Neutral Citation No. [2011] NICA 34 | *Ref:* **HIG8192**

Judgment: approved by the Court for handing down | *Delivered:* **10/6/2011**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

DUNCAN McLUCKIE

Appellant;

-and-

THE CORONER FOR NORTHERN IRELAND

Respondent.

Before: Higgins LJ, Girvan LJ and Sir John Sheil

Higgins LJ (giving the judgment of the Court)

[1] This is an appeal from the decision of Treacy J dismissing the appellant's application for judicial review of a decision of the Coroner, Mr J Leckey (the Coroner), whereby he refused the appellant's application for an order under Section 4(2) of the Contempt of Court Act 1981 postponing media reporting of inquest proceedings before the Coroner.

[2] The appellant is a former member of the Royal Signals. In May 1972 he was a Signalman on a tour of duty with his regiment in Northern Ireland, based at 3 Brigade Headquarters in Lurgan. On 17 May 1972 he was part of a group of regular soldiers and members of the Ulster Defence Regiment (UDR) engaged in an exercise involving a simulated terrorist attack. As the exercise was taking place near the border the soldiers were issued with live rounds in addition to the blank rounds to be used in the exercise. No Blank Firing Attachments were issued. These attachments prevent a live round exiting the barrel of a rifle, if the rifle is fired with live rounds loaded. In the course of the exercise the appellant fired a live round which struck WO II Bernard Adamson of the UDR (the deceased, otherwise referred to as Company Sergeant Major or Sergeant Major Adamson). The deceased was struck in the hand but the round passed through his hand and into the lower chest causing serious internal injuries from which he later died in hospital. Police and military investigations commenced. The appellant has maintained that he never intended to fire a live round at the deceased. No criminal

charges were brought against the appellant but he was convicted of negligent handling of a weapon contrary to Section 69 of the Army Act 1955 and fined. An Inquest was conducted in Belfast on 18 December 1972 and the jury returned an 'Open' verdict.

[3] On 7 November 2007 the Attorney General, following application by the family of the deceased, exercised her powers under Section 14 of the Coroner's Act (Northern Ireland) 1959 and ordered an Inquest to be conducted into the death of the deceased. This decision was communicated to the Coroner on the same date who subsequently directed enquiries and documents. It is important to note that no reason was given by the Attorney General for this decision nor has one emerged since her decision.

[4] On 28 September 2008 an Acting Detective Inspector of the Police Service of Northern Ireland (PSNI) sent a report to the Coroner accompanied by statements, together with the original police and military reports and statements. The PSNI Report identified various witnesses who were at the scene of the exercise in May 1972 and indicated whether they were still alive and their availability to attend the Inquest. The appellant is referred to at page 4 with the comment –

> "Currently serving Life Sentence at HMP Frankland for unrelated offence. Has to date refused to co-operate with Police (Copy statements RUC/RMP available)."

[5] The statement that the appellant had refused to co-operate is quite inaccurate. On 20 May 2008 officers of the PSNI arrived at HMP Frankland, apparently without notice, and requested to speak to the appellant. A Senior Prison Officer spoke to the appellant in the presence of a Deputy Governor and informed him that representatives of the Northern Ireland Coroner's Office (in fact PSNI officers) had requested to speak to him about various matters. The appellant refused to speak to them 'due to lack of legal representation'. In a handwritten document signed by the appellant the PSNI officers were asked to 'please contact' his solicitors whose name and address and telephone numbers (office and mobile) were written on the document. Far from being unco-operative the appellant was facilitating a future meeting.

[6] A Preliminary Hearing took place before the Coroner in September or October 2009. The appellant was neither present nor represented. In all probability he was not notified of this hearing. It is clear that it was disclosed in open court that the appellant was serving a life sentence for murder and that he was refusing to co-operate with the Coroner. These statements emanated from the Report to the Coroner referred to above. Counsel on

behalf of the deceased's family is reported as having commented – 'that he [that is, the appellant] is thumbing his nose at this enquiry' (sic). Needless to say this exchange attracted considerable publication by way of newspaper articles and news reports which was not corrected.

