

# SUPREME COURT OF QUEENSLAND

CITATION: *Younan & Ors v Callanan & Ors* [2009] QSC 241

PARTIES: **PAUL YOUNAN**  
(first applicant)  
**JASON KHALIL**  
(second applicant)  
**TONI ELBAYEH**  
(third applicant)  
**MARIANE KAZZI**  
(fourth applicant)  
v  
**JOHN DAVID CALLANAN, STEPHEN LAMBRIDES,  
ROSS BARNETT, BARRY SALMON AND DIANA  
JOHNSTON AS MEMBERS OF THE CRIME  
REFERENCE COMMITTEE**  
(first respondent)  
**JOHN DAVID CALLANAN, ASSISTANT  
COMMISSIONER, CRIME AND MISCONDUCT  
COMMISSION**  
(second respondent)

FILE NO/S: 5340 of 2009

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 21 July 2009

JUDGE: Dutney J

ORDER: **1. Application is dismissed.**  
**2. The applicants to pay the respondents' costs of the application to be assessed on the standard basis**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW  
LEGISLATION – GROUNDS OF REVIEW – ERROR OF  
LAW – Where the applicants seek judicial review of a  
decision to refer a suspected murder to the Crime and  
Misconduct Commission – Whether the Committee could  
have been satisfied that the police investigation ‘had not been  
effective’ – Whether the Committee could have been satisfied  
that it was in the public interest to refer the matter

*Crime and Misconduct Act 2001* (Qld), s 27, s 28(2), s 28(3), s 29(1)

*Accused A & Ors v Callinan & Ors* [2009] QSC 12

COUNSEL: T Carmody SC, with him G Del Villar, for the applicants  
G P Long SC for the respondents

SOLICITORS: Nyman Gibson Stewart for the applicants  
D T Murphy Official Solicitor for the respondents

- [1] This is an application for a statutory order of review. The decisions the applicants seek to set aside are as follows:
1. The decision of 23 March 2009 of the Crime Reference Committee of the Crime and Misconduct Commission (“CMC”) to refer the murder to the CMC.
  2. The decision of 2 April 2009 of the second respondent as delegate of the CMC to authorise the holding of an investigative hearing into the murder.
  3. The decision of 2 April 2009 of the second respondent to appoint himself to conduct the investigative hearings.
  4. The decision of 3 April 2009 on the second respondent to issue attendance notices on each of the applicants.
- [2] On 26 January 2009, a motorist was fatally shot in the stomach on the Gold Coast Highway at Burleigh Heads.
- [3] Immediately prior to the shooting the deceased was involved in a “road rage” incident involving a second vehicle described as a small red four door sedan or hatch. The second vehicle contained three persons who were described as being of “Lebanese” extraction.
- [4] The shooting is not suspected of being connected with organised crime and is believed to be an isolated incidence of road rage.
- [5] Police investigations have not identified the shooter. The Queensland police have, however, received information in the form of criminal intelligence provided in confidence by the New South Wales police force. This intelligence gives rise to suspicions concerning the involvement of persons referred to in the information.
- [6] The police do not believe that the applicants are persons who would cooperate with them in providing information. They also believe that alerting them to law enforcement interest in them might lead to their attempting to leave the country or intimidating other witnesses. For these reasons, the police have refrained from attempting to question the applicants concerning the killing.
- [7] The police belief is that the coercive powers of the CMC are more likely to result in useful information being obtained which might lead to a person being charged in relation to the offence.
- [8] Section 27 of the *Crime and Misconduct Act 2001* (Qld) (“the Act”) authorises the Crime Reference Committee (“the Committee”) to refer to the CMC major crimes for investigation. Murder is a major crime.

- [9] Section 28(2) of the Act limits the matters that may be referred. Referrals may take place only if the Committee is satisfied that:
- “(a) the police service has carried out an investigation into the particular incident of major crime that has not been effective; and
  - (b) further investigation into the particular incident of major crime is unlikely to be effective using powers ordinarily available to police officers; and
  - (c) it is in the public interest to refer the particular incident of major crime to the commission for investigation.”
- [10] In seeking to set aside the decision to refer the matter to the CMC, Senior Counsel for the applicants challenged the test for an investigation that “has not been effective” expressed by Applegarth J in *Accused A & Ors v Callinan & Ors* [2009] QSC 12 at paragraph [35]:
- “I accept the respondents’ submission that, as a general proposition, the usual objective of a police investigation of any offence is to gather all available relevant information as to the commission of an offence and that an investigation which does not succeed in that aim may be regarded as resulting in an investigation that ‘has not been effective’. That general proposition is subject to qualifications, for instance in circumstances in which the relevant information that has not been gathered has little or no forensic or other utility. Expressed differently, the available relevant information that the police investigation has been unable to gather must have a significant utility.”
- [11] I accept that in the passage just quoted his Honour was formulating a broad test. However, this is not an appropriate occasion on which to express any opinion as to the validity or otherwise of that test. There seems to me to be no doubt that the police investigation has not been effective in this case. No person has been charged and the shooter has not been identified. There is thus in this case no basis for concluding that the Committee misdirected itself as to the test to be applied in determining the effectiveness or otherwise of the police investigation.
- [12] In the alternative, Senior Counsel for the applicants argued that the Committee had taken into account irrelevant considerations in determining that they were satisfied that the public interest was served by the reference.
- [13] It was argued that the criteria set out in s 28(3) of the Act must be considered when determining whether a reference was in the public interest. Those criteria demonstrate that the CMC is concerned with organised crime or incidents related to organised crime. It was submitted that it would be exceptional that a crime of passion such as this would qualify for referral.
- [14] The flaw in the argument is that it is the Committee itself which is required to be satisfied and each of the criteria which the Committee took into account has been carefully recorded. In particular, Mr Callinan has separately considered each of the criteria in s 28(3) and come to the conclusion that on balance the public interest favoured the referral.

