. The decision was to admit into evidence a statement, dated 13 August 2004 from Acting Chief Superintendent Kummerow, and also that he be required to give evidence at the inquest. In the Supreme Court the application for the order to review was refused, against which the Commissioner has now appealed to this Court. The acting coroner, who is the first respondent to the appeal, has undertaken to abide by the order of the court. The Attorney-General, who intervened in the application pursuant to s 51 of the *Judicial Review Act 1991* and is now the second respondent, opposes the appeal.

[2] Mr O'Sullivan was seen alive at Monto in mid-central western Queensland on 28 March 2003, when he approached an employee of a service station at or after 7.00 am, and told her that persons were hiding in the bushes nearby with a gun trained on him. The employee summoned the police, and, while waiting for their arrival, Mr O'Sullivan removed a hose from the bowser, activated the pump, and discharged a small quantity of fuel on the ground. When the two police officers arrived, he told them that no one was in fact threatening him; he had simply wished to attract the police in order to enlist their help to get him out of Monto. He asked them to drop him some distance away at Mulgildie, some 10 or 12 kms distant, which is a place at which long haul trucks are known to stop and pick up persons who wanted lifts to other parts of the State.

[3] The policemen drove O'Sullivan there, and dropped him at Mulgildie, which appears not to be a closely populated area. They said that during the journey he appeared lucid and normal; but he was not seen alive again. His remains were found on 21 April 2003, in a sorghum field some 300 metres from where he had been left. It was estimated that he had died at some time between 28 and 30 March 2003. The only abnormality discovered on post-mortem examination was a potentially fatal level of methylamphetamine found in the liver of the deceased.

[4] After the State Coroner had decided to hold an inquest into the cause and circumstances of the death of Mr O'Sullivan, the applicant Commissioner was notified that the State Coroner wished a senior police officer to attend the inquest to "give evidence about Queensland Police Service's policy guidelines (or the like) for dealing with similar situations" to those that "confronted" the two police officers at Monto on 28 March 2003. A statement concerning that matter was prepared by Acting Chief Superintendent Kummerow. At the inquest it was submitted for the Commissioner that the statement had nothing to do with Mr O'Sullivan's death and was irrelevant to the inquest. However, the acting coroner ruled that the statement was admissible and that he required Acting Chief Superintendent Kummerow to give evidence that was "relevant to the issue of how Mr O'Sullivan came to be at Mulgildie on the morning before it appears he died, and that he wished to be

informed about police procedures that applied in the particular circumstances that arose for the police officers in relation to Mr O'Sullivan".

[5] The inquest into the death in March 2003 of Mr O'Sullivan is governed by the provisions of the *Coroners Act 1958*. In conferring jurisdiction to inquire into the death of a person, s 7(1) of the Act provides that a coroner shall inquire "whether the death has occurred and into the cause of the death and the circumstances of the death of a person". That is to apply where the coroner is informed that for instance the person is dead and -

> "(a) in the coroner's opinion there is reasonable cause to suspect that the person - …
>
> (ix) has died in such circumstances as to require the cause of death or the circumstances of death or both to be ascertained or more clearly and definitely ascertained; or …".

In addition, s 7(3) provides that, where under the Act, a coroner inquires into any death, the coroner "may from time to time make or cause to be made such inquiry, investigation, inspection, examination and test, or any of these, as the coroner considers fit".

[6] From these provisions alone, it is clear that jurisdiction at an inquest is very wide. Section 7B(1) proceeds to add that, if as a result of a post-mortem examination, or otherwise as the result of the coroner's inquiry, the coroner is of the opinion that -

> "(a) there is reasonable cause to suspect that the person – …
>
> (ii) has died a sudden death of which the cause is unknown; or
>
> …
>
> (c) the person has died in such circumstances as to require an inquest to be held;"

the coroner shall hold an inquest into the death of that person unless, in certain specified circumstances not relevant here, it is decided that the holding of an inquest is unnecessary.

[7] In the present case, no question is raised that the State Coroner acted within the jurisdiction conferred by s 7(1) and s 7B(1) in holding an inquest into the death of Mr O'Sullivan. The real issues here are whether the acting coroner at Gladstone exceeded the ambit of his jurisdiction (1) in making the request for the statement provided by Acting Chief Superintendent Kummerow; and (2) in deciding to admit it into evidence. As to the first of these matters, s 24 of the Act under the heading **Scope of inquest on death** declares:

> "(1) Where an inquest into a death is held under this Act it shall be for the purpose of establishing so far as practicable –
>
> (a) the fact that a person has died;
>
> (b) the identity of the deceased person;
>
> (c) when, where, and how the death occurred;
>
> (d) the persons (if any) to be charged with murder [or] manslaughter …".

