SUPREME COURT OF QUEENSLAND

CITATION: *Doomadgee & Anor v Deputy State Coroner Clements & Ors* [2005] QSC 357

Hurley v Deputy State Coroner Clements & Ors [2005] QSC 357

PARTIES: **JANE DOOMADGEE and ELIZABETH DOOMADGEE and VALMAI APLIN**
(applicants)
v
DEPUTY STATE CORONER CLEMENTS
(first respondent)
COMMISSIONER OF THE POLICE SERVICE
(second respondent)
ERYKAH KYLE, CHAIR OF THE PALM ISLAND ABORIGINAL COUNCIL
(third respondent)
CHRISTOPHER HURLEY
(fourth respondent)
MICHAEL LEAFE and LLOYD BENGAROO
(fifth respondent)
TRACEY LEE MARIA TWADDLE
(sixth respondent)
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
(seventh respondent)
ATTORNEY-GENERAL OF QUEENSLAND
(eighth respondent)

CHRISTOPHER HURLEY
(applicant)
v
DEPUTY STATE CORONER CLEMENTS
(first respondent)
ERYKAH KYLE, CHAIR OF PALM ISLAND ABORIGINAL COUNCIL
(second respondent)
TRACEY LEE MARIA TWADDLE
(third respondent)
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
(fourth respondent)
JANE, ELIZABETH AND VALMAE DOOMADGEE
(fifth respondent)
COMMISSIONER OF THE QUEENSLAND POLICE SERVICE
(sixth respondent)

ATTORNEY-GENERAL OF QUEENSLAND
(seventh respondent)

FILE NO:	BS9137 of 2005 BS9221 of 2005
DIVISION:	Trial Division
PROCEEDING:	Applications for statutory review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2005
JUDGE:	Muir J
ORDER:	**BS9137 of 2005 – Application is dismissed**

CATCHWORDS: ADMINISTRATIVE LAW – QUEENSLAND – GROUNDS FOR REVIEW – IMPROPER EXERCISE OF POWER – POWERS AND DISCRETION OF COURT – coronial inquest into death of an aboriginal man in police custody on Palm Island – coroner made preliminary ruling as to what evidence she would consider in making her findings under s 45 and s 46 of the *Coroners Act* 2003 (Qld) ("the Act") – application made under *Judicial Review Act* 1991 (Qld) that coroner erred in accepting propensity evidence under s 46 of the Act – applicant contends such evidence not "connected with" a death under s 46(1) of the Act – scope of "connected with" – whether coroner exercised her discretion consistently with object of the Act – whether court should intervene in interlocutory decision of coroner – separate application made under *Judicial Review Act* 1991 (Qld) that coroner erred in excluding evidence of two complainants when making her findings under s 45 of the Act – applicant contends coroner erred in ruling such evidence was "impermissible" for her consideration and that she should "adopt a more restrictive view" with regards to it – whether coroner applied an erroneous principle of law in coming to her decision – whether coroner bound by legal principle to consider complainants' evidence in her determination

Acts Interpretation Act 1954 (Qld), s 14A
Coroners Act 2003 (Qld) s 37, s 45, s 46
Judicial Review Act 1991 (Qld)

Atkinson v Morrow [2005] QSC 092
Briginshaw v Briginshaw (1938) 60 CLR 336
Cain v Glass (No 2) (1985) 3 NSWLR 230
Claremont Petroleum NL v Cummings (1992) 110 ALR 239

Coco v Shaw [1994] 1 Qd R 469
Harmsworth v The State Coroner [1989] VR 989
Harriman v The Queen (1981) 167 CLR 590
KRM v The Queen (2000) 206 CLR 221
Mills v Meeking (1990) 169 CLR 214
Minister for Immigration and Ethnic Affairs v Wu Shan Lung [1996] 185 CR 259
Pfennig v The Queen (1995) 182 CLR 461
PMT Partners Pty Limited (in Liquidation) v Australian National Parks and Wildlife Service (1995) 184 CLR 301
Pochi v Minister for Immigration and Ethnic Affairs (1979) 36 FLR 482
Queensland Fire & Rescue Authority v Fall [1998] 2 Qd R 162
R v Deputy Industrial Injuries Commission; Ex parte Moore [1965] 1 QB 456
R v O'Keefe [2001] 1 Qd R 564
T A Miller Ltd v Minister of Housing and Local Government [1968] 1 WLR 992
Walker v Corporate Affairs Commission (1988) 13 NSWLR 550

COUNSEL:

BS9137 of 2005
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No appearance for the first respondent
P J Baston for the second respondent
A Boe for the third respondent
P J Flanagan SC with S W Zillman for the fourth respondent
No appearance for the fifth, sixth and seventh respondents
M D Hinson SC with S McLeod for the eighth respondent

BS9221 of 2005
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P Callaghan SC with A Moynihan for the fifth respondent
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SOLICITORS:

BS9137 of 2005
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CJ Strofield Qld Police Service Solicitor for the second respondent
Boe Lawyers for the third respondent
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C Lowe Crown Solicitor for the eighth respondent

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Boe Lawyers for the second respondent
No appearance for the third and fourth respondent
Legal Aid (Queensland) for the fifth respondent
CJ Strofield Qld Police Service Solicitor for the sixth respondent
C Lowe Crown Solicitor for the seventh respondent

Introduction

[1] Two applications for statutory order of review made pursuant to the *Judicial Review Act* 1991 (Qld) were heard together on 7 December 2005. Application BS9137 of 2005 by Christopher Hurley, a senior sergeant of police, seeks to review the decision on 5 October 2005 of the first respondent that the evidence of Barbara Pilot, Noel Cannon, Douglas Clay and another witness called 'D' be admitted for the purposes of possible coronial comment pursuant to s 46 of the *Coroners Act* 2003 (Qld) ("the Act"). I will refer to the evidence of those three persons as "the Propensity Evidence". The other application was by Jane Domadgee, Elizabeth Doomadgee and Valmai Aplin seeking to review the decision of the first respondent on 5 October 2005 not to admit the evidence of Noel Cannon and Douglas Clay "that alleges the fourth respondent [Christopher Hurley] had previously assaulted indigenous people within the Palm Island police station" as relevant to findings to be made under s 45 of the Act.

[2] The first respondent to each of the applications is the Deputy State Coroner who is enquiring into the death of an Aboriginal man on 19 November 2004 in a watch house cell at the Palm Island Police Station whilst in custody. The deceased has been described in the Deputy Coroner's ruling, in evidence and in submissions received by the Coroner, as "Mulrunji". For convenience, I will refer to the Deputy State Coroner as "the Coroner".

[3] On the hearing of the applications, the Attorney-General, at her request, was joined as a respondent.

[4] The evidence of Cannon and Clay, the subject of the second application, is that referred to in the Hurley application. The decision sought to be reviewed in both applications is contained in a five page document entitled "Rulings on admissibility of evidence" ("the Ruling").

[5] The Commissioner of the Queensland Police Service appeared by counsel on both applications. His submissions were consistent with those made on behalf of Senior Sergeant Hurley.

[6] The submissions of Ms Erykah Kyle, Chair of the Palm Island Aboriginal Council adopted and supplemented the Doomadgee/Aplin submissions. There was no appearance on behalf of the third and fourth respondents to the Hurley application.

The evidence at the Inquest concerning the cause and circumstances of death

[7] In order to understand the parties' claims, it is necessary to know something of the subject matter of the inquiry and of the course of action taken by the Coroner. Paragraphs 3, 4 and 5 of the Ruling contain a useful description of the events surrounding the death and cause of death:

> "The evidence to this stage of the inquest is that Mulrunji died on 19 November 2004 in the watch-house cell at the Palm Island Police Station whilst in custody. There is no evidence to suggest that Mulrunji was suffering from any illness or injury when he was taken into custody by Senior Sergeant Hurley. There is no dispute in the medical evidence that he died as a result of blood loss due to his liver being torn. The injury required severe blunt force that could have occurred as a result of the application of a compressive force when Mulrunji was against a hard surface.
>
> Senior Sergeant Hurley has given evidence in chief as required by this court No cross examination or questions from his counsel has occurred yet. The evidence in chief from Senior Sergeant Hurley is that when he removed Mulrunji from the police vehicle at the back of the watch house cells, Mulrunji punched him to the face. That evidence was confirmed by Penny Sibley who was standing at the back of the police van at the rear of the police garage area.
>
> Senior Sergeant Hurley's evidence was that then a "tussle" occurred between the two men while Hurley was trying to get him to the police station door and Mulrunji was resisting. This resulted in the two of them falling through the back door of the police station onto the lino covered cement floor. Hurley's statement to investigating officers is that they fell apart from each other and landed separately on the floor. However, after he became aware of the medical evidence he considered that the only explanation of Mulrunji's injuries was that he must have fallen onto Mulrunji in the course of the fall. He rejected the alternative possibility raised by counsel insisting that he had deliberately struck some blow of very forceful nature that has caused the injury and death."