[7] The appellant's solicitors in London contacted his present solicitors in Northern Ireland and arranged for them to represent the appellant at the Inquest. At a subsequent Preliminary Hearing the Coroner was advised that the appellant was willing to cooperate with the Inquest. Further Preliminary Hearings took place and finally, after the resolution of issues relating to Legal Aid, the Inquest was scheduled to take place on 22 November 2010. Arrangements were made for the appellant to give evidence by video link and to consult with his legal representatives in the days before the hearing date. For technical reasons connected with the video equipment the consultation did not take place. On 22 November a jury was sworn and sent away until 2pm, apparently to enable the appellant to consult with his legal representatives. A partial consultation took place which was interrupted by further technical difficulties with the video link. Eventually the jury was sent away until the following day. In the absence of the jury counsel on behalf of the appellant made various legal submissions to the Coroner. These included that the appellant's conviction for murder in 1989 and that he was giving evidence by way of a video link from HMP Frankland were irrelevant for the purposes of the Inquest and should not be referred to and that the Coroner, in order to preserve the integrity of the jury, should make an order under Section 4(2) of the Contempt of Court Act 1981 postponing any publication of the proceedings until the jury had arrived at its verdict. It was readily agreed by the Coroner and the other parties that his conviction for murder in 1989 was irrelevant. However the Coroner was concerned that the jury would become aware that he was giving evidence while he was a prisoner and/or from a prison. Miss Quinlivan then applied for an order under Section 4(2) (referred to as a Restricted Reporting Order) postponing publication, until after the inquest jury had returned its verdict, of the fact that the appellant had been convicted of murder and that he was in HMP Frankland. The Coroner responded "That has already been reported". There then followed a discussion about whether the Coroner had power to make such an order and he was referred to Section 4(2). Counsel on behalf of the family then suggested that in other proceedings representatives of the media are asked if they wish to make representations about the making of such an order. This in turn led to representations being made by journalists from BBC News and the Press Association who were present at the preliminary hearing. They indicated that they would have to consult their lawyers and as a result the case was adjourned. The following morning, 23 November 2010, written submissions were produced by representatives of the media for the Coroner's consideration (I shall refer to these later in this judgment) and Miss Quinlivan's application for an order under Section 4(2) proceeded. Following a short adjournment the Coroner made a ruling refusing the application

having taken into account the submissions made by counsel and the media. Having given the ruling the Coroner then inquired whether there would be any further proceedings elsewhere arising out of his ruling. Miss Quinlivan responded that proceedings would be brought to judicially review the Coroner's decision. This led to a discussion about what to do about the Inquest when the jury had been sworn, witnesses had come from America and others were present who had long since retired from their previous occupations. The Inquest was adjourned to the following day, 24 November 2010. In the meantime that afternoon an emergency application by the appellant for leave to bring judicial review proceedings was brought before Treacy J. It was agreed between the parties that the application for leave be treated as the full hearing (referred to as a 'rolled-up' hearing). Treacy J gave his ruling (refusing the application) the following morning and the Inquest resumed shortly after 11am. The Coroner was informed of the judge's ruling. Miss Quinlivan stated that she wished to consider whether to appeal the judge's ruling but would need some time to consider the situation. The Coroner was understandably concerned at this and commented that this matter could have been raised at one of the earlier preliminary hearings. Counsel for the family said that his clients, some of whom had travelled from America, were very upset at this development. Ultimately the Coroner decided that there was no alternative but to discharge the jury and set a new date for the Inquest. That such an adjournment should happen some three years after the Attorney General had directed that an Inquest be held, with witnesses summoned out of retirement and from overseas was, to say the least, most unfortunate. We shall have more to say on this subject later in this judgment.

[8] I turn now to consider the ruling of the Coroner. He began by stating that he had been asked to make an order pursuant to section 4(2) of the Contempt of Court Act 1981 forbidding the media from publishing any information relating to [the appellant] being a prisoner in HMP Frankland, until after the conclusion of the Inquest. He referred to arrangements having been made for him to give his evidence by video link from HMP Frankland. He then commented on his own experience of prisoners giving evidence namely, being brought into court in handcuffs by prison officers, the handcuffs being removed when the relevant witness steps into the witness box and the prison officers remaining in close proximity. He stated that "everyone present in court would be aware that the witness is a prisoner". He then gave the following reasons for ruling against the application –

> "1. I am satisfied that the media reporting that Duncan McLuckie is a prisoner would not give rise to a substantial risk of prejudice to the administration of justice.