The provisions of s 24(1) are reflected in s 43 of the Act which is concerned with the findings to be made at the inquest. After considering all the evidence at the inquest,

the coroner is required by s 43(1) to give his or her findings in open court. Specifically, by s 43(2) where the inquest concerns the death of any person, the finding must set forth –

> "(a) so far as has been proved –
>
> (i) who the deceased was;
>
> (ii) when, where, and how the deceased came by his or her death; and
>
> (b) the persons (if any) committed for trial."

[8] Without seeking to anticipate or usurp the coroner's function in the present case, it seems reasonably clear from the material before this Court that the deceased was Mr O'Sullivan, and that he came by his death at Mulgildie. What is not clear, and needs in terms of s 7(1) "to be ascertained or more clearly and definitely ascertained" are the cause of his death or the circumstances of the death, or both. In that regard, the applicant Commissioner relies on s 24(1)(c) and s 43(2)(a)(ii) of the Act as serving to impose a limiting factor on the scope of the inquiry, and on the findings available to be made by the coroner. Considered in the context of those parts of the Act that have already been set out here, there is no obvious reason to suppose that they have any such restrictive effect; but the applicant relies on the decision of the Court of Appeal in England in *R v North Humberside Coroner, Ex p Jamieson* [1995] QB 1, 20, 24, in which, in giving the judgment of the Court, Sir Thomas Bingham MR approved a statement in an earlier case that, in inquiring how the deceased met his death, the word "how" must mean "by what means", and not "in what broad circumstances". Commenting on and interpreting s 11(5)(b)(ii) of the Coroners Act 1988 in England and r 36 of Coroners Rules 1984, his Lordship added ([1995] QB 1, 24):

> "It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how … the deceased came by his death', a more limited question directed to the means by which the deceased came by his death."

[9] Several things may be noticed about the interpretation adopted by the Court of Appeal. The first is that in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, 200, it has since been treated by the former Master of Rolls himself, now Lord Bingham of Cornhill, as being "narrow". Furthermore, in *Keown v Kahn* [1999] 1 VR 69, at 76, Callaway JA, speaking with the agreement of Ormiston and Batt JJA and referring to *Jamieson's* case, said in a footnote at that page of the report that "how" in the context "how death occurred" in s 19(1)(b) of the Coroners Act (Victoria) meant, *or at least included*, "by what means". The expression used in s 24(1)(c) of the Queensland Act concerning the scope of the inquest is, as we have seen, "how the death occurred", whereas, when it comes to the findings to be made "so far as has been proved", s 43(2)(a)(ii) uses the expression "came by his or her death", which the Court of Appeal in *Jamieson* considered was a much "more limited question". By contrast, in the Queensland Act the two expressions appear to have been used interchangeably and as virtual synonyms. Mr Martin SC, who appeared as counsel for the Commissioner, accepted on the appeal that those phrases are to be read as being the same.

[10] In my opinion the distinction apparently made by the Court on this point in *Jamieson's* case ought not to be followed in relation to the meaning of the phrases "how the death occurred" and "how the deceased came by his or her death" in ss 24 and 43 of the Queensland Act. The ruling in *Jamieson* was strongly influenced by

the recent history of the relevant legislation since 1977 in England, which for this purpose is sufficiently recounted, together with the reasons for it, in paras 1-09 and 1-10 of *Jervis on Coroners* (12th ed; 2002) as well as in *Jamieson's* case itself. In this respect the Queensland Act of 1958 embodies the earlier provisions of the Coroners Act 1887 in England, but not the much more recent changes in the statutory provisions or their philosophy that resulted in the Court of Appeal decision in 1995.

[11] That this is so can be seen from the much earlier decision of the Divisional Court in England in *R v Graham* (1905) 93 LT 371, which was not referred to in the decision of the Court of Appeal in 1995. *R v Graham* was a decision given under the English Coroners Act 1887, from which the relevant provisions of the Queensland Act were evidently drawn. In particular, s 4(3) of the Act of 1887 required the coroner's jury, after hearing the evidence, to give their verdict "setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death". In *R v Graham*, the facts were that the deceased had died in a prison of a wound to the head by a blow from a blunt instrument sustained at some time before his incarceration. The Act of 1887 contained a provision corresponding to s 7(1)(b) of our Act specifically providing for an inquest in the case of a person who died in prison. Lord Alverstone CJ said (93 LT 371, 375), however, that the fact that no harm had been inflicted on the deceased in the prison itself did not exonerate the coroner from the obligation and duty of making a full inquiry into the death.