[8] The cause of death was a badly ruptured liver. The most likely cause of the rupture was a compression injury caused by severe force being applied over a confined area whilst the body was supported by a hard flat surface. The deceased had four broken ribs and the evidence of the pathologist who conducted an autopsy of the deceased's body was to the effect that the force necessary to cause the injury could only have been conveyed by some part of the applicant's body, such as a knee or elbow, being applied to a confined space over the ribs whilst the deceased's body was immobilised by the fall.[1]

[9] On the basis of the evidence placed before the Coroner thus far, none of the parties to these applications demurs from the proposition advanced by counsel for one of the parties that the death of the deceased was either caused accidentally by collision

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1 Transcript 625, lines 1-30.

between the applicant and the deceased or by the application of deliberate force by the applicant to the deceased.

Evidence the subject of both applications

[10] Mr Cannon alleges that in about July 2004 he was picked up by Senior Sergeant Hurley, put in the police wagon, taken to the police station and locked in a cell by himself. He kicked the door and called out asking for a mattress. Senior Sergeant Hurley told him to stay quiet for 30 minutes. He did and after that time elapsed he kicked the door again and called out, upon which Senior Sergeant Hurley came in "grabbed (him) by the throat, and squeezed (his) throat. He then kneed (him) once in the stomach. It did not leave a bruise, it just winded me. He kept squeezing my throat, he squeezed so hard that I wet myself."

[11] My Clay says that, on a date in about September 2004, when drunk, he went to the Police Station where he met and started interrogating Senior Sergeant Hurley and another police officer. He was "being pretty difficult". After two or three minutes Senior Sergeant Hurley got up from sitting down and punched him four or five times in the head and body. He was knocked to the ground and dragged into a cell by another police officer. Senior Sergeant Hurley called out abuse whilst this was happening. Earlier, on arrival at the police station, he had urinated on one of the wheels of a police car. It appears that that was either observed by, or made known to, Senior Sergeant Hurley as he commented on it when Mr Clay was leaving the police station.

Evidence the subject of the Hurley application only

[12] An Aboriginal man identified as "D" alleges that he was unlawfully arrested by Senior Sergeant Hurley who, in the course of the arrest, "unlawfully assaulted him by twisting his right arm behind his back." D was charged with assaulting police officers and the complaint against Senior Sergeant Hurley has not been investigated thus far. The reason advanced for this is that the circumstances giving rise to the complaint are substantially the same as those giving rise to a criminal charge against D. It was considered by the responsible body that the Court proceedings may be the appropriate forum for determination of the merits of the complaint.

[13] A police report of the incident asserts that Senior Sergeant Hurley attended at a house in which D resided in order to assist a female member of the community obtain her property. D became abusive and threatened Senior Sergeant Hurley who then arrested him and placed him in a restraining hold. D broke loose, continued to abuse Senior Sergeant Hurley and threw a large piece of wood and a piece of rock or cement at another police officer who had arrived by this time.

[14] Barbara Pilot gave a statement to the following effect. Two police officers, one of whom was Senior Sergeant Hurley, arrived at her brother's residence one evening in response to a call made to them from the residence. The residents of the house had all consumed a substantial quantity of alcohol. The police officers placed Ms Pilot's de facto husband into the police vehicle. Driven by Senior Sergeant Hurley, the vehicle went forward a little and then reversed back with the result that its back wheel spun on Ms Pilot's foot. Senior Sergeant Hurley told her to get up and go inside. Her foot was so badly hurt that the bone was sticking out through the skin. She was taken to hospital, stayed that night and was then taken to Townsville Hospital where plaster was placed on her foot.

[15] The incident was the subject of a police investigation by Detective Sergeant Robinson, the officer in charge of the Palm Island Criminal Investigation Branch. He found no evidence that the injury to Ms Pilot's foot was caused by police and he regarded the statements by Ms Pilot about it as "fictitious". The investigation was "overviewed by Inspector S Holahan Ethical Standards Command" who on 20 October 2004 reported that no further action was required.

The circumstances giving rise to the Ruling

[16] Counsel assisting the Coroner drew up a list of potential issues to be addressed by the Coroner. He submitted that the Propensity Evidence was irrelevant to the findings to be made by the Coroner under section 45 of the Act. He intimated also that he did not propose to lead such evidence in relation to any comments the Coroner may wish to make under s 46 of the Act. Respondents to the Hurley application, including the second and fifth respondents, sought to have the scope of the inquiry expanded. It was submitted that the Propensity Evidence was relevant to the s 45 determination and that this evidence, as well as the evidence of Pilot, was relevant to the Coroner's comment-making power or role under s 46.