2. A witness who is physically present in court should be treated no differently from one giving evidence via video-link. The reasons for my deciding to receive Duncan McLuckie's evidence via video-link were (a) the cost to the public purse involved in bringing him from HMP Frankland to Belfast and (b) security considerations associated with him being a Category A prisoner.

3. The threshold that must be met before I may make an order pursuant to section 4(2) is that otherwise there would be a substantial risk of prejudice to the administration of justice in the inquest proceedings. That is a high threshold and I have concluded that it has not been met. I am satisfied that any possible risk of jury prejudice can be overcome by me and Mr Daly, who is counsel to the inquest, addressing the jury on the issue. It would be important that the jury is made aware that the offence for which Duncan McLuckie is presently in prison is totally unconnected with the death of Sergeant Adamson.

4. The fact that Duncan McLuckie is a prisoner in HMP Frankland and is scheduled to be a witness at this inquest is already in the public domain. It has been widely reported in the media. Courts have no power under section 4(2) to prevent publication of material already in the public domain. (See paragraph 4.5 of the second edition of the guide to Reporting Restrictions in the Criminal Courts, October 2009.) Whilst no authority statute or caselaw, is cited in support of this statement I attach considerable weight to a document that carries the imprimatur of the Judicial Studies Board and the Rt Hon Lord Judge, Lord Chief Justice of England and Wales. That being so, I have concluded that, in any event, it would not be appropriate for me to make any order pursuant to that section.

5. The same paragraph of the Reporting Restrictions in the Criminal Courts guide refers to a judge having a discretion and the importance of balancing the competing public interests between protecting the administration of justice and ensuring open justice and the fullest possible reporting of

> criminal trials. Those principles can be applied equally to coroners' inquests. I have adhered to that guidance."

[9] The Coroner added that this application was not made until yesterday afternoon, which was the scheduled opening day of this inquest, and after the jury was sworn in. It was made without any prior notice having been given. He said that Duncan McLuckie's legal representatives had ample time to consider this issue in advance of the opening of the inquest and to ask for it to be addressed at one of the hearings dealing with preliminary matters.

[10] Treacy J had before him the written ruling of the Coroner. At paragraph 2 of his judgment he repeated what the Coroner had stated about the nature of the application before him, namely, that it related to the fact that the appellant was a prisoner in HMP Frankland. He then set out the history and the relevant sections of the Act. At paragraph 14 he stated that the 'courts have no power under section 4(2) to prevent publication of material that is already in the public domain'. He stated that publication of such material would be subject to section 2 of the Act and the 'strict liability rule'. At paragraph 15 he referred to the Guidance of the Judicial Studies Board of England and Wales which points out that appellate courts have emphasised that newspapers and broadcasters should be trusted to fulfil their responsibilities to accurately inform the public about court proceedings. At paragraph 16 he stated that whether or not a court has power under section 4(2) to restrict publication of material already in the public domain, the fact that the material is already in the public domain would be a relevant factor in the exercise of the discretion whether to make an order or not. At paragraph 17 he stated that central to the appellant's case was the contention that publication of the appellant's conviction for murder would prejudice the administration of justice, in that it may influence the jury's assessment of the evidence. He commented that such a submission overlooks the safeguards which exist and the robustness and independence of juries and quoted a passage from the decision of Judge LCJ in R v B 2006 EWCA Crim 2692. He concluded that he was not persuaded that the decision by the Coroner in the exercise of his discretion to refuse the Restricted Publication Order should be quashed.

[11] The appellant's grounds of appeal are –

> "1. Inasmuch as he concluded that the Coroner had no power to grant an order under section 4(2) of the Contempt of Court Act 1981, the Learned Trial Judge erred in law.

2. The Learned Trial Judge failed to consider adequately or at all the extent to which media publicity about the Appellant's conviction during the course of the hearing of the Inquest would be likely to prejudice the jury in their consideration of the Appellant's evidence and thereby prejudice the administration of justice.

3. The Learned Trial Judge failed to properly balance the prejudice which would be caused to the administration of justice against the limited departure from the rule of open justice sought by the Appellant in seeking to restrict publicity for the duration of the inquest.

