SUPREME COURT OF QUEENSLAND

CITATION:	*Leahy v Barnes* [2013] QSC 226
PARTIES:	**ALAN NOEL THOMAS LEAHY** (applicant) **v** **MICHAEL BARNES** (respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervener)
FILE NO/S:	SC No 135 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	27 August 2013
DELIVERED AT:	Cairns
HEARING DATE:	5 August 2013
JUDGE:	Henry J
ORDERS:	1. **The decision of the Coroner to commit the applicant for trial is set aside.** 2. **I will hear the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW - JUDICIAL REVIEW - REVIEWABLE DECISIONS AND CONDUCT - REVIEW OF PARTICULAR DECISIONS - APPLICATION FOR A STATUTORY ORDER OF REVIEW - where the applicant applies for a statutory order of review to set aside the decision of the respondent that he be committed to stand trial on a charge of unlawful killing ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - IMPROPER EXERCISE OF POWER - where the applicant contends the respondent's decision involved an improper exercise of the power conferred by the *Coroners Act* 1958 (Qld) - where the applicant submits the respondent took into account irrelevant considerations when making the decision such as the

applicant's morality, criminal history and his own opinion the applicant had told lies - where the applicant submits the respondent failed to take into account relevant considerations when making the decision such as whether there was a discretion to commit the applicant for trial and whether the evidence was capable of dispelling any rational hypotheses consistent with the applicant's innocence - where the applicant contends that the respondent exercised his power in a manner that was so unreasonable that no reasonable person could so exercise the power - whether there was an improper exercise of power

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - OTHER GROUNDS - NATURAL JUSTICE - where the applicant contends a breach of the rules of natural justice happened in relation to the making of the decision because the respondent failed to disclose an association with an expert witness - where the applicant contends a breach of the rules of natural justice happened because the respondent failed to adequately communicate with the applicant about the coronial inquest and failed to disclose some communications with the relatives of the deceased - where the applicant submits these circumstances had the consequence that a fair minded, properly informed member of the public might reasonably apprehend the respondent did not bring an impartial mind to bear upon the evidence and his decision.

Acts Interpretation Act 1954 (Qld) ss 4, 32CA
Coroners Act 1958 (Qld) ss 24, 41, 43
Coroners Act 2003 (Qld) ss 45, 48, 100
Justices Act 1886 (Qld) s 108
Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT) s 19

British American Tobacco Australia Services Limited v Laurie (2011) 242 CLR 203
Delhi and London Bank Ltd v Orchid LR 4 Ind App127
Ebner v Official Trustee (2000) 205 CLR 337
Edwards v The Queen (1993) 178 CLR 193
Farrell v The Queen (1998) 194 CLR 286
Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106
House v Defence Force Retirement & Death Benefits Authority (2011) 193 FCR 112
Lamb v Moss (1983) 76 FLR 296
Leach v The Queen (2007) 230 CLR 1
MacDougall v Paterson (1851) 11 CB 755
Mitchell v The Queen (1995-1996) 184 CLR 333
Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees' Federation (1917) 24 CLR 85

Pfeiffer v Stevens (2001) 209 CLR 57
R v Exall (1886) 4 F&F 922
R v Matterson and Anor [1994] TASC 184
Shepherd v The Queen (1990) 170 CLR 573
The Queen v Commonwealth Industrial Court; ex parte the Amalgamated Engineering Union Australia Section (1960) 103 CLR 368
Zoneff v The Queen (2000) 200 CLR 234

COUNSEL: PJ Callaghan SC with A Collins for the applicant
M Hinson QC for the intervener

SOLICITORS: Lilley Grose & Long Solicitors on behalf of the applicant
RG Marsh of Crown Law on behalf of the respondent
Crown Law on behalf of the intervener

[1] Julie-Anne Margaret Leahy and Vicki Sarina Arnold both died of gunshot wounds to the head in July 1991 at Cherry Tree Creek near the Atherton-Herberton Road.

[2] Two coronial inquests into their deaths concluded Ms Arnold had killed Ms Leahy and then taken her own life. At a recently held third inquest that conclusion was not favoured in the presiding Coroner's formal finding as to how the women died. Further, the Coroner found that the applicant, who was the husband of Ms Leahy at the time of her death, should be committed to stand trial on a charge of unlawfully killing Ms Arnold and Ms Leahy.

[3] The applicant applies for a statutory order of review seeking to set aside the decision of the respondent that the applicant be committed to stand trial.

[4] The respondent Coroner has taken the conventional non-adversarial position in respect of the application. The Attorney-General resists the application, having intervened in it.

Brief Background

[5] The factual background of this matter is canvassed at length in the reasons of the Coroner. It need not be replicated in detail here and the below background is not intended to canvass all potentially relevant facts.

[6] Briefly, the deceased bodies of Ms Arnold and Ms Leahy were found in the Leahy family's four wheel drive vehicle on a dead end track in scrub 800m west of the Atherton-Herberton Road near Cherry Tree Creek. It was a countryside location. If a third party was involved, without access to another vehicle, it was a substantial walk back to any township. The driver's side wheel of the vehicle was off the ground and the undercarriage sitting on a stump, suggesting the vehicle had not come to a well-controlled stop.

[7] Mrs Leahy was in the driver's seat. The seat belt was looped twice around her neck. There were three apparent knife incisions on her neck. There was a non-fatal bullet entry wound to the corner of her mouth and a fatal bullet entry wound near the left eye. A rock with human hair and blood on it was on the floor.

[8] Ms Arnold was seated in the front passenger footwell with her legs outside the vehicle. There was a non-fatal bullet entry wound under her jaw, a non fatal bullet wound to her upper left thigh and a fatal bullet entry wound behind the right ear. A bent and bloodied kitchen knife was jammed between the left upper thigh of the body of Ms Arnold and the bottom of the passenger seat.

[9] The sawn off firearm which apparently inflicted the bullet wounds was lying near Ms Arnold and her right hand was on it with her index finger resting near the trigger. This raised the possibility favoured by some investigating police that Ms Arnold may have fired the weapon which killed her and Ms Leahy. However, there were aspects of the scene suggesting that was less likely than it seemed at first blush and that a third party may possibly have been involved and staged the scene to look like a murder suicide. For instance the bullet which penetrated Ms Arnold's thigh had first passed through her seat having entered it from behind the seat and Ms Arnold's shoes were found about 19m from the vehicle.

[10] There also existed no evidence of a motive or mental illness on Ms Arnold's part to suggest she was likely to have murdered Ms Leahy and taken her own life. On the other hand the murder weapon had been acquired by her earlier in the month. Part of its barrel had been sawn off by a hacksaw between then and the date of the killings. Two weeks after the bodies had been discovered a pillowslip likely owned by the Leahy family but which Ms Arnold may well have possessed was found in Ms Arnold's carport. It contained a hacksaw and parts of the firearm which had been cut from it after its acquisition by Ms Arnold.

[11] The items had not been noticed by police when they earlier searched Ms Arnold's premises. The neighbour who found the pillowslip and contents announced seven years later that the night before her discovery she had seen a male person in the vicintity, sugesting the possibility the items were planted at Ms Arnold's after the event.

[12] Ms Leahy's husband, who reported the ladies missing, had allegedly last seen them in the early hours of 26 July 1991 when they departed the Leahy household together to go fishing at Lake Tinaroo. Fishing gear was later found in the vehicle but not a light such as a torch. Also the night was cold, yet the ladies were not dressed in warm clothing and Ms Arnold did not have her glasses with her.

[13] The third inquest focussed upon Mr Leahy as a suspect. He was the last person to see the deceased alive. His potential motives for wanting his wife to die included that he was under financial pressure and there was an insurance policy on her life and he had developed a sexual interest in his wife's 16 year old half sister Vanessa, who lived with them. He pursued that sexual interest after the ladies went missing but before they were found. He also owned some crime magazines one of which contained an article about the staging of a murder scene to make it look like murder suicide had been committed.

[14] He has denied involvement in the deaths.