[17] A hearing was then held in which the Coroner received submissions on whether the subject evidence was admissible for purposes of her determination under s 45, her comment-making role under s 46 or for both or neither of such purposes. It seems that this course was thought necessary because of the Coroner's decision to split the hearing by making a finding under s 45 and then proceeding to hear further evidence with a view to making comments under s 46.

[18] The wide ambit of the evidence relevant to the s 45 inquiry and the ancillary nature of the comment-making power under s 46 ensured the likelihood of extensive overlapping of the evidence relevant to the Coroner's roles under each of these sections. If the inquiry had proceeded without the evidentiary hearing and the consequent ruling, evidence received by the Coroner as relevant for the purposes of s 46, but initially thought by her to be irrelevant to her s 45 determination, could have been used by her for s 45 purposes if, for example, upon further consideration, the significance of a particular piece of evidence was noticed for the first time. By compartmentalising the inquiry, the Coroner deprived herself of this flexibility, at least without first informing interested parties of the change in her position and, perhaps, affording them a further opportunity to be heard. It is also difficult to resist the conclusion that the making of formal rulings on the admissibility of evidence was tantamount to an invitation to the parties to these proceedings to challenge the rulings.

The Ruling challenged in the Doomadgee/Aplin application

[19] The Coroner held:

> "The application to admit previous complaint history against Senior Sergeant Hurley in the context of section 45 findings is declined."

[20] Her Honour explained in paragraph 20 of the Reasons that she had direct evidence from persons present concerning the circumstances surrounding the death of the deceased. In addition to that, there was a video recording of what happened inside the deceased's cell and medical evidence. In the light of that evidence she was not "persuaded that it would be helpful to consider what might have happened on other occasions in considering whether accident has played a part in what happened".

[21] In paragraph 19 of the Reasons, after referring to the existence of direct evidence of the events leading up to the deceased's death, she said:

> "There is additional evidence around this incident from others who were there at the time. This is sufficient for the court to make findings without reference to allegations of previous incidents. I consider that the significance of any findings of fact is so important that I should adopt a more restrictive view of considering extraneous material beyond the scope of direct evidence. The primary focus will be on examining accounts and deciding what happened based on direct sources of information about the event itself."

[22] Paragraph 17 of the Reasons, which was the primary focus of the respondent's challenge, states:

> "It is not an issue for this inquest to determine whether or not Senior Sergeant Hurley has assaulted anyone in the course of his duties at any other time. This inquest must determine what happened on 19 November 2004. *If the previous complaint evidence was to be admitted, and if I was satisfied that Hurley had assaulted other people in the course of, or after arresting them on Palm Island and placing them in the watch house, I do not see how I could draw upon that conclusion to determine what happened when Mulrunji was arrested and placed into custody. Although the rules of evidence do not apply it would be impermissible in my view to admit the evidence of some other alleged assault for the purposes of drawing an inference about what occurred concerning Senior Sergeant Hurley and Mulrunji.*" (emphasis added)

Senior Sergeant Hurley's contentions in relation to the ruling that the Propensity Evidence and the evidence of Ms Pilot are admissible for s 46 purposes.

[23] In their written outline of argument counsel for Senior Sergeant Hurley contended that the Coroner erred in failing to give consideration to the requirement of s 46 that the comment must be in relation to "anything connected with the death". It was submitted that the subject evidence could not meet that description. In that regard, support was sought to be gained from submissions made to the Coroner by Senior Counsel assisting. He submitted, in effect, that if the death was accidental it resulted from Senior Sergeant Hurley and the deceased falling as they entered the police station. Any comments that might be made about how police are to control alleged offenders during a struggle whilst entering a police station "seem unlikely to be of any real benefit". On the other hand, if the death resulted from a deliberate application of force arising from provocative conduct by the deceased, there would be no scope for comments under s 46 either.

[24] Attention was drawn to the following comments of Nathan J in *Harmsworth v The State Coroner*:[2]

> "The power to comment, arises as a consequence of the obligation to make findings: see s19(2). It is not free-ranging. It must be comment 'on any matter connected with the death'. The powers to comment and also to make recommendations pursuant to s 21(2) are

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2 [1989] VR 989 at 986.

> inextricably connected with, but not independent of, the power to inquire into a death or fire for the purposes of making findings. They are not separate or distinct sources of power enabling a coroner to enquire for the sole or dominant reason of making comment or recommendation. It arises as a consequence of the exercise of the coroner's prime function, that is to make 'findings'."