4. The Learned Trial Judge failed to give any or any adequate weight to the fact that the Coroner had concluded that the fact of the Appellant's conviction was not relevant to the inquest proceedings and that none of the Interested Parties were seeking to adduce evidence about the Appellant's conviction.

5. The Learned Trial Judge erred in concluding that the administration of justice did not require that the media not publish information about the Appellant's conviction during the course of the inquest.

6. The Learned Trial Judge failed to give any or any adequate consideration to the fact that the Coroner had erred in law in reaching his decision inasmuch as he reached his decision on the basis that he had no power to make an order under section 4(2) of the Contempt of Court Act 1981 in circumstances where the information which was the subject-matter of the application was already in the public domain.

7. The Learned Trial Judge failed to give any or any adequate weight to the fact that the Coroner had erred in law in giving any weight in reaching his decision to the fact that normally when prisoners give evidence during inquest proceedings they are handcuffed so that the jury will be aware that the witness is a serving prisoner as a matter which justified media reporting of the fact of the Appellant's conviction."

[12] The original application for judicial review sought the following relief-

> "2. The Applicant seeks the following relief:
>
> i) An Order of Certiorari to quash the decision of the Coroner refusing to accede to the Applicant's application for a Restricted Reporting Order under section 4(2) of the Contempt of Court Act 1981 restraining the media from publicising information received by them in the course of the Inquest proceedings about the Applicant's conviction until such time as the jury has reached its verdict in the Inquest into the death of Bernard Adamson.
>
> ii) An Order of Mandamus compelling the Coroner to make a restricted reporting order under section 4(2) of the Contempt of Court Act 1981 restraining the media from publicising information received by them in the course of the Inquest proceedings about the Applicant's conviction until such time as the jury has reached its verdict in the Inquest into the death of Bernard Adamson.
>
> iii) A Declaration that the said decision is unlawful, ultra vires and of no force or effect.
>
> iv) An abridgement of time for service of the Notice of Motion to enable an urgent hearing of this case.
>
> 3. The grounds upon which the said relief is sought are:
>
> (i) That permitting the media to publicise the fact of the Applicant's conviction, information about which was given during the course of the Inquest proceedings into the death of Bernard Adamson, during the hearing of the Inquest has the potential to seriously prejudice the jury hearing the Inquest and thus reporting of that fact should be postponed until, and only until, the jury reaches its verdict.

(ii) That permitting the media to publicise the fact of the Applicant's conviction, information about which was given during the course of the Inquest proceedings into the death of Bernard Adamson, for the duration of the Inquest proceedings is necessary because it poses a substantial risk of prejudice to the administration of justice in the Inquest proceedings inasmuch as it may influence the jury's assessment of evidence abut the events of the 17th May 1972.

(iii) That permitting the media to publicise the fact of the Applicant's conviction, information about which was given during the course of the Inquest proceedings into the death of Bernard Adamson, means the jury are likely to read about the fact of the Applicant's conviction, a matter which the Coroner has accepted is irrelevant, and the prejudicial effect of such material far outweighs its probative value.

(iv) That permitting the media to publicise the fact of the Applicant's conviction, information about which was given during the course of the Inquest proceedings into the death of Bernard Adamson, in circumstances where it is likely that members of the jury will read any articles published about the matter, is unfair to the Applicant and the Coroner has a duty to conduct the Inquest fairly to all parties to the proceedings.

(v) That in permitting the media to publicise the fact of the Applicant's conviction, information about which was given during the course of the Inquest proceedings into the death of Bernard Adamson, the Coroner took into account irrelevant considerations, inasmuch as he had regard to the fact that prisoners sometimes give evidence handcuffed and in a manner which communicates to the jury the fact that the witness is a prisoner.

(vi) That permitting the media to publicise the fact of the Applicant's conviction, information about which was given during the course of the Inquest proceedings into the death of Bernard Adamson, the Coroner failed to conduct an appropriate balancing exercise in that he gave undue weight to the principle of open justice whilst failing to give any or any adequate weight to the risk of prejudice to the Applicant and the fact that the Applicant was seeking a very limited departure from the principle of open justice for a short period of time.