Grounds

[15] The grounds of the amended application are:

1. A breach of the rules of natural justice happened in relation to the making of the decision.
2. The making of the decision was an improper exercise of the power conferred by the *Coroners Act* 1958 (Qld), in that:
   (a) the Coroner took into account irrelevant considerations when making the decision;
   (b) the Coroner failed to take into account relevant considerations when making the decision; and
   (c) the Coroner exercised his power in a manner that was so unreasonable that no reasonable person could so exercise the power.[1]

[16] These grounds were supplemented by further amended particulars[2] which were in turn further amended through the applicant's written outlines and oral submissions to give rise to the following amalgamated particulars:

1. The decision of the State Coroner included errors of law, namely:
   (a) a misconstruction of s 41 of the *Coroners Act* 1958;
   (b) a misapprehension as to the legal principles included in the concept of circumstantial evidence.
2. The decision of the State Coroner included errors of law and was an improper exercise of power, in that his Honour informed the decision to commit by reference to considerations that were irrelevant and inadmissible in criminal proceedings, namely:
   (a) evidence of the applicant's morality and criminal history;
   (b) his own opinion that the applicant had told lies;
   (c) unsubstantiated allegations of rape made by one witness, which were then used for the purpose of bolstering the credibility of another witness;
   (d) expert opinion as to the state of mind of a deceased person.
3. The decision was an improper exercise of the power in that there was a failure to have regard to the relevant consideration that a stranger may have been responsible for the deaths.
4. The State Coroner exercised his power in a manner that was so unreasonable that no reasonable person could so exercise the power, in that his conclusion was supported by evidence that did not exist and was reached without certifying the existence of a prerequisite that was indispensable to his conclusion.
5. A breach of the rules on natural justice happened in relation to the making of the decision, in that the State Coroner failed to disclose his association with Professor Diego de Leo, with

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1 Doc 21.
2 Doc 11.

the consequence that a fair minded, properly informed member of the public might reasonably apprehend that the State Coroner did not bring an impartial mind to bear on the Professor's evidence.

6. A breach of the rules on natural justice happened in relation to the making of the decision, in that:
   (a) the history of the State Coroner's attempts (or lack thereof) to communicate with the applicant; and
   (b) the history of the State Coroner's communications with other relatives of the deceased; and
   (c) the failure by the State Coroner to make disclosure of some of the communication referred to in (b) above,

   combine to bring about the consequence that a fair minded, properly informed member of the public might reasonably apprehend that the State Coroner did not bring an impartial mind to bear upon his decision.

[17] As the above-mentioned grounds and particulars demonstrate, this application does not fall to be considered as if it were a merits review or an appeal. The application does not require a consideration afresh of whether the applicant has a case to answer. The application is solely concerned with whether the Coroner's decision-making process involved legal error, particularly whether there was a breach of the rules of natural justice or an improper exercise of power.

Particular 1(a): Committal for trial mandatory under s 41?

[18] The *Coroners Act* 2003 (Qld) ("the new Act") does not contain any provision empowering a Coroner to commit a person for trial.[3]

[19] On the other hand the new Act's predecessor, the *Coroners Act* 1958 (Qld) ("the old Act") did contain a provision empowering a Coroner to commit a person for trial. Significantly, s 100 of the new Act provides that the old Act continues to apply to deaths reported to a police officer or Coroner or deaths in respect of which an inquest was held before the commencement of the new Act. The old Act therefore continues to apply to the deaths of Ms Leahy and Ms Arnold.

[20] Section 41(1) of the old Act relevantly provides:

> **"41 Committal for trial**
>
> (1) If in the opinion of the coroner holding any inquest the evidence taken at the inquest is sufficient to put a person upon the person's trial—
>
> (a) where a death has occurred—for murder, manslaughter…
>
> the coroner may order that person to be committed to take the person's trial for the offence before some court of competent jurisdiction and may issue the coroner's warrant for the apprehension and commitment of that person if no such warrant has already been executed." (emphasis added)

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[3] Section 45(5) of the new Act specifically precludes a Coroner from finding a person is or may be guilty of an offence and s 48(2)(a) provides that the Coroner must inform the Director of Public Prosecutions if the Coroner reasonably suspects a person has committed an indictable offence.

[21] The applicant emphasises the use of the word "may" in s 41(1). He contrasts it with the use of the word "shall" in s 108(1), the provision of the *Justices Act* 1886 (Qld), dealing with the decision to commit at a committal proceeding:

> **"108 Procedure upon a consideration of all the evidence**
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> (1) If upon a consideration of all the evidence adduced upon an examination of witnesses in relation to an indictable offence… the justices are of the opinion that the evidence is not sufficient to put the defendant upon the defendant's trial for any indictable offence, the justices shall… order the defendant to be committed to be tried for the offence before a court of competent jurisdiction…" (emphasis added)

[22] The applicant submits that where a Coroner concludes there exists a prima facie case against a person for unlawfully killing another, the Coroner has the discretion but not the obligation to commit the person for trial. That is, the Coroner may, but not must, commit the person for trial.

[23] The applicant submits that having concluded there was a prima facie case against Mr Leahy the Coroner did not approach the matter on the basis he had any discretion as to whether or not to commit Mr Leahy for trial and rather proceeded on the basis he was obliged to commit him.

[24] In summarising the issues to be addressed near the outset of his reasons his Honour observed:

> "In accordance with s. 41 of the Act, I am also required to find whether anybody should be committed to stand trial for the murder or manslaughter of the women."[4]

In his ensuing reasons his Honour again reiterated that one of the considerations with which he was concerned was whether to commit a person to stand trial.[5]

[25] He did not elaborate upon the nature of that consideration until the "Conclusions" section of his reasons. There his Honour referred to s 43 of the old Act, which provides:

> **"43 Finding of Coroner**
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> (1) After considering all the evidence before the coroner at the inquest the coroner shall give the coroner's finding in open court.
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> (2) Where the inquest concerns the death of any person, the finding shall 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. …"

[26] His Honour reasoned it would be unfair in addressing the question posed by s 43(2)(a)(ii) to determine whether Mr Leahy caused the deaths while dealing with what he called the second question, namely, whether Mr Leahy should be committed for trial for causing the deaths. He said:

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4 Reasons p 2.

5 Reasons pp 3, 114, 115.

> "In my view, it could be unsafe and unfair to consider these questions in sequence and separately because it could result in a finding that Mr Leahy caused the deaths but there was insufficient evidence to commit him for trial. Alternatively, were I to make a finding under s 43 that he killed the women and I committed him to stand trial, it could be suggested that I had intruded into the jury's province. Accordingly, I only intend to deal with the second question which requires me to consider whether a properly instructed jury could convict. If I conclude it could, then I am obliged to commit Mr Leahy for trial."[6] (emphasis added)

[27] Those words suggest his Honour approached his task on the basis that if he found a prima facie case existed he was obliged to commit. That was confirmed when his Honour later said:

> "I am required to consider the possible Crown case at its highest. As the evidence stands, I consider a properly instructed jury could exclude beyond reasonable doubt that Ms Arnold carried out the killings and determine no one other than Mr Leahy did. Accordingly, I am obliged to commit Mr Leahy to stand trial."[7] (emphasis added)

[28] If the applicant's submission as to the meaning of s 41 is correct then having found a prima facie case the Coroner had a discretion whether or not he should commit the applicant but failed to exercise that discretion. The intervener does not submit to the contrary. Nor does the intervener suggest that if there was such a failure it was inconsequential. Rather, the intervener submits there is no such discretion under s 41.

[29] Section 32CA of the *Acts Interpretation Act* 1954 (Qld) relevantly provides:

> "**32CA Meaning of may must etc.**
>
> (1) In an Act, the word may, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.
>
> (2) In an Act, the word must, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised. …"

[30] That provision is consistent with the ordinary meaning of the words "may" and "must". Moreover s 41 uses the word "shall" elsewhere, suggesting a conventional distinction in intended meaning within the section as between "may" and "shall", the latter being a similar word to "must".

[31] There may be circumstances in which it is apparent from the content of a statute that the legislature intended the words "must" or "shall" ought be substituted for the word "may" however "in the absence of proof of such intention, the word 'may' must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense".[8] Such an approach is consistent with the *Acts Interpretation Act* 1954 providing at s 4 that the Act's application, and thus the meaning of "may" in s

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6 Reasons pp 114, 115.

7 Inquest into the deaths of Julie-Anne Leahy and Vicki Arnold ("reasons") p 116.

8 *Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees' Federation* (1917) 24 CLR 85, 97, citing the Privy Council in *Delhi and London Bank Ltd v Orchid* LR 4 Ind App 127, 135.

32CA(1), may be displaced, wholly or partly, by a contrary intention appearing in any Act. In *Pfeiffer v Stevens*[9] McHugh J explained:

> "An intention contrary to the *Acts Interpretation Act* may appear not only from the express terms or necessary implication of a legislative provision but from the general character of the legislation itself."