[25] In oral submissions, it was contended that any comment under s 46 must be in connection with the death under investigation and must fulfil the purpose or objects of the Act, namely, the prevention of deaths from similar causes. The cause of death delineates the scope of the comment that may be made. That being so, in this case the comment, depending on the Coroner's finding, would be confined to helping to prevent deaths from similar accidents "or the same causes or similar causes of that accident" or, in the case of deaths by the deliberate application of force, deaths arising in such circumstances. Consequently, if it is held that the evidence is not relevant to determining the cause of death for the purposes of s 45, it cannot be relevant for the purpose of commenting with a view to helping to prevent deaths from similar causes. A further argument advanced was that, generally for the reasons just stated, matters occurring after the death could not be relevant.

[26] The argument seeks to draw support from s 3 of the *Coroners Act* 2003 (Qld), which states the objects of the Act, one of which is:

> "(d) help to prevent deaths from similar causes happening in the future by allowing coroners at inquests to comment on matters connected with deaths, including matters related to—
>
> (i) public health or safety; or
>
> (ii) the administration of justice."

Sections 45 and 46 of the Act

[27] The statutory provisions at the centre of the subject debate are:

> "**45 Coroner's findings**
>
> (1) A coroner who is investigating a suspected death must, if possible, find whether or not a death in fact happened.
>
> (2) A coroner who is investigating a death or suspected death must, if possible, find—
>
> (a) who the deceased person is; and
>
> (b) how the person died; and
>
> (c) when the person died; and
>
> (d) where the person died, and in particular whether the person died in Queensland; and
>
> (e) what caused the person to die.
>
> …
>
> (5) The coroner must not include in the findings any statement that a person is, or may be –
>
> (a) guilty of an offence; or
>
> (b) civilly liable for something.
>
> (6) This section applies whether or not an inquest is held.
>
> **46 Coroner's comments**
>
> (1) A coroner may, whenever appropriate, comment on anything connected with a death investigated at an inquest that relates to –

(a) public health or safety; or
(b) the administration of justice; or
(c) ways to prevent deaths from happening in similar circumstances in the future.

(2) The coroner must give a written copy of the comments to –
(a) a family member of the deceased person who has indicated that he or she will accept the document for the deceased person's family; and
(b) any person who, as a person with a sufficient interest in the inquest, appeared at the inquest; and
(c) if the coroner is not the State Coroner – the State Coroner; and
(d) if a government entity deals with the matters to which the comment relates –
(i) the Minister administering the entity; and
(ii) the chief executive officer of the entity; and
(e) if the comments relate to the death of a child – the children's commissioner.

(3) The coroner must not include in the comments any statement that a person is, or may be –
(a) guilty of an offence; or
(b) civilly liable for something.

Conclusions on Senior Sergeant Hurley's application

[28] The scope of the inquiry under s 45 is extensive and is not confined to evidence directly relevant to the matters listed in s 45(2).[3] The coroner's role under s 46 is ancillary to the role under s 45.

[29] Section 46(1) does not make coroners roving Royal Commissioners empowered to make findings and recommendations in respect of the matters described in paragraphs (a), (b) and (c) of s 46. Comment under s 46(1) must be on a thing "**connected with**" the **death** under investigation and that thing must "**relate to"** public health or safety, the administration of justice or "ways to prevent deaths from happening in similar circumstances in the future" (emphasis added). There is no justification, however, for construing s 46(1), by reference to s 3(d), as if it contained the qualification that any comment be directed to the prevention of deaths from causes similar to that of the accident. Section 46(1) is clear and unambiguous. It contains no such limitation and is consistent with the purpose expressed in s 3(d). Section 14A of the *Acts Interpretation Act* 1954 (Qld) does not enable a court to rewrite an Act in light of its purposes instead of construing it.[4]

[30] The expressions "connected with" and "relates to" are of wide import and connote a connection or relationship between one thing and another. The closeness of the connection or relationship is to be "ascertained by reference to the nature and purpose of the provision in question and the context in which it appears".[5] The

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3 *Atkinson v Morrow* [2005] QSC 092 and *Queensland Fire & Rescue Authority v Fall* [1998] 2 Qd R 162 at 170.

4 *Mills v Meeking* (1990) 169 CLR 214 at 234, 235.