(vii) That s.4(2) of the Contempt of Court Act 1981 must be read in a manner compliant with Convention rights, and in particular Articles 2, 6 of the Convention. The Applicant's Article 6 rights are engaged inasmuch as he is entitled to have the Inquest conducted fairly and in a manner which does not permit of the admission of irrelevant and highly prejudicial evidence which has the capacity to adversely affect the jury and thus impact on any verdict which the jury might reach and in circumstances where any adverse finding of the jury in turn could adversely affect his applications to be released from custody."

[13] It was submitted by Miss Quinlivan, who with Miss Doherty, appeared on behalf of the appellant, that there was a substantial risk of prejudice to the appellant should there be publication by the media during the period of the inquest hearing of the applicant's conviction for murder. That risk could not be overcome by directions to the jury. The situation was analogous to a criminal trial where evidence not given at trial or ruled inadmissible would (or should) not be reported for fear of prejudicing the jury. While the verdicts open to a coroner's jury are limited they can still make findings of facts (Jordan v Lord Chancellor 2007) which could be prejudicial to the appellant, not just at the inquest hearing itself but also at any future parole hearings where his release would be considered. She submitted that the risk of prejudice was clearly illustrated by the argument put forward by the Press Association in its written submission to the Coroner. In the course of his Ruling the Coroner had failed to appreciate and consider the risk and to apply the test laid down in Re MGN Ltd's Application 2011 EWCA Crim 100. She submitted that the Coroner was wrong to decide that he had no power to intervene as the information

relating to his conviction and status was already in the public domain. He should also have taken into account the passage of time since the last media report of the issue and the effect of the passage of time on the public memory (referred to as the 'fade factor'). She further took issue with the views expressed by the Coroner about the manner in which prisoners give evidence, the use and removal of handcuffs in respect of such prisoners and the attendance of prison officers. She submitted that this problem was irrelevant to the main issue for determination by the Coroner which related to the potential infringement of the integrity of the particular Inquest jury. In relation to the judgment of Treacy J she submitted that the learned trial judge had failed to address the deficiencies in the Coroner's ruling and was incorrect to rely on the responsibility of the media not to report irrelevant material when, in the absence of a ruling by the Coroner, they were free to report, as they had done previously, the fact of the appellant's conviction and that he was presently in prison. Miss Quinlivan stressed that the application was for a postponement of any report and not an outright ban on reporting.

[14] Mr Lockhart QC who, with Mr Daly, appeared on behalf of the Respondent submitted that the Coroner had focused on the application before him which related to the appellant, as a prisoner, giving evidence before the jury and how the dangers inherent in that, from the point of view of the jury, might be addressed. In doing so the Coroner had reached a decision which in the circumstances was reasonable and could not be faulted. The situation had been prompted by the fact that the appellant was to give evidence by the video-link and the Coroner was confident that he could deal with that and remove any risk of prejudice, by adopting the approach that he set out in his ruling. In upholding that ruling the Judge could not be criticised for so doing.

[15] The freedom of the media to report court proceedings, which includes inquest proceedings before Coroners, is well recognized and of long standing and is now enshrined in Article 10 of the European Convention on Human Rights and Freedoms. Not unnaturally any encroachment on that freedom is rightly approached with caution by the courts and jealously defended by the media. We have considerable sympathy with the Coroner and indeed the Judge in the manner and circumstances, not least the haste, in which the original application for the postponement order and subsequent application for judicial review, were made. There appears to have been a significant misunderstanding as to the history of the Inquest proceedings and what prompted the application in the first place, and whether it related to his conviction or prisoner status or both. This was the subject of dispute before this court, but the issue was clarified by reference to the transcript of the proceedings on 22 November 2010. At page 176 of the Book of Appeal Miss Quinlivan is clearly recorded as asking for a restricted reporting order that the media do not publish the fact that the appellant was "in HMP Frankland or anything in relation to his criminal convictions" [our emphasis]. The

Coroner responded to that "Well it's already been reported" and "That has already been reported". It is clear that the Coroner was of the opinion that there was nothing he could do about what was already in the public domain. This is confirmed by his ruling which concentrates on how to deal with the fact that the appellant is in prison and would give evidence by video link from that prison in the presence of the jury.