[32] In support of its submission that the old Act implies such a contrary intention the intervener emphasised that pursuant to s 43 of the old Act the Coroner is obliged to deliver a finding which "shall set forth… the persons (if any) committed for trial". However, the obligation for findings to set forth who, if anyone, is being committed for trial does not assist in determining how that finding should be arrived at. More relevantly, the intervener emphasised that pursuant to s 24 of the old Act one of the purposes of an inquest into a death is "establishing so far as practicable… the persons (if any) to be charged" with murder or manslaughter. He submitted in effect that no purpose is served by conferring a discretion to commit given that one of the purposes of an inquest is to establish the persons, if any, to be committed.

[33] That submission sparked a diverting debate about why, even upon proof of the condition grounding the exercise of the power to commit, there are good reasons to retain a discretion about whether the power to commit should be exercised.

[34] The applicant highlighted a number of differences between coronial inquests and committal proceedings as justifying why, if a prima facie case is made out, a Coroner should retain a discretion to commit whereas a Magistrate would be obliged to commit. For instance, at a committal proceeding after the Magistrate has formed the requisite opinion there is a case to answer the defendant has the opportunity to say something in answer to the charge and go into evidence. Additionally, at a committal proceeding the person being committed will ordinarily have been present and will likely have been legally represented throughout the proceeding. That will not necessarily be the case in respect of a coronial inquest. Here, the applicant's solicitor and counsel did not attend the entirety of the inquest. Further, at an inquest the dual purpose of the proceeding may give rise to the admission of evidence which would not be admitted at a committal proceeding. Also, the very nature of a committal proceeding means that the State is impliedly warranting there is a case which it is resolved to prosecute. On the other hand, a Coroner is unlikely to be armed with the full knowledge of the State relating to matters bearing upon a case proceeding.

[35] These are all good reasons why as a matter of policy a Coroner who concludes there exists a prima facie case should not be obliged to commit upon it. However, they are of no particular assistance in the construction of s 41. They do not provide a reason to disregard the contextual significance of one of the purposes of an inquest as set forth in the old Act, being to establish so far as practicable the persons, if any, to be charged.

[36] More importantly, there exists a binding line of High Court authority supporting the conclusion that construed in the context of the old Act as a whole s 41, through its use of the word "may", should not be construed as conferring a discretion but construed as conferring a power which must be exercised if the circumstances are such as to call for its exercise. That line of authority is, in summary, to the effect

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9 (2001) 209 CLR 57, 73.

that "may" effectively means "must" in cases where the fulfilment of stipulated conditions grounds the exercise of power.

[37] In *The Queen v Commonwealth Industrial Court; ex parte the Amalgamated Engineering Union Australian Section*[10] Fullagar J observed it was a well established and very important rule of construction that in cases where a right is given to a defined class of persons and a jurisdiction is given to a court for the benefit of that class of persons, "words which are merely permissive in form connote a duty, and… if the conditions of jurisdiction exist, the jurisdiction must be exercised and the appropriate order made".

[38] In *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[11] Windeyer J spoke of the circumstance in which a permitted power must be exercised where stipulated conditions are fulfilled:

> "This does not depend on the abstract meaning of the word "may" but [on] whether the particular context of words and circumstance make it not only an empowering word but indicate circumstances in which the power is to be exercised - so that in those events the "may" becomes a "must". Illustrative cases go back to 1663: *R. v. Barlow*. Today it is enough to cite *Julius v. Bishop of Oxford*; and add in this Court *Ward v. Williams*. But I select one other reference out of a multitude: *MacDougall v. Paterson*. There Jervis C.J. said in the course of the argument "The word 'may' is merely used to confer the authority: and the authority *must* be exercised, if the circumstances are such as to call for its exercise". And, giving judgment, he said:
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> > "[W]e are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises." (citations omitted)

[39] The reason for the opinion expressed by Jervis CJ in *MacDougall v Paterson*[12] was said by Jervis CJ to be:

> "[W]hen a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application."[13]

[40] The fact that an inquest does not involve an application for an exercise of power by a party interested is not a proper basis to disinguish this line of authority, particularly given that a clear statutory purpose of an inquest under the old Act is determining who if anyone should be committed for trial. It not a task which requires an application in order to call for its performance.

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10 (1960) 103 CLR 368, 378.
11 (1971) 127 CLR 106, 134-135.
12 (1851) 11 CB 755 [138 ER 672].
13 Ibid 773 [679].

[41] The above quoted passage by Windeyer J in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* was cited with approval by the plurality in *Mitchell v The Queen*[14] and *Leach v The Queen*.[15]

[42] In *Leach v The Queen* the High Court was concerned with s 19(5) of the *Sentencing (Crime of Murder) and Parole Reform Act* 2003 (NT) which relevantly provided:

> "The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole. ..." (emphasis added)

The plurality rejected the proposition that the court could conclude that a non parole period should be fixed even though persuaded that the stipulated condition that community interest could only be met if the offender was in prison for life without parole was satisfied. It said:

> "Section 19(5) is not to be read as requiring the Court to consider the exercise of some separate or additional discretion after, or despite, its having reached the conclusion that the level of the prisoner's culpability was as described in the provisions: "so extreme" that the community interest in the specified considerations could "only be met" by imprisonment for life.
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> It is true that s 19(5) says that the court "may refuse to fix a non-parole period" if satisfied of the matters set out in the provision. But it by no means follows that, if the Court is satisfied of those matters, it then has to exercise a discretion... The word "may" is used, not to give a discretion, but to confer a power which is to be exercised upon the Court being satisfied of the matters described in the provision."[16]

[43] Applying that same reasoning to the present case the word "may" is used not to give a discretion but to confer a power to commit which is to be exercised upon the Coroner being satisfied the evidence taken at the inquest is sufficient to put a person upon a person's trial. Given one of the purposes of an inquest is to determine who, if anyone, should be committed for trial, satisfaction that the evidence is sufficient to put a person upon trial effectively compels the exercise of the power to commit. Thus, the exercise of the power to commit in the present case is not said to depend upon the discretion of the Coroner but upon proof of the circumstance conferring the power, namely that the evidence taken at the inquest is sufficient to put a person upon trial.

[44] The Coroner did not err in his construction of s 41.

Particular 1(b) & 4: Circumstantial evidence principles applied erroneously?

[45] The applicant submits the Coroner failed to apply the principle, for which *Shepherd v The Queen*[17] is authority, that in the assessment of a circumstantial case there will sometimes be the need to identify an intermediate fact as indispensable to proof of a matter beyond a reasonable doubt.

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14 (1995-1996) 184 CLR 333, 345-346.
15 (2007) 230 CLR 1, 17-18.
16 Ibid 17.
17 (1990) 170 CLR 573.

[46] The applicant submits an indispensable intermediate step in the reasoning process towards an inference of guilt was the need for evidence of the applicant's knowledge of and control over the gun used in the killings. It is effectively contended by the applicant that such evidence is so critical to proving any potential case against the applicant that the case must fail without it. In this regard the applicant likens the nature of the circumstantial case here to links in a chain which would fail if any one link broke, rather than a combination of strands to a rope, none of which is alone critical to the rope sustaining weight.[18]

[47] In the context of the present potential case against the applicant it is undoubtedly indispensable to proof of the case that the applicant had control of the gun which killed the deceased. There is no evidence, for example, that the applicant counselled or procured a third party to fire the gun for him. It is bordering on illusory in that context to therefore describe the fact the applicant was in control of the gun at the time it killed the deceased as an intermediate fact. However, while proof of that fact is indispensable to proof of guilt it does not mean there must exist evidence of the applicant having earlier had some knowledge or control of the gun.

[48] There may for example be cases where various pieces of circumstantial evidence compel the conclusion that a defendant was the killer notwithstanding the absence of any direct evidence that the defendant ever had possession of the murder weapon. The Coroner obviously considered this was such a case. That much is apparent from items of circumstantial evidence he listed in his conclusion as supporting a case against the applicant.[19] Whilst minds may differ as to the combined force of that evidence, there was no error of approach.

[49] The applicant also submitted it was necessary for the Coroner to find that the evidence was capable of dispelling any rational hypotheses consistent with innocence and that by his own assessment the evidence could not do so. In this context the applicant cited this observation by the Coroner:

> "The case against Mr Leahy could only be framed against the background that it is not impossible that Ms Arnold was the killer; in those circumstances, there may be room for doubt as to whether Mr Leahy was responsible."[20]

[50] The applicant complains the exclusion of the possibility Ms Arnold was the killer is an indispensable prerequisite to the proof of a case against the applicant and the Coroner's observation shows he failed to regard it so. That observation must be considered in its proper context, that being that it formed part of a list of aspects of the case said to militate against a finding Mr Leahy was responsible. It followed a similar list supporting a finding that Mr Leahy was responsible.