5 cf *PMT Partners Pty Limited (in Liquidation) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313.

expressions are "capable of including matters occurring prior to as well as subsequent to or consequent upon" as long as a relevant relationship exists.[6]

[31] The purpose of s 46(1)(c) is self-explanatory. The purpose of the other two paragraphs of the subsection is to empower the Coroner to address the topics specified in them with a view to exposing some failing, deficiency or wrong and/or suggesting measures which may be implemented for the public benefit. Section 46(1), being remedial in nature, should be construed liberally.[7]

[32] "Public health or safety" and "the administration of justice" are also broad subject matters with indefinite boundaries. I have difficulty in seeing why they are not sufficiently broad to permit comment on matters such as the handling by police officers of drunken and abusive prisoners in and about police stations or watch houses, appropriateness of training or lack thereof of police officers in the handling of such persons, including the control of emotional responses and procedures which could be adopted for investigation of incidents in such circumstances. Appropriate investigative processes are capable of playing a role in allaying suspicions of the deceased's family and maintaining public confidence in State institutions. Any such investigative process may relate to the administration of justice.

[33] Any matter on which comment is made, as well as having the requisite relationship, must be connected with the death under investigation. But, as counsel for the Attorney-General pointed out in the course of their submissions, there is no warrant for reading "connected with" as meaning only "directly connected with". Something connected with a death may be as diverse as the breakdown of a video surveillance system, the reporting of the death, a police investigation into the circumstances surrounding the death, and practices at the police station or watch house concerned.

[34] Although the submissions of some of the parties dwelt at considerable length on the Guidelines issued by the State Coroner under s 14 of the Act, I do not find it necessary to consult them for present purposes. The powers of a coroner under s 45 and s 46 cannot be increased or decreased by any such guidelines.

[35] It is significant also that the rules of evidence do not bind a coroner's court and that it may inform itself in any way it considers appropriate.[8] That does not mean that there are no constraints at all on coroners in relation to the gathering of evidence. The evidence relied on by the Coroner must be relevant to the matters within the scope of the coronial inquiry. The Coroner may act "on any material which is logically probative";[9] that is, "the decision must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant."[10]

[36] The scope and indefinite boundaries of a coroner's roles under sections 45 and 46, generally make it inappropriate to interfere with the gathering of evidence by a coroner, at least where the exercise on which the Coroner is engaged is within the

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6 See *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239 at 280.

7 cf. *PMT Partners Pty Limited (in Liquidation) v Australian National Parks and Wildlife Service* at 313.

8 *Coroner's Act* 2003 (Qld) s 37.

9 *T A Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992 at 995.

10 *R v Deputy Industrial Injuries Commission; Ex parte Moore* [1965] 1 QB 456 at 488 and see *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 492.

ambit of either of s 45 or s 46. Normally, it will be inappropriate also to seek from a coroner a ruling that one piece of evidence or another is inadmissible or irrelevant as if the coroner were conducting a civil or criminal trial. Questions of judgment which require the exercise of commonsense and restraint are involved and reasonable minds may well differ as to what evidence ought be received. Although the Coroner is under pressure to take a broad view of her role under s 46 and has made intimations which suggest that she may be so inclined, paragraph 21 of the Ruling makes it plain that she is conscious of the limitations inherent in the section.

[37] Of relevance to any challenge to a coroner's evidentiary rulings is the reluctance of courts to interfere in the processes of tribunals or similar bodies exercising statutory powers, particularly where the challenge is in respect of evidentiary or procedural matters.[11] In *Cain v Glass (No 2)*, Kirby P explained the reason for this approach as follows:

> "The reasons include: (1) the undesirability of discontinuity, disruption or delay in committal proceedings; (2) the superior knowledge of the committing magistrate concerning the whole facts and circumstances of the case under his consideration; (3) the undesirability of the beneficial remedies of declaration or the prerogative writs being issued to justify transfer to the superior courts of matters committed by law to the magistracy; (4) the cost, much of it borne by the public purse, of proliferating litigation, especially at an interlocutory stage, which diverts attention from the real substance of the accusations brought and concentrates instead upon peripheral and often procedural matters …"

[38] Such considerations have particular application where, as is the case here, the rulings are of an interlocutory nature and can be departed from by the Coroner.

[39] The application under consideration can be disposed of, however, without invoking those principles. I detect no error in that part of the Reasons under challenge in this application. The subject evidence may be relevant to comments the Coroner may make under s 46. As earlier discussion indicates, it has not been shown to lack relevance and the Coroner has power to receive the evidence in the exercise of her discretion. The application will be dismissed.