- [15] Mr Callinan was not cross-examined and there is no reason to doubt that the views which he sets out in his affidavit were in fact the views of the Committee on the relevant day.
- [16] Being unable to demonstrate that the Committee has failed to take into account any relevant consideration the applicants were ultimately forced to resort to an argument that an irrelevant consideration was taken into account. That consideration is to be found in paragraph 59 of Mr Callinan's affidavit where he says:  
"Towards the end of the discussion of the public interest consideration as it applied in this matter, I, as chair of the CRC, asked members whether they wished to raise any other issues they considered from their personal experience or professional background should be taken into account. This led to mention being made of, and regard being had to, public concern about the prevalence of 'road rage' incidence of the kind which apparently gave rise to the shooting; the devastating effect on the family of the deceased of his loss; and the apparent public outrage that followed upon this crime being committed in such a public way on Australia Day."
- [17] It was submitted that the references to public outrage and Australia Day should be construed as taking into account what would on any view be irrelevant, namely the particular day on which the offence was committed.
- [18] I am not sure that this is a fair reading of the paragraph. Undoubtedly the prevalence of road rage incidence is a matter which could be taken into account on whatever day the killing occurred. It seems to me, however, that the reference to Australia Day in the affidavit can be construed merely as part of the identification of the offence. In those circumstances the onus is on the applicants to establish that the particular date was a relevant factor taken into account as opposed to its being a mere descriptor of the offence. In the absence of any cross-examination of Mr Callinan it seems to me impossible to determine one way or the other which construction should be placed on the sentence.
- [19] The sentence is unfortunately expressed but in my view however it is read, placed in context, the fact that the offence took place on Australia Day was of such trivial relevance to the decision that it should not be treated as a basis for setting aside the process.
- [20] In the circumstances, I am not satisfied that the decision of the Committee to refer the matter to the CMC was so tainted by procedural error as to justify its being set aside.
- [21] The second decision, that of the CMC to accept the referral was challenged on the basis that Mr Callinan, who for this purpose was the delegate of the Commission, was in a position of conflict between his duties as delegate of the CMC and his duties as a member of the Committee whose referral he had to accept or reject.
- [22] This argument seems to me materially identical with that advanced before Applegarth J in *Accused A & Ors v Callanan & Ors* where at paragraphs [72] and [73] his Honour said:  
"[72] The second respondent exercised the Commission's power to authorise the holding of a hearing because he had been

delegated the Commission's power under s 176. The applicants submit that it was practically impossible for him to 'independently, fairly and impartially consider the rival s 176 issues on the Commission's behalf.' I do not accept this submission. In exercising the Commission's power under s 176 the second respondent was not adjudicating on a matter in dispute between parties. The fact that he held suspicions about the first applicant and actively argued for the referral did not preclude him from exercising the power delegated to him impartially and independently.

[73] By 10 November 2008 the matter had been referred to the Commission in circumstances in which the Committee had formed the view that it was in the public interest to refer the matter to the Commission for the purpose of the Commission conducting an investigative hearing. The second respondent, as the Commission's delegate, was required to consider the exercise of the discretion under s 176 to authorise the holding of a hearing. The decision of the Committee was a highly relevant consideration in that exercise. I do not consider that the second respondent's prior involvement in the matter meant that he acted contrary to s 57 in making the second decision. His prior involvement in the matter, and the fact that he held views about the case, did not render his exercise of the discretionary power under s 176 unfair. The obligation on the Commission under s 57 to act independently, impartially and fairly having regard to the purposes of the Act and the importance of protecting the public interest arises in a wide variety of circumstances. In the circumstances of the present matter it was possible for the second respondent to act independently, impartially and fairly having regard to the purposes of the Act, notwithstanding his prior involvement."

- [23] I can see no reason in this case why I should not adopt the same position adopted by Applegarth J. I am not satisfied that the fact that Mr Callinan both served on the referral committee and the exercised the Commission's power as its delegate to accept the referral justifies the setting aside of that decision.
- [24] By the same process of reasoning it seems to me to follow that the decision of Mr Callinan to appoint himself to conduct investigative hearings in relation to the murder ought not to be set aside.
- [25] The remaining decisions concern the issuing of attendance notices on the applicants. The argument in relation to the notices arises from the condition placed by the Committee on the reference.
- [26] Section 29(1) of the Act authorises the Committee to impose limitations on an investigation. In this case, the limitation imposed was that a notice was not to be served on any proposed witness at an investigative hearing unless the proposed witness had refused to be questioned by a police officer or had given an account to the police officer involved in the investigation which the police officer reasonably considered to have been untruthful.

- [27] The decision of the second respondent in relation to the notices was to issue the notices but to direct the officer serving the notice not to serve the notice without first satisfying him or herself that the person to whom the notice was directed was not cooperative or was not truthful.
- [28] The argument advanced was that the limitation imposed prevented the issuing of the notice until after a determination as to cooperation or truthfulness had been made in relation to the particular witness. This, however, misconstrues the limitation placed on the referral by the Committee which was against the service of an attendance notice on a witness rather than the issuing of the attendance notice.
- [29] I am not satisfied that the decision in relation to the notices directed to each of the applicants is otherwise than authorised by the legislation and the terms of the referral.
- [30] It follows from what I have said that in my view none of the decisions challenged should be set aside and the application should be dismissed.
- [31] I order the applicants to pay the respondents' costs of the application to be assessed on the standard basis.