[16] Section 4 of the Contempt of Court Act 1981 (the Act) under the heading 'Contemporary report of court proceedings' provides-

> "4 (1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
>
> (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

[17] Thus by reason of Section 4(1) a person is not guilty of contempt of court if he publishes an accurate and fair report of court proceedings, contemporaneously with the proceedings, and he acts in good faith. Section 4(2) empowers the court to make an order postponing publication of court proceedings if such an order is necessary in order to avoid a substantial risk of prejudice to the administration of justice. Miss Quinlivan's application was made under Section 4(2). The strict liability rule referred to in Section 4(1) is found in Section 1 of the Act and is in these terms –

> "1. In this Act 'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so."

[18] Section 1 permits conduct tending to interfere with the course of justice to be treated as contempt of court regardless of the intent of the actor. By Section 2(2) the rule only applies to a publication which creates a substantial risk that the course of justice will be seriously impeded or prejudiced. Miss Quinlivan submits that publication, during the period of the

Inquest hearing, of the fact that the appellant has been convicted of murder will create a substantial risk that justice will be seriously impeded or prejudiced. In other words that the Inquest jury may learn of the conviction through media reports which include reference to the earlier preliminary hearing and the disclosures made at that hearing.

[19] In MGN Ltd's Applications 2011 EWCA Crim 100 Judge LCJ considered the appropriate test to be applied in an application for a postponement order under Section 4(2) of the Act. The decision arose from an appeal against a ruling of Judge Moss QC prohibiting any reporting of three criminal trials, due to take place at the Central Criminal Court in London, until the conclusion of the third trial. The three trials involved twenty defendants who were on trial in connection with, inter alia, the murder of a 15 year old schoolboy. The Judge was satisfied that accurate reports of the three trials before the conclusion of the third trial would create a substantial risk of prejudice to the administration of justice in those trials, even if the reports were published contemporaneously and in good faith. The effect of the order was a blanket prohibition on reporting any aspect of any of the three trials until the conclusion of the third. In giving the judgment of the Court Lord Judge LCJ stated that in R v Sherwood ex parte the Telegraph Group Plc 2001 1 WLR 1983 it was suggested that any possible confusion in relation to applications under Section 4(2) could be avoided by a systematic approach to applications to restrict the media in what they could report. He then set out at paragraph 15 of his judgment, what the systematic approach would involve.

> "The first question is whether the reporting would give rise to a not insubstantial risk of prejudice to the administration of justice. The second question is whether an order under section 4(2) would eliminate that risk. If not, there would be no necessity to impose such a ban. Again, that would be the end of the matter. If, on the other hand, an order would achieve the objective, the court still has to consider whether the risk could satisfactorily be overcome by less restrictive measures. Third, even if there is no other way of eliminating the perceived risk of prejudice, it still does not follow necessarily that an order has to be made. This requires a value judgment. The court highlighted the need for care to avoid confusing the senses in which the word 'necessary' is used in the legislation. Adapting Viscount Falkland's famous aphorism, the court's approach should be that, unless it is necessary to impose an order, it is necessary not to impose one; and if it is necessary to impose an order at all, it must go no further than necessary. In

> summary, an order under section 4(2) of the 1981 Act should be regarded as a last resort."

[20] The first point to note about that passage is that orders under Section 4(2) are orders of last resort. They require careful consideration. The first question for the Coroner was whether publication during the currency of the Inquest of the fact that the appellant has been convicted of murder, would give rise to a not insubstantial risk of prejudice involving the integrity of the Inquest jury. In other words if one of the jurors read that the appellant had been convicted of murder some years after the death of WOII Adamson, might that affect his mind on the issue which the jury would have to consider, namely, in what circumstances did WOII Adamson meet his death. It would not be unnatural for a juror to think there may be some connection when a new Inquest is ordered many years after the event. Significantly the manner in which this issue was dealt with by the Press Association highlights the dangers. In its written submission to the Coroner, dated 22 November 2010, the Legal Editor of the Press Association stated –

> "11. It is also submitted that it would in fact be wrong to keep from the jury the fact that [the Appellant} is serving a jail sentence for murder. The fact that a new inquest ordered into Warrant Officer Adamson's death suggests that at the very least a question mark hangs over the open verdict which ended the original hearing. The facts (sic) that the [appellant] was the soldier whose gun killed Mr Adamson, and the fact that he is now serving a sentence for murder in another case cannot be described as being irrelevant to the purpose of the inquest."