[12] The case was one in which it had in fact come to the knowledge of the coroner that there had earlier been a struggle or fight with others in the course of which the deceased had suffered the injury to his skull, from the effects of which he later died in prison. Referring to s 4(3) of the 1887 Act, Lord Alverstone said (93 LT at 376):

> "Those words 'how, when, and where the deceased came by his death' do not, in my judgment, mean, for the purpose of dealing with the duty of a coroner, merely the actual cause of death as certified by a medical man. But they may mean, and I think in this case they would mean, an inquiry of how, when, and where the injury to the skull … was received."

Ridley J agreed. He too held (93 LT, at 378) that it was not proper that the coroner should cease inquiry merely on having arrived at a conclusion that some injury had been inflicted on the deceased. "I am speaking", he said, "of the general rule. He must inquire, as a rule, how that injury came to be inflicted". The other judge of the Court was Kennedy J. He seemed more doubtful about the matter, but concluded by saying (at 377) that there was no finding how the blow was caused, "and in most cases it is absolutely necessary in the interests of public justice that that should be done".

[13] The decision seems to me, with respect, to be clear authority against the proposition contended for here by Mr Martin SC for the applicant Commissioner, which is that "how the death occurred" in s 24(1) does *not* mean "by what means and in what circumstances the death occurred". The English decision in 1905 is supported by an earlier one from Ireland in *R v James Courtney* (1856) 7 Cox CC 111. The immediate question there arose in the context of a conviction for perjury committed at an inquest into the death of one of three men who it was suggested had

been drinking together; but it incidentally also concerned the scope and extent of the duty of a coroner. His duty, said Monahan CJ (7 Cox CC, at 118):

> "… is to inquire into all the circumstances attending, or which might have caused the death … That being so, it at once became material to ascertain whether or not death had not been caused, to some extent, by the deceased having been tippling in a public-house, and, therefore, in a state to render it more probable that he should have lost his way."

The other judges agreed, Jackson J saying (at 120) that it was material for the coroner to ascertain not only the actual cause of the death, as murder, suicide or otherwise, "but also all the circumstances attending it", for which purpose it was a necessary part of the coroner's duty to ascertain the way in which the deceased had spent the evening before his death. The case is a strong one because the death was said to have been "admittedly accidental" (7 Cox CC 111, at 118); but, accepting the authorities cited by the Crown (see 7 Cox CC 111, at 116), the Court was persuaded that it was still necessary for the coroner to inquire into the circumstances of the death. Because the evidence of the witness later accused of perjury was in that way "material" to the inquest, the conviction was affirmed by the Irish Court for Crown Cases Reserved.

[14] One of the major differences that now exists in the English statute law, as it has been since 1977, compared to the earlier English Act of 1887 and the Queensland Act of 1958 is that those Acts provided or provide for the committal for trial of persons to be charged with murder or manslaughter or other specified offences. See ss 24(1)(d) and 43(2)(b) of the *Coroners Act 1958* in Queensland and s 4(3) of the English Act of 1887. In that respect the coroner's jury in England functioned as a grand jury indicting for trial. It was with the prime purpose of removing statutory provisions and powers like these that the English legislation was adopted in 1977: see *Jervis on Coroners* §1-10 (12th ed). This no doubt helps to explain why the Court of Appeal in *Jamieson's* case in 1995 did not think it relevant to consider decisions given before that time. As can be seen, however, they remain relevant in interpreting the Queensland Act of 1958. My conclusion is that on the first question on this appeal those decisions confirm that the acting coroner was correct in concluding here that it was part of his function in conducting the inquest into the death of Mr O'Sullivan to inquire into all the circumstances attending that death or which might have caused it. In deciding to do so, he did not exceed the jurisdiction conferred by s 24(1)(c), or potentially under s 43(2)(a)(ii), or otherwise under the Act. This conclusion accords with the decision of the learned judge below in refusing the application to review the acting coroner's decision in this matter.

[15] The second question concerns the admissibility of the statement of Acting Chief Superintendent Kummerow. In it, he states that the Queensland Police Service policy and procedures "associated with the situation that confronted the police at Monto on 28 March 2003 in relation to their dealings with" Mr O'Sullivan are primarily contained in various service publications or manuals with names such as the Operating Procedures Manual, the Human Resources Manual, and so on. They include the Queensland Police Service Code of Conduct and Procedural Guidelines for Professional Conduct. The legislative authority for some of these manuals, or the directions they contain, rests partly on the provisions of the *Crime and Misconduct Act 2001*, which in schedule 2 defines police misconduct as including misconduct

that: (c) "does not meet the standard of conduct the community reasonably expects of a police officer".