[51] In substance, the Coroner was merely acknowledging it was unlikely but not necessarily impossible that Ms Arnold caused the deaths. His Honour went on to reason, correctly, that whether that possibility is ultimately regarded as excluded by the jury would be affected by the jury's view of the force of the evidence indicating the applicant was responsible.[21] Moreover, his Honour expressly went on to find

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18 See *R v Exall* (1866) 4 F & F 922, 929 per Pollick CB.

19 Reasons p 113.

20 Reasons p 114.

21 Reasons p 116.

that a jury "could exclude beyond reasonable doubt that Ms Arnold carried out the killings".[22]

[52] Contrary to the applicant's submission, the Coroner did find the evidence was capable of displacing rational hypotheses consistent with innocence.

Particular 2(a): Applicant's morality and criminal history considered erroneously/irrelevantly?

[53] The applicant complains the Coroner's decision to commit was informed by reference to evidence of the appellant's morality and criminal history.

[54] It is inevitable that some evidence adduced at a coronial inquest into deaths will not be admissible at a criminal trial in respect of those deaths. That arises from the dual purpose of the inquest. Not all evidence adduced will be relevant to the narrow question of who if anyone should be committed for trial. The latter question requires consideration only of the evidence adduced at the inquest which would be admissible at a trial.

[55] It is rare for evidence about a defendant's morality or criminal history to be admitted in a criminal trial. The intervener does not suggest the exceptional circumstances that might ground the admissibility of such evidence are present here. Rather, the intervener submits the evidence did not inform the decision to commit.

[56] The references complained of featured in part 12 of the Coroner's reasons, "12. Analysis, Conclusions, Findings and Committal". More specifically they appeared under the sub heading "12.4 Mr Leahy responsible?" and sub-sub-heading "12.4.1 Mr Leahy's criminal history". Then after canvassing a variety of other matters his Honour's reasons culminated in the heading "12.4.10 Conclusion". There his Honour listed the items of circumstantial evidence that supported a case the applicant caused the deaths.[23] Significantly, that list did not include reference to the applicant's morality or criminal history.

[57] The intervener suggests the Coroner likely made reference to those topics earlier because they had been the subject of submissions by the parties before him. The Coroner's reasons did not specifically explain the irrelevancy of those considerations to that specific aspect of his task which went to whether anyone should be committed for trial. However, it is apparent from the absence of those considerations among the list of circumstantial evidence which the Coroner ultimately identified as supporting a case against the applicant that they did not inform his eventual decision that the evidence was sufficient to put the applicant upon trial.

Particular 2(b): Lies considered erroneously/irrelevantly?

[58] The applicant submits the Coroner erred in his consideration of alleged lies by the applicant as evidence of guilt. He submits the Coroner's opinion the applicant had lied was not a relevant consideration in whether the alleged lies could be used as

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22 Reasons p 116.

23 Reasons p 113.

evidence of guilt and the Coroner thereby engaged in an improper exercise of power by taking that irrelevant consideration into account.[24]

[59] It is important to appreciate in considering this particular that the inquest's dual purpose of determining when, where and how the ladies died (an inquisitorial purpose) and who if anyone should be charged with causing their deaths (a determination of whether there is a prima facie case) meant the Coroner was considering the use of evidence in two different contexts. The latter purpose required the Coroner to confine his consideration of the evidence before him to that evidence which would potentially be admissible before a jury and to the use of that evidence in the way a jury would be permitted to use it. It was not necessary for him to engage in refined determinations of admissibility in that context but there necessarily had to be some proper legal basis for the potential admissibility and potential manner of use of the evidence by a jury before it could be considered in determining whether there was sufficient evidence to put the applicant upon trial. On the other hand the Coroner was less restricted in considering the evidence in carrying out his inquisitorial purpose.

[60] The distinction is an obvious one in the context of considering whether a suspect of the inquest has lied. It is a distinction which underscores the important difference between using lies to assess the credibility of evidence and using lies as positive evidence of guilt. It is one thing to reason by virtue of a lie that a person ought not be believed. It is quite another to reason by virtue of the telling of that lie that the person is guilty of an offence.

[61] In performing his inquisitorial purpose the Coroner was entitled to have regard to his opinion whether or not the applicant lied as part of the process of determining credibility and considering what evidence he would accept or reject in his own determination of fact as to when, where and how the ladies died. However, in considering whether there was a prima facie case against the applicant the Coroner could not have regard to the alleged lies of the applicant as potential evidence of guilt unless they could potentially meet the test which would allows lies to be used as positive evidence of guilt.

[62] Counsel assisting did not expressly submit that the applicant's alleged lies should be used as positive evidence of guilt in the assessment of whether there was a prima facie case however the Coroner purported to use them in that way. Unfortunately the Coroner appears to have substituted the test for their use in that way with the much less demanding test of his own opinion as to the credit of the applicant's account which he applied in carrying out his inquisitorial purpose.

[63] The intervener acknowledges his Honour did have regard to alleged lies as evidence of guilt in assessing whether there was a prima facie case against the applicant. That concession was unavoidable given that in part "12.5.10 Conclusion" of his Honour's reasons one of the seven aspects of the evidence listed as supporting a case against Mr Leahy was:

> "He has been untruthful about key aspects of closely related issues that could involve a consciousness of guilt."[25]

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24 See *Judicial Review Act* 1991 (Qld) ss 20, 23.

25 Reasons p 113.

[64] The intervener submits that because no further reference was made to this aspect the Coroner regarded it as only marginally relevant. I reject that submission. The above quoted reference to untruths as involving a consciousness of guilt was itself part of the Coroner's conclusion. Against a background where the reasons had earlier discussed how this aspect of the evidence could be used against the applicant, it is clear that the Coroner regarded it as forming part of the combined body of evidence he regarded as sufficient to put the applicant upon trial. It cannot be said it was of no or only marginal relevance to the decision. To the contrary, the purported existence of lies potentially constituting implied admissions of guilt bolstered a collection of circumstances which did not provide objectively strong evidence of guilt.

[65] At "12.4.9 Consciousness of Guilt", his Honour said:

> "Another aspect of Mr Leahy's conduct which attracts suspicion is his unwillingness to admit matters that might reflect adversely upon him."[26]

[66] His Honour then listed by dot point five topics which he regarded Mr Leahy as having been "less than candid in relation to". His Honour continued:

> "The Courts have repeatedly warned of the care that needs to be taken when drawing inferences from a finding that a witness has been untruthful. In most cases, the telling of lies by a witness can be used to suggest the witness' evidence on other matters may also be unreliable, but not that he necessarily committed the crime in question - there may be other explanations for the lie. However, in limited circumstance, lies told by a witness can be used to prove allegations against the witness. So called 'probative lies' are those for which the most likely explanation is that the witness knows the truth would implicate him in the matters alleged against him."[27]

[67] The applicant correctly complains this was not an accurate statement of the law relating to the use of lies as evidence of guilt as explained in *Edwards v The Queen*[28] and *Zoneff v The Queen.*[29] It was inaccurate in that it did not also indicate the need for there to be evidence that the alleged probative lie was a deliberate untruth and related to a material issue. That is, two critical elements of the relevant legal test were not mentioned.

[68] Considered in context this might not have been an attempt to fully state the law as it relates to the way in which a lie may be used as an implied admission of guilt. Rather, it may have been calculated as distinguishing between the relevance of lies that go to credit as distinct from lies that may be used as evidence of guilt. Thus, in the paragraph immediately following the above passage his Honour referred to one of the five topics about which Mr Leahy had been "less than candid", namely Mr Leahy's alleged sexual exploitation of his wife's half sister Vanessa Stewart, as being only relevant to credit and not "relevant to the determination whether he murdered Ms Arnold and Ms Leahy".[30]

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26 Reasons p 112.
27 Ibid.
28 (1993) 178 CLR 193.
29 (2000) 200 CLR 234.
30 Reasons p 113.

[69] On the other hand, of the other four topics he had listed his Honour observed there were no explanations for Mr Leahy's untruthfulness about them "other than he was conscious that to admit them built the case for his being responsible for the deaths".[31]

[70] His Honour did purport to distinguish between lies going to credit and lies as evidence of guilt. Unfortunately, his Honour did not articulate the legal pre-requisites for the use of lies as evidence of guilt. The only test he recited was inaccurate because it was incomplete. As will be seen there are clear indications in his reasoning that he did not have regard to the two elements which were missing from his incomplete statement of the law.