The applicants' submissions on the Doomadgee/Aplin application concerning the evidence of Cannon and Clay

[40] The argument of the applicants, in substance, is as follows. The evidence in question discloses a propensity on the part of Senior Sergeant Hurley to use violence in order to subdue indigenous arrestees. If the laws of evidence did apply, such evidence would be admissible as propensity evidence. But even if it were inadmissible in criminal proceedings, it would not follow that it was not relevant to the Coroner's determination. In *Harriman v The Queen*[12] Dawson J said:

> "When a person is charged with a criminal offence, evidence is ordinarily inadmissible that he has on other occasions been guilty of

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11 *Walker v Corporate Affairs Commission* (1988) 13 NSWLR 550 at 556-557; *Coco v Shaw* [1994] 1 Qd R 469 at 485 and *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 235.

12 (1981) 167 CLR 590 at 597.

> behaviour indicating a criminal disposition. This is not because the evidence is irrelevant. On the contrary, it is excluded because a jury is likely to regard it as proving too much …"

[41] The assertion in the Reasons that the Coroner could not "draw upon that conclusion [i.e. that Hurley had assaulted other persons in the course of or after arresting them on Palm Island and placing them in the watch house] to determine what happened when Mulrinji was arrested and placed into custody" is explicable only on the basis that the Coroner has overlooked the possibility that such evidence may establish a relevant propensity. The decision not to hear the evidence was one so unreasonable that no decision-maker could have made it.

[42] The conclusion in paragraph 17 of the Reasons that "…it would be impermissible … to admit [the Propensity Evidence] for the purposes of drawing [a relevant inference]" reveals an error of law. She has imposed, erroneously, a limit on her powers not to be found in the Act.

The submissions on behalf of Senior Sergeant Hurley and the Attorney-General

[43] It is argued on behalf of the Attorney-General that no error is disclosed in the Reasons. In paragraph 19 the Coroner was prepared to assume that the evidence of other assaults would be accepted.

> "She then asked how that evidence would assist in making findings about how Mulrunji died and what caused him to die, and concluded that the evidence would not permissibly support an inference about what occurred between Hurley and Mulrunji.
> That conclusion was correct."

[44] It is further submitted that in the ruling,

> "The cogency of the evidence was assumed … But that evidence did not support an inference that Hurley behaved violently towards Mulrunji. It is at best productive of speculation or suspicion, and is not probative of what occurred on 19 November 2004: see *Sutton v R* (1984) 152 CLR 528 at 557 per Deane J and *Hollingham v Head* (1958) 4 CB (NS) 388 at 391-392.
> It is further contended that the evidence of disposition is of no probative assistance in assessing the evidence of direct observations of what occurred."

[45] Counsel for Senior Sergeant Hurley canvassed, at some length, the authorities relating to propensity evidence. Reference was made to the observation of Thomas JA in *R v O'Keefe*[13] that "propensity evidence can never of itself prove the facts in issue. It is always ancillary to other proof". It was then submitted that the only purpose in seeking to have the evidence admitted was to support the hypothesis that death had been caused by deliberate application of force but s 45(5) prohibits the Coroner from including in any finding any statement that a person may be guilty of an offence". It was further submitted that the Propensity Evidence would prove, if accepted:

> "nothing more than Senior Sergeant Hurley had a natural human reaction to react in a violent way to provocation, insults, assaults or

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13 [2001] 1 Qd R 564 at 571.

> even annoyance, even though such reaction may constitute a criminal offence. The …Coroner was in a position from direct evidence to reach such a conclusion without any consideration at all of any propensity or similar fact evidence."

[46] The use of the word "impermissible" is explained as,

> "understandable in the context that the … Coroner was dealing with a similar fact or propensity evidence which is evidence is ordinarily led by the Prosecution to prove the guilt of an accused. The … Coroner was not conducting a criminal trial and was not concerned with, and was indeed specifically prohibited from, making any [such] finding …".

Consideration of the Doomadgee/Aplin application

[47] In considering the challenge to the Reasons I am mindful that they "are not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.[14]

[48] In paragraph 1 of the Reasons, the Coroner identifies her task as being "to consider the admissibility and if so, for what purpose of certain material".

[49] In paragraph 2 of the Reasons she acknowledges that "the Coroners Court is not bound by the rules of evidence". The same acknowledgement is made in paragraph 17 immediately before it is concluded that "it would be impermissible … to admit the evidence of some other alleged assault for the purposes of drawing an inference about what occurred". In the preceding sentence she had said "I do not see how I could draw on that conclusion to determine what happened when Mulrinji was arrested and placed into custody.