[16] There is provision in section 6.6.3 of the Operational Procedures Manual concerning a case in which a police officer reasonably believes a person has a mental illness and there is an imminent risk of significant physical harm being suffered, in which event the person may be taken to an authorised mental health service for examination to decide whether a request and recommendation for assessment should be made. Whether such an authorised mental health service exists or existed in Monto on the date in question may be a matter into which the acting coroner wishes to inquire. Alternatively, section 6.6 of the Operational Procedures Manual states a policy that is to apply in an effort to "canvass the possibility of the person voluntarily obtaining such assessment or treatment …". Where none of these options is available or applicable, Acting Chief Superintendent Kummerow opines that the obligations of the police "appear to be limited". There is, however, he says "a legislative basis for police to provide reasonable general assistance to members of the public, including transportation in police vehicles if considered necessary or appropriate"; and an obligation under s 17.2.3.2 of the Human Resources Management Manual under the heading "Respect for Persons" that requires members of the police service to "be responsive to the reasonable demands of members of the community …".

[17] It may be thought that not much of this appears to bear directly on the circumstances of or attending the death of Mr O'Sullivan in this case. Mr Martin SC submitted that most, if not all of it, was in any event contained in statutory provisions, legislative instruments or published instructions that are or would have been available to the acting coroner, without troubling Acting Chief Superintendent Kummerow. But it may be that the acting coroner, in inquiring into the circumstances of the death of Mr O'Sullivan wished to know what it is that police in a distant part of the State are expected to do when "confronted" with a case like this. If, for example, there were, objectively speaking, indications that on 28 March 2003, Mr O'Sullivan was suffering from the effects of drug ingestion that were obvious to some others if not to the police officers concerned, it would not appear to have been helpful or "appropriate" that Mr O'Sullivan should have been taken and left alone in a more remote and even less populous part of the district.

[18] The powers of a coroner with respect to the evidence to be admitted at an inquest are deliberately stated very widely indeed. Under s 34 of the Act they are that:

> "(1) In any inquest the coroner may admit any evidence that the coroner thinks fit, whether or not the same is admissible in any other court, provided that no evidence shall be admitted by the coroner for the purposes of the inquest unless in the coroner's opinion the evidence is necessary for the purpose of establishing or assisting to establish any of the matters within the scope of such inquest".

The expression "scope of such inquest" takes the reader back to s 24(1), in which the or a purpose of an inquest into a death under the Act is stated to be that of establishing, so far as practicable, "how the death occurred". The meaning of this phrase has already been considered. It was submitted or implied that evidence was not or would not be "necessary" within the terms of s 34(1) unless it was essential; but in this context the word "necessary" plainly means "reasonably directed to" the

purpose prescribed in the subsection: see *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, at 452. Under s 34(1), that purpose extends not only to establishing, but to "assisting to establish" any of the matters within the scope of the inquest into "how" the death of Mr O'Sullivan occurred.

[19] Mr Martin SC stressed that in prescribing the findings that a coroner may make, s 43(6) provides that "no finding of the coroner may be framed in such a way as to appear to determine any question of civil liability or as to suggest that any particular person is found guilty of any indictable or simple offence". No doubt the acting coroner will formulate his findings in such a way as not to offend the provisions of that section; but no question as to that matter will arise here unless and until, if at all, he expresses them in contravention of that statutory provision. The learned judge from whom this appeal comes said that she was not satisfied that it could be unreservedly concluded "at this stage" that the statement of Acting Chief Superintendent Kummerow had no relevance whatsoever for the purpose of assisting to determine how Mr O'Sullivan died or the circumstances of his death. On appeal, we were told that, apart from the statement by Acting Chief Superintendent Kummerow, the evidence at the inquest has now concluded. Even so, I consider that it was and is open to the acting coroner under s 34(1) to admit the statement in question, as he proposes or has already decided to do.

[20] In my opinion the application for an order to review was correctly refused. I would dismiss the appeal with costs against the applicant.

[21] **CULLINANE J:** I have had the opportunity to read the reasons for judgment of McPherson JA. I respectfully agree with those reasons and the order proposed.

[22] **JONES J:** I have had the advantage of reading the reasons of McPherson JA. I agree with those reasons and the order he proposes.