[71] Further, the Coroner did not enlarge materially upon what it was about the evidence of alleged lies of the applicant in respect of the four topics that, taking the evidence at the highest for the potential prosecution case, could allow a jury to conclude they were deliberate untruths, that went to material issues and were told because the applicant knew the truth would implicate him in the commission of the killings. His Honour was not obliged to articulate such matters in the way a trial judge is obliged to in directing a jury about lies. The absence of such analysis does not necessarily mean his Honour erred in having regard to the alleged lies about the four topics as potential evidence of guilt, as long as the evidence identified in his Honour's reasons was capable, taken at its highest, of giving the alleged lies the requisite qualities to allow them to be considered as evidence going to proof of guilt.

[72] The topics about which the applicant allegedly told lies evidencing a consciousness of guilt were identified as:

> "• his possession of a vice that could have been used to cut down the gun;
> • the financial difficulties facing the family at the time the women went missing; including:-
> o the plans that had been made to sell the Nissan 4WD; and
> o demands by the bank to bring their home loan arrears up to date.
> • the existence of a life insurance policy on Julie-Anne's life of which he was the beneficiary; … and
> • his ownership of the crime magazines he attempted to associate with Ms Arnold."[32]

[73] The applicant focused in particular on the evidence about the first and third of those as demonstrating that his Honour failed to apply the correct legal tests for the potential use of lies as evidence of guilt.

[74] As to the first of these, there was evidence from which it could be inferred the gun used in the killings had been sawn off by a hacksaw. Experts considered the gun had likely been held in a vice when it was sawn off.[33] That it was only a likely possibility suggests a lie about the topic is unlikely to have been a lie about a material issue but the more obvious issue is whether there even was a lie.

[75] Of the applicant's alleged dishonesty on this topic his Honour observed:

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31 Ibid.
32 Reasons p 112.
33 Reasons p 98.

> "Mr Leahy denied that he cut down the gun but his prevarication about matters associated with it create suspicion. For example, there is ample evidence he had possession of a vice and tools in a storeroom under the house at Danzer Drive. …
> Mr Leahy told this inquest that *very possibly* he had a vice in his workshop. He also acknowledged he had several hacksaws for use in his carpet business. However, his answers on this occasion contrast starkly with the answers he gave to Frank O'Gorman on this topic during the Mengler-O'Gorman Inquiry when he stated in a tape recorded interview that he did not recall having a vice in the storage area under the house but that he may have had a work bench. When advised that three people had told Messrs Mengler and O'Gorman that there was a vice in the shed he said, *It's possible. I can't recall.* However, he did agree he did have hacksaws."[34] (citations omitted)

[76] At a later stage of his reasons his Honour described those answers as evidencing prevarication and a false denial.[35] He did not explain how.

[77] It is necessary as a threshold requirement that the alleged lie was a deliberate untruth. The applicant did not even deny that he had a vice. All that occurred here was that the appellant indicated he did not recall having a vice and after having been informed that others recalled there was a vice in his shed he acknowledged the possibility there had been a vice in his shed, both then and subsequently.

[78] The learned Coroner identified no evidence capable of proving that the applicant was lying when he said he could not recall. Moreover, the topic was not of such a character as to inevitably be remembered with such clarity that an assertion of lack of recollection could be inferred to be a deliberate falsehood. This was no mere error of fact. It was an error of law. His Honour failed to have regard to the legal requirement that the alleged lie must be shown to be a deliberate untruth. His Honour erred in regarding this aspect of the evidence as being capable of evidencing a lie told because the applicant knew the truth would implicate him in the killings. It was an irrelevant consideration in that context.

[79] There was a similar error made in respect of the applicant's alleged lies about the life insurance policy. His Honour found the applicant deliberately and persistently sought to understate the existence of the insurance policy on Ms Leahy's life because he was aware to admit the truth might be construed as a motive for him to murder his wife.[36] He earlier found that in evidence before the inquest and in evidence before the CMC in 2008 the applicant dissembled and feigned ignorance about the insurance policy and its details.[37] Perusal of that evidence[38] demonstrates the applicant's recollection about when the policy was taken out and when he found out about it was vague. That is hardly surprising given the lapse of time.

[80] It is tolerably clear his Honour did not think the applicant was being candid in the evidence given before him. However, whether or not his Honour felt the applicant was feigning ignorance or dissembling in his evidence did not assist in identifying

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34 Reasons p 43.
35 Reasons p 98.
36 Reasons p 113.
37 Reasons pp 37, 107.
38 Inquest Ex B35.3 pp 35-36; Inquest Transcript 9-50.

whether there was evidence that, taken at its highest, could prove the applicant's asserted lack of certain recollection was false.

[81] To the extent the Coroner's reasons specifically identified some evidence potentially capable of demonstrating a deliberate untruth on this topic it appeared to be that the applicant told the CMC he had not known about the insurance policy on the life of his wife until after his wife had taken it out[39] whereas there was some hearsay evidence attributed to the insurance agent Mr Choveaux to show the applicant had known about it before it was taken out. Police Inspector Kruger's report indicated that when he spoke with the agent in 1993 the agent had said it was Ms Leahy's idea to take the policy out on her life, the applicant was against it for financial reasons but had relented and the policy "proceeded".[40] It is unclear given the imprecision of the hearsay evidence whether it means the applicant knew from the outset that Ms Leahy had taken steps to take the policy out or whether he found out later, albeit before the policy actually proceeded. Even ignoring that the evidence referred to would be inadmissible hearsay in a trial it does not, taken at its highest, permit the conclusion that the applicant lied to the CMC and later the Coroner when he said he only became aware of the policy after his wife had taken it out.

[82] Further, it is not apparent how a lie about the era when the policy was first taken out could be material in the context of the potential case against the applicant. Whether he knew about the policy before or after it was taken out, it appears the applicant knew of the existence of the insurance policy well before his wife's death. Had he lied and said he had not known about the existence of the policy until after her death that may have been a lie on a material issue but the reasons do not suggest he lied about his state of knowledge about the policy in that era.

[83] His Honour erred in that he failed to consider whether the evidence could meet the prerequisites that the alleged lie was a deliberate untruth and related to a material issue. His Honour thus erred in regarding this aspect of the evidence as being capable of evidencing a lie told because the applicant knew the truth would implicate him in the killings. It was an irrelevant consideration in that context.

[84] While the applicant did not submit in any detail in respect of the other two areas of alleged lies said to evidence a consciousness of guilt, perusal of the Coroner's analyses of them confirms they also do not contain an accurate explanation of the correct test for admissibility of lies or involve findings demonstrating a proper application of the correct test.

[85] The Coroner's discussion of the applicant's alleged lies about the extent of his financial problems revealed that the applicant had generally acknowledged he had been facing financial difficulties but not conceded those difficulties were pressing. For instance the Coroner cited the example of the applicant having told the second inquest "[w]e weren't desperate but we weren't, you know, things were tight."[41]

[86] He also noted that at the latest inquest the applicant "would not commit to or outright reject the proposition the family were in dire financial straits".[42] His Honour

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39 Reasons p 37, Inquest Ex B35.3 p 35; Inquest Transcript 9-50.

40 Reasons p 37, Inquest Ex D2 p 17 (the word "proceeded" appears in this context in Inspector Kruger's report whereas the word "purchased" is used instead in the reasons).

41 Reasons p 36.

42 Ibid.

obviously did not regard the applicant's apparent history of equivocation about the degree of financial difficulty he was in as credible but gave no specific consideration to how an apparent reluctance to concede an opinion about a matter of degree could amount to a deliberate untruth.

[87] As to the alleged lies about the ownership of crime magazines the evidence was to the effect that the applicant had actually produced the magazines to the initial investigating police saying Ms Arnold had once borrowed them from him.[43] On the other hand the applicant told the latest inquest he did not recall owning them or subscribing to them but then conceded it was possible he had subscribed to them but could not remember.[44]

[88] Once again it appears the Coroner did not consider whether there was evidence that the applicant's answers were deliberate untruths. Further, in dealing with evidence of consciousness of guilt his Honour said:

> "Similarly, to admit he owned and had read an account of a notorious crime that closely resembled the crime scene in this case, may have led to a conclusion he imitated that criminal."[45]

As that observation suggests, his Honour does not appear to have given any consideration to whether ownership of the crime magazines was a material issue as contemplated in the context of the test for use of alleged lies as implied admissions.

[89] In summary his Honour did not recite the correct test of admissibility for lies as evidence of guilt and his findings show he did not apply the correct test. To the contrary, his findings suggest he elevated his adverse opinion of the applicant's credibility to providing evidence going to guilt rather than merely credibility – the very mischief which the correct test is calculated at avoiding.