[50] It may well be the case that when the totality of the evidence available to the Coroner is considered she will find the Propensity Evidence of little or no weight in comparison with the eyewitness accounts and other more direct evidence. But that does not produce the result that it would be "impermissible" to admit the Propensity Evidence. The rules of evidence do not apply and the discussion in the authorities concerning the admissibility of propensity evidence in criminal trial is thus of little benefit except insofar as it identifies the probative limitations of such evidence and the care which must be employed in its use.

[51] The Propensity Evidence, if accepted, is "logically probative" of the fact or one of the facts in issue.[15] It is thus relevant and potentially available for use by the Coroner together with all the other evidence before her. Consequently, the conclusion that it is "impermissible" to receive that evidence for the purpose of s 45 is erroneous. The Coroner proposes to receive the evidence anyway for s 46 purposes.

[52] It does not follow from this conclusion that the Coroner is obliged to admit the Propensity Evidence and rule on its merits in order to make her determination under

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14 *Minister for Immigration and Ethnic Affairs v Wu Shan Lung* [1996] 185 CR 259 at 272.

15 See *Harriman v The Queen* (1981) 167 CLR 590 at 597; *Pfennig v The Queen* (1995) 182 CLR 461 at 487-488 and 531, 532; *KRM v The Queen* (2000) 206 CLR 221 at 228-232 and *R v O'Keefe* [2000] 1 Qd R 564 at 571.

s 45. "A coroner's court may inform itself in any way it considers appropriate".[16] A coroner's discretion as to what evidence ought be obtained and by what means requires the exercise of commonsense and judgment. Even though some potential evidence might be regarded by a coroner as relevant, he or she is not bound to attempt to procure it regardless of its probative value or of the cost of or time spent in obtaining it. The resources of all tribunals are finite and the public interest often will be better served by the expeditious and economical dispatch of business than by the undiscriminating pursuit of evidence which the tribunal regards as having no reasonable likelihood of influencing the outcome of the hearing. The Reasons reveal that the Coroner has concluded that, in view of the direct evidence available to her of the events at the watch house, and what is described in paragraph 19 of the Reasons as the "additional evidence", the probative value of the Propensity Evidence is marginal, at best. Nothing drawn to my attention casts doubt on the correctness of that view.

[53] I now turn to the Coroner's conclusion that because of "the significance of any finding of fact is so important" she should "adopt a more restrictive view of considering extraneous material beyond the scope of direct evidence". Logically, relevance and admissibility cannot be decided by reference to the consequences of a possible finding. Nor does the application of logic or any principle of law suggest that the extent of the evidence to which regard may be had in order to make a determination is affected by the significance of the fact to be found. Within the limits just discussed, regard should be had to all relevant available evidence even if only to conclude, in respect of some of it, that no benefit can be gained from its use or that, in comparison with other evidence, it has little, if any, probative value.

[54] It was suggested in argument that the passage under consideration may be directed to the principle stated in *Briginshaw v Briginshaw*.[17] If so, an erroneous principle was applied as what is generally known as the *Briginshaw* test or principle is concerned with the standard of proof not the admissibility of evidence.

[55] In summary:

(a) The Coroner has applied erroneous principles in deciding to exclude the Propensity Evidence from consideration in the hearing pursuant to s 45;

(b) The Propensity Evidence is relevant and logically probative of a fact to be determined, namely whether the death was caused by the deliberate application of force. It is not "inadmissible" and it is not "impermissible" for the Coroner to receive it;

(c) The Coroner is not required by any legal principle to determine the merits of the allegations made in the Propensity Evidence for the purposes of her s 45 determination. If in the exercise of her judgment and discretion she does consider the merits of those allegations, the weight she attributes to the matters found by her is a matter for her judgment;

(d) No doubt has been cast on the soundness of the Coroner's appreciation that the quality of the direct evidence and "additional evidence" available to her renders pursuit of the Propensity Evidence unnecessary for the purposes of her s 45 determination.

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16 *Coroners Act* 2003 (Qld), s 37.

17 (1938) 60 CLR 336.

[56] Having regard to these conclusions, and bearing in mind the principles set out in the passage quoted earlier from the reasons of Kirby J in *Cain v Glass*, I do not propose to make any order on this application except as to costs. The Coroner and those appearing on the inquest will have the benefit of these findings when the hearing resumes. I note that it was argued on behalf of Ms Kyle that Senior Sergeant Hurley had no standing to appear on the Doomadgee/Aplin application. The point has no practical consequence and I do not regard it as meritorious. If the Propensity Evidence and other evidence in relation to Senior Sergeant Hurley's conduct are to be pursued by the Coroner, her findings will have the potential to affect his interests adversely.