[90] The applicant has made good his complaint that the Coroner's decision to commit was informed by reference to his opinion the applicant had told lies in circumstances where those alleged lies could not be admissible in criminal proceedings as positive evidence of guilt and were thus irrelevant. These were errors of law and involved an improper exercise of power in that irrelevant considerations were taken into account when making the decision to commit.

[91] This Court has a discretion to refuse relief notwithstanding that a case for relief has been shown. In this context it is important to bear in mind the general reluctance of civil courts to grant relief under Judicial Review in respect of committal proceedings in the absence of exceptional circumstances.[46]

[92] However, the approach of the learned Coroner involved a exceptional deviation from legal principle in respect of an aspect of the evidence which must have had a significant bearing upon the question of whether there was sufficient evidence to commit the applicant for trial. It cannot be said the use of alleged untruths as evidencing implied admissions of guilt, would have made no difference to the decision.[47] It was obviously material to it. The decision that the applicant be committed to stand trial should be set aside.

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43 Reasons p 65.
44 Reasons pp 65, 66.
45 Reasons p 113.
46 *Lamb v Moss* (1983) 76 FLR 296.
47 See *House v Defence Force Retirement & Death Benefits Authority* (2011) 193 FCR 112.

Particular 2(c): Margaret Stewart's allegation of rape considered erroneously/irrelevantly?

[93] Ms Leahy's half sister Margaret Stewart alleged for the first time in 2011 that the applicant had raped her shortly before her 16th birthday in early 1990. There was no suggestion of any ongoing illicit relationship between the applicant and her, let alone at the time of the killings. It was Ms Leahy's other half sister, Vanessa Stewart, with whom the applicant had an illicit relationship when she was 16 around the time of the killings. Evidence of that relationship is potentially relevant to motive and evidence of its pursuit while Ms Leahy was missing is arguably relevant to the applicant's knowledge of whether she was dead or merely missing. Evidence of the solitary sexual episode with Margaret Stewart is not relevant to those issues.

[94] The applicant complains that the Coroner had regard to Margaret Stewart's evidence as corroborating Vanessa Stewart's allegations. His Honour noted the applicant had allegedly sexually exploited both women when they were about the same age. It appears to be for that reason that his Honour had regard to Margaret's allegations as corroborating Vanessa's allegations.[48] In fact there is no particular dispute between the applicant and Vanessa that they had a sexual relationship when she was about 16. The critical difference between their evidence is whether it commenced before, during or after the period when the women were missing. Margaret's evidence cannot conceivably corroborate Vanessa's recollection of when the sexual activity commenced.

[95] In any event, even if the existence of Vanessa's sexual relationship with the applicant was in dispute it must be borne in mind the relevance of the evidence of that relationship is as it relates to potential charges of unlawful killing. Vanessa's evidence does fall to be considered as if she were to be giving evidence as a complainant against the applicant for a sex offence. It would not be permissible in a proceeding against the applicant for unlawful killing to adduce evidence from Margaret which could only be collateral evidence going to Vanessa's credit.

[96] The intervener meets the applicant's complaint in the same way as the complaint about references by the Coroner to the applicant's morality and criminal history, namely that those topics fell away as relevant considerations when the Coroner came to his conclusions at the end of part 12 of his reasons.

[97] In part 12 the Coroner alluded to the supposedly corroborative quality of Margaret's evidence at part "12.4 Was Mr Leahy responsible?" under the heading "12.4.4 Mr Leahy's involvement with his step-daughter". When his Honour later reached part "12.4.10 Conclusion" he made no reference at all to Margaret's evidence. He did of course refer to the applicant's motives for killing his wife, one of which may have been the pursuit of a relationship with Vanessa. He also referred to the applicant's pursuit of a sexual relationship with Vanessa when the women were missing as consistent with knowledge his wife was not returning.

[98] The absence of reference to Margaret's evidence as corroborating Vanessa's does not of itself mean the Coroner had excluded it from his mind. However, his Honour expressly acknowledged the process with which he was then concerned involved

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48 Reasons pp 28, 29, 107.

considering the "possible Crown case at it highest",[49] from which it follows he was then approaching his task as if a jury would accept Vanessa's evidence. His awareness that this was the nature of his task at that point renders it unlikely that he had silent regard to Margaret's evidence in performing that task.

[99] Margaret's evidence did not inform the decision to commit.

Particular 2(d): Psychopathology evidence erroneously/irrelevantly?

[100] Ms Arnold acquired the firearm used to kill both women and when they were found Ms Arnold's right hand was resting on the firearm with her index finger near the trigger. The circumstances raise the possibility, consistent with the applicant's innocence, that Ms Arnold killed Ms Leahy and herself. That possibility may well be unlikely but it must be excluded as a necessary part of any case against the applicant. Evidence incriminating the applicant as responsible would tend to exclude it and evidence demonstrating Ms Arnold is unlikely to have committed suicide would also tend to exclude it.

[101] In making the decision to commit the Coroner reasoned a jury "would be entitled to have regard to the evidence indicating Ms Arnold was most unlikely to have taken her own life".[50] The evidence to which his Honour was referring included the evidence of Professor Diego de Leo.

[102] Professor de Leo, described by the Coroner as a "world-renowned suicidologist",[51] is a professor of psychiatry and the Director of the Australian Institute for Suicide Research and Prevention (AISRAP) at Griffith University, Brisbane. AISRAP was designated as the Commonwealth's National Centre of Excellence in Suicide Prevention in 2008. At Griffith University, Professor de Leo also directs the World Health Organization (WHO) Collaborating Centre for Research and Training in Suicide Prevention. He continues to undertake clinical practice in the area in Queensland and Italy.

[103] The applicant submits Professor de Leo's evidence would be inadmissible on any trial of the applicant and thus should not have informed the decision of the Coroner. The applicant's complaint is that the Professor's evidence does not involve an expert body of learning and that it was not established that there is a science which would allow a "suicidologist" to opine about a person's state of mind at or near the time of death.

[104] A variety of expert witnesses provided evidence to the inquest. A number of them provided some evidence that might be admissible in a trial as well as some evidence that exceeded the bounds of their expertise and would not be admissible at a trial. Professor de Leo was one such expert. For instance, his report referred to elements of physical interpretation of the scene unrelated to the likelihood of Ms Arnold committing suicide, such as Ms Arnold's physical ability to wrap the seatbelt around Ms Leahy while she was resisting.[52] Such evidence went beyond his area of expertise and would be inadmissible at trial.

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49 Reasons p 116.
50 Ibid.
51 Reasons p 88.
52 Inquest Ex D8 p 16.

[105] However, some of the evidence provided by Professor de Leo was well within his field of expertise as a professor of psychiatry specialising in an expert body of learning about suicide. Much of that evidence was founded upon data patterns relating to the circumstances and frequency of suicides and the inconsistency between those patterns and Ms Arnold's circumstances and the circumstances of her death. Such evidence derives from a field of expert learning, as was explained by Kirby J in *Farrell v The Queen:*[53]

> "…[T]he study of human behaviour … is an accepted scientific discipline. It is one upon which the frontiers of expert knowledge are constantly expanding. … [W]here established patterns of human behaviour have been studied, analysed and scientifically described, it is appropriate that evidence about them should be available to the decision-maker".

[106] The real issue for present purposes is, to the extent the Coroner's decision to commit was informed by any particular evidence from Professor de Leo, whether that particular evidence would likely be admissible at trial.

[107] The Coroner's decision to commit was undoubtedly informed in part by the consideration that a jury "would be entitled to have regard to the evidence indicating Ms Arnold was most unlikely to have taken her own life".[54] As to what that evidence was, the concluding analysis of the Coroner's report at part "12.2 Was Ms Arnold the killer?" dealt with some aspects of Professor de Leo's evidence at part "12.2.7 Motive – Psychopathology". Then at part "12.2.8 Conclusion" his Honour referred in 14 dot points to the aspects of the evidence to which he had had particular regard in concluding it would be unsafe and unreasonable to find Ms Arnold killed Ms Leahy and herself. Of those aspects, those which could be said to be based directly or indirectly upon the evidence of Professor de Leo were:

> "• ...Her completely normal behaviour in the days and hours before the women went missing and the many plans she had made for the following day; ...
> • The unlikely position of Ms Arnold's body had she taken her own life;
> • The persuasive evidence of an internationally renowned suicidologist that Ms Arnold showed none of the traits associated with suicide, and was in fact, on all of the available evidence less at risk of doing such a thing than a person in the general population;
> • The absence of any of the usual triggers or motives for Ms Arnold to commit suicide or to murder Ms Leahy; and
> • The absence of any records of a woman on woman murder suicide ever being committed in Queensland or referenced in academic literature. …"[55]

[108] None of those aspects of the evidence involve the expression of an expert opinion about Ms Arnold's state of mind at or about the time of the killings. Some of them go to features that bear upon the likelihood of whether Ms Arnold would have committed suicide and in that sense are relevant to what her state of mind may have been. But at the highest they go to the probability of whether Ms Arnold was

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53 (1998) 194 CLR 286, 299.

54 Reasons p 116.

55 Reasons pp 105, 106.

suicidal and do not involve an opinion as to what her state of mind actually was. The complaint that the Coroner's decision to commit was informed by opinion evidence as to what Ms Arnold's state of mind was has not been made out.

[109] The applicant also complained that the Professor had never provided a report for a court in Australia[56] but that is not to the point. There doubtless exist many experts in their fields who could give admissible evidence in trials or inquests but whose opinions have never been sought for that purpose.

Particular 3: Relevant possibility the killer was a stranger not properly considered?

[110] The applicant submits the Coroner erred in law and failed to take into account a relevant consideration when he effectively dismissed the possibility that a stranger, that is, neither Ms Arnold nor the applicant, killed the women. It is submitted the Coroner failed to consider the inability of the evidence to exclude the possibility a stranger was responsible and wrongly assumed the possibility only arose for practical consideration where it had come to police attention or was contended for by someone involved in the case.

[111] In fact the Coroner undoubtedly did have regard to the possibility a stranger was involved. The real crux of the applicant's complaint is that he did not give that possibility much weight.

[112] His Honour's reasons commented on the possibility twice. Firstly he said:

> "***12.3 Was a stranger responsible?***
> If Mr Leahy's account of their leaving to go fishing after midnight is correct, no one else could have known Ms Arnold and Ms Leahy were going to Tinaroo Dam and so for them to have been killed by a stranger, the killer would have had to come across them by chance and then discovered and taken from them the firearm, which on this scenario, they would have had no reason to be carrying. The women were not raped or robbed. Only a seriously deranged person would kill for no motive and with such violence. The chances of the women stumbling across such a person after midnight in Atherton and the person never coming to police attention before or since is too remote to warrant any further consideration. It is dismissed."[57]

[113] Minds may strongly differ as to the prospect of whether a person might kill others for no apparent reason and not come to police attention. Others might not be as dismissive of the possibility as his Honour was but his Honour did at least consider it. Further, the context in which his Honour dismissed the possibility was during his review of who may have caused the deaths. He did not assert it was an irrelevant consideration in the assessment of whether there was sufficient evidence against the applicant to commit him for trial.

[114] Furthermore, under the heading "12.4.10 Conclusion", he said:

> "In this case, there are gaps in the evidence and areas of uncertainty, some brought about by the passing of time, others by flaws in the

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56 The intervener notes the Professor gave evidence in the County Court of Victoria in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 237.

57 Reasons p 106.

> original investigation and still others that just remain a mystery. However, I consider a jury could conclude the killer was only either Ms Arnold or Mr Leahy. Indeed, no one involved in the case has ever suggested any other possibility."[58]

[115] In finding that a jury "could" conclude the killer was only either Ms Arnold or Mr Leahy his Honour was implicitly acknowledging the existence of another potential conclusion, namely the commission of the killings by some other person. His reference to no-one having suggested the possibility was merely commentary, illustrating the relative remoteness of the likelihood of a stranger being involved. It did not suggest his Honour failed to appreciate it would be for the prosecution to exclude the possibility consistent with innocence that a stranger committed the killing.

[116] The applicant's submission that the Coroner failed to consider "the inability of the evidence to exclude the possibility"[59] does not accurately reflect his Honour's approach or the nature of a case of this kind. Every circumstantial killing case involves the theoretical possibility the killing has been committed by an undetected stranger. It is a possibility that could never be excluded if it fell to be considered purely theoretically, in isolation from the actual state of the evidence in the case. The viability of the possibility will diminish in the absence of evidence showing the involvement of a stranger and the presence of evidence showing the killing was likely committed by someone who was not a stranger to the deceased. It was open to his Honour, having considered the possibility in the circumstances of this case, to dismiss it as so remote that a jury could (not necessarily would) conclude the killer was only either Ms Arnold or Mr Leahy. The applicant's complaint in this context must fail.

Particular 4: Reliance on non-existent evidence?

[117] His Honour reviewed the pathology evidence in part 11 of his reasons, "11 Expert evidence and investigation results".[60]

[118] He there referred to the opinions of Dr Ansford and Dr Ranson about features of the state of the deceased when found suggesting murder suicide was unlikely. The applicant does not complain such evidence went beyond their expertise but points merely to an error in the Coroner's recounting of one aspect of Dr Ranson's evidence.

[119] The Coroner said in the course of noting some of Dr Ranson's observations:

> "When witnessing the first re-enactment and when viewing the video of the second re-enactment, it was apparent to him the person taking the role of Ms Arnold found it very difficult to get sufficient free space for her right arm to bring the gun back to the 4cm position behind the right ear…"[61]

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58 Reasons pp 115, 116.
59 Applicant's Outline [78].
60 Reasons pp 75-79.
61 Reasons p 79.

[120] This was a reference to some evidence before the inquest of persons purporting to re-enact what may have occurred at the scene.[62] His Honour's apparent understanding that Dr Ranson viewed a video of a second re-enactment was wrong. Dr Ranson did not view such a video. The applicant therefore contends the Coroner had regard to an irrelevant consideration and in having regard to it exercised his power so unreasonably no reasonable person could so exercise the power.

[121] The error is inconsequential. The evidence of Dr Ranson and Dr Ansford identified an array of features in the physical evidence that rendered the murder suicide scenario unlikely and those features did not require illustration by re-enactment in order to have evidentiary force. In any event both witnesses acknowledged murder suicide could not be scientifically excluded.[63]

[122] Further, the very next observation of Dr Ranson noted by the Coroner after the above quoted observation was:

> "As a result of having watched the re-enactment he concluded that Ms Arnold could have been put in the position she was found or could have collapsed into that position."[64]

That suggests the Coroner correctly understood from Dr Ranson's evidence that the re-enactment process could not exclude the possibility of suicide. This was confirmed when considering the state of the scene in his reasons at "12.2.5 the crime scene"[65] his Honour expressly acknowledged that the re-enactment process could not exclude the possibility of suicide.

[123] The applicant's complaint is of a minor error which had no bearing upon the Coroner's decision to commit. The error did not give rise to an unreasonable exercise of power.

Particular 5: Failure to disclose association with Professor de Leo a breach of natural justice?

[124] The applicant complains there was a breach of natural justice because the Coroner failed to disclose his association with Professor Diego de Leo, with the consequence that a fair minded, properly informed member of the public might reasonably apprehend that the Coroner did not bring an impartial mind to bear on the Professor's evidence.

[125] As earlier mentioned, Professor de Leo is director of AISRAP at Griffith University. Its website indicates that the Coroner is a member of the adjunct academic staff of AISRAP.[66] More significantly, the AISRAP website discloses that Professor de Leo and the Coroner have co-authored three publications namely:

> "1. DE LEO D, KLIEVE H, BARNES M: Austrian Firearms: Data require cautious approach. British Journal of Psychiatry, 191:562—563, 2007.

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62 The applicant did not agitate in this application the issue of the admissibility of such evidence at a trial.

63 Reasons p 78.

64 Reasons p 79.

65 Reasons p 101.

66 Affidavit of Malcolm James Liston filed 30 May 2013 Ex MJL3.

> 2. KLIEVE H, BARNES M, DE LEO D: Controlling Firearms use in Australia: Has the 1996 gun law reform produced the decrease in rates of suicide with this method? Social Psychiatry and Psychiatric Epidemiology, 44:285-292, 2009.
> 3. DE LEO D, DUDLEY M, AEBERSOLD C, MENDOZA J, BARNES M, HARRISON JE, RANSON D (2010) Achieving Standardised Reporting of Suicide in Australia: Rationale and program for change. Medical Journal of Australia, 192:452—456, 2010." [67]

[126] While the fact of the Coroner's professional collaboration with Professor de Leo was apparent from the Professor's publishing history, it was not disclosed by the Coroner. The applicant does not suggest the existence of what was an apparently purely professional collaboration mandated disqualification. Rather, he submits the fact of the collaboration and the failure to disclose it would cause a reasonable lay observer to apprehend an appearance of impermissible bias.

[127] The governing principle applicable in the case of alleged apprehended bias was summarised by the plurality in *Ebner v Official Trustee*:[68]

> "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer…), … the governing principle is that, subject to qualifications relating to waiver… or necessity… a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done…" (citations omitted)

[128] The Court went on to explain the two step application of the principle:

> "Its application requires two steps. First, it requires the identification of what it is said might lead a judge… to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge… has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."[69]

[129] Here the only consideration identified that might have lead the Coroner to decide the inquest other than on its legal and factual merits was the fact of his professional collaboration with Professor de Leo. The applicant's argument encountered difficulty in its articulation of the logical connection between that collaboration and a feared deviation from the course of deciding the case on its merits. The applicant acknowledges the mere fact of the professional collaboration would not mandate

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67 Affidavit of Malcolm James Liston filed 30 May 2013 Ex MJL4.

68 (2000) 205 CLR 337, 344.

69 Ibid 345.

disqualification. However, that proper concession necessarily undermined the force of the applicant's complaint.

[130] The applicant endeavoured to bolster his submission with the points that it was the Coroner's inquest which commissioned the Professor's evidence, the Coroner had significant regard to it in his reasons[70] and the Coroner disparaged the applicant's counsel for failing to appreciate its significance.[71]

[131] I have already addressed the significance attached by the Coroner to the evidence of Professor de Leo. His evidence was but part of a broader body of evidence which the Coroner had regard to as demonstrating that it was unlikely Ms Arnold committed suicide. It is readily apparent from his Honour's ultimate reasoning on this topic that Professor de Leo's evidence was not determinative in that regard.

[132] The fact that the Coroner's reasons dealt with and rejected the applicant's submission that Professor de Leo's evidence could provide little guidance was a mere product of having to address the submission. I have already found the Coroner did not err in his approach to Professor de Leo's evidence as informing his decision to commit. It can hardly be suggested therefore that the Coroner's rejection of the applicant's counsel's submissions derived from a position of bias.

[133] As for the fact that the Professor's evidence had effectively been commissioned by the Coroner a fair minded lay observer ought be presumed to have some general legal knowledge about the nature of the coronial proceedings.[72] An inquest is different from an ordinary trial. There are no parties to the proceeding and it is inquisitorial rather than adversarial. Moreover, the Coroner is the principal inquirer. A fair minded lay observer would attribute sufficient professionalism to a Coroner that the Coroner would not attribute undue weight to evidence merely because it relates to an area the Coroner sought to further inquire into.

[134] The relevance of the unique nature of the Coroner's role in this context was well developed by Underwood J in *R v Matterson and Anor*:[73]

> "It is well established that what is required of the tribunal to avoid giving rise to a reasonable apprehension of bias depends on the nature and jurisdiction of the tribunal. In this case the tribunal is a coroner discharging common law and statutory duties…
>
> In the circumstances of a coronial inquiry, fair minded people or the hypothetical bystander, would not reasonably apprehend bias from the mere fact that there had been out of court contact between the coroner and a witness who later gave evidence. Indeed, the bystander would not be at all surprised to learn that there had been such contact having regard to the nature of the coronial process. In *R v Carter and the Attorney-General; ex p Gray and McQuestin* the court held that the apparent bias needs to be considered in the context in which it is claimed, and that the fair minded people referred to in the majority judgment of *R v Watson* would be aware that a large part of the Commissioner's duty involved investigation and inquiry. So it is in the case of a coronial inquiry." (citations omitted)

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70 Reasons pp 88-92, 104, 105.

71 Reasons pp 88, 89.

72 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 203, 305, 306, 329.

73 [1994] TASC 184, 11.

[135] A reasonable apprehension of bias must be "firmly established"[74] from the perspective of an informed lay observer. That has not occurred here. In the circumstances of this case no apprehension of bias arises reasonably out of a failure to disclose the existence of a purely professional past publishing collaboration between the Coroner and Professor de Leo. A fair minded observer with an awareness of that professional connection would not, in the context of a coronial inquest and having regard to the wide ranging nature of the evidence considered in this coronial inquiry, apprehend bias on the part of the decision maker because the decision maker did not disclose it.

Particular 6: Communications with relatives of the deceased and lack of communications with the applicant a breach of natural justice?

[136] The applicant submits a breach of the rules of natural justice happened because the Coroner made little attempt to communicate with the applicant but did communicate with other relatives of the deceased and failed to disclose some of those communications. It is alleged those considerations in combination mean that a fair-minded properly informed member of the public might reasonably apprehend that the Coroner did not bring an impartial mind to bear upon his decision.

[137] The principles relevant to apprehended bias discussed above are also relevant here.

[138] In his reasons at footnote 17 the Coroner noted of a complaint which had been made about an aspect of the police investigation:

> "I was the chief officer of the complaints section of the CJC at the time and thus supervised the investigation of the complaint. I disclosed this to the families of Ms Arnold and Ms Leahy before commencing the investigation that culminated in this inquest. None of them submitted that my involvement in the CJC investigation created a conflict or raised a suspicion of apprehended bias such as should cause me to refrain from conducting this inquest."

The applicant emphasises this was the first public disclosure of the Coroner of the fact of his private communications with members of the Leahy and Arnold families.

[139] That disclosure apparently occurred when the Coroner and Detective Inspector Smith met with representatives of the Leahy family and a solicitor representing the Arnold family on 23 December 2010. The Coroner did not have a like meeting with the applicant or his legal representative.

[140] However, the Coroner did, on 1 December 2010, write to the applicant informing him of the convening of the inquest and inviting him to attend a meeting to discuss preliminary issues.[75] The address to which that correspondence had been directed was a West Australian address derived from earlier information but it was not Mr Leahy's current address and the correspondence was not received by him. An undated file note in the Coroner's file contains a notation that Kathleen Leahy, the applicant's daughter, who had been present at the meeting of 23 December 2010, "will call" the applicant.[76] Further, in a file note of the Office of the Coroner dated

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74 *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 203, 305.

75 Affidavit of Malcolm James Liston filed 2 August 2013 Ex MJL13.

76 Affidavit of Malcolm James Liston filed 2 August 2013 Ex MJL12 p 32.

17 December 2010 a note of a telephone conversation with Kathleen Leahy includes the hand written annotation "they are going to speak to Alan".[77]

[141] The Coroner's investigation team wrote to the applicant by correspondence on 17 June 2011 informing him of the re-opening of the inquest and the date and venue of a pre-inquest conference.[78] That correspondence was received by the applicant; however, the pre-inquest conference did not proceed as planned.

[142] The above chain of events does not suggest there was any attempt to shut the applicant out from the discussions with relatives of the deceased or their lawyers and from the disclosure of the Coroner's past connection with an aspect of the case when he was at the CJC. To the contrary, an attempt was made to write to the applicant. His daughter also apparently informed the Coroner's Office that the applicant would be spoken to.

[143] The real gravamen of the applicant's complaint is that there was a lack of conscientiousness in the Coroner's Office in ensuring the applicant was directly informed of the Coroner's disclosure and of the Coroner's invitation to meet him and discuss preliminary issues. The result – that the applicant was not informed of the Coroner's disclosure before ordering the inquest – was obviously a product of bureaucratic inefficiency rather than bias.

[144] A fair-minded lay observer would not apprehend from those circumstances that the Coroner was biased against the applicant and might decide the inquest other than on the legal and factual merits.

Conclusion

[145] For the reasons canvassed at [58]-[92] above in respect of the Coroner's dealing with the alleged lies of the applicant as evidence of guilt the decision to commit should be set aside.

[146] That decision does not disturb the Coroner's other findings. The inquest's effective overturning of the positive findings of past inquests that Ms Arnold took her own life and Ms Leahy's still stands.

[147] As to the sole component of the decision which has been interfered with – the decision to commit the applicant for trial - the parties agree no further substantive order other than setting it aside should be made. It is common ground that it is inappropriate to remit that issue back to the Office of the State Coroner. Whether proceedings should be instituted against any person in respect of the killings remains, as ever, a matter for the State's prosecuting authorities.

[148] It will be necessary to hear the parties as to costs.

Orders

1. The decision of the Coroner to commit the applicant for trial is set aside.
2. I will hear the parties as to costs.

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77 Affidavit of Malcolm James Liston filed 2 August 2013 Ex MJL12.

78 Affidavit of Malcolm James Liston filed 2 August 2013 Ex MJL14.