[21] As Miss Quinlivan said in the course of her submissions, if experienced court observers drew that connection or inference, what connection or inference might a jury draw about it? There is clearly a risk that a jury might be influenced in some way by being informed that the appellant has been, since the death of WOII Adamson, convicted of murder. It is accepted by all parties that the conviction of the appellant for murder is irrelevant for the purposes of the Inquest. It might be said from that acceptance alone that there is a risk of prejudice to the appellant if the fact of his conviction was reported. The fact that the appellant has been convicted of murder was disclosed at a preliminary hearing of the Inquest and reported as an accurate report of the proceedings on that occasion. It does not seem to have occurred to anyone present on that occasion that the disclosure of that fact, if not relevant to the Inquest proceedings, could be prejudicial to the new Inquest and consideration then given to requesting the media not to report that fact until after the conclusion of the Inquest or making a postponement

order under Section 4(2) of the Act. The fact that it has been reported in the media and therefore in the public domain at the time when it was reported, is not the end of the matter. The important consideration is the integrity of the jury sworn to consider the circumstances relating to the death of the deceased. The fact that the conviction of the appellant came into the public domain as result of an accurate report of the preliminary proceedings would permit the republication of that fact at the time of the Inquest. If it was published during the hearing of the Inquest the jurors may read or hear about it and there is a danger that one or more may be influenced by it (in precisely the manner in which the Press Association Editor stated). Therefore the answer to the first question posed by Lord Judge is that there is a not insubstantial risk of prejudice to the administration of justice. The second question is whether an order postponing publication would eliminate that risk. In our opinion it would. However could other measures other than postponement overcome the risk? None have been suggested. The procedure proposed by the Coroner related not to the fact of his conviction, but to the fact that the appellant is a prisoner. The Court then has, in the words of Lord Judge LCJ, to make a value judgment remembering that 'necessary' means necessary and no more than necessary.

[22] What the Coroner did was solely to consider whether the media reporting that the appellant was a prisoner was a matter which would give rise to a substantial risk of prejudice rather than the further fact that he had been convicted of murder. The Coroner appears to have decided that as the latter was already in the public domain there was nothing he could do about it. He relied on Chapter 4.5 of the Guidance published jointly by the Judicial Studies Board of England and Wales and various Media Interests entitled 'Reporting Restrictions in the Criminal Courts'. While this relates to criminal courts there is no reason in principle why the Guidance should not apply to other proceedings including inquest proceedings. Paragraph 4.5 is headed 'Postponement of fair and accurate reports'. The third paragraph of Chapter 4.5 states –

> "The subject matter of a postponement order under s4(2) is fair, accurate, good faith and contemporaneous reports of the proceedings. Trial judges have no power under s4(2) to postpone publication of any other reports, e.g. in relation to matters not admitted into evidence or prejudicial comment in relation to the proceedings. Likewise, courts have no power under s4(2) to prevent publication of material that is already in the public domain. Such publications may incur liability for contempt of court under the strict liability rule and the media bear the responsibility for exercising their judgment in such cases."

[23] The Guidance states the courts have no power under Section 4(2) to prevent publication of material already in the public domain. In our opinion the Guidance is there referring to material that is in the public domain through sources other than fair, accurate, good faith and contemporaneous reports of proceedings. In this instance the reports are in the public domain, in this jurisdiction, by reason of the reports of the disclosure made in the preliminary hearing of the Inquest. Section 4(2) of the Act applies to any part of the proceedings and there is nothing to suggest that the reports of the preliminary hearing were other than fair and accurate contemporaneous reports, made in good faith. Thus the Coroner has power to make a postponement order where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice in the Inquest into the death of WOII Adamson. The learned trial judge in upholding the ruling of the Coroner fell into the same error in concentrating on the status of the appellant as a prisoner and the fact that the conviction has already been reported in the media. In his judgment the learned trial judge commented that the court has a discretion whether to make an order or not and the fact that the information is already in the public domain was a factor to be taken into account in exercising that discretion. In exercising his discretion the Coroner has to balance the competing public interests between protecting the administration of justice and ensuring open justice and the fullest possible reporting of Coroner's Inquests. Where the fact that the information is already in the public domain is a factor to be taken into account in exercising the discretion, so also would be the length of time since the matter was reported and the nature and extent of the coverage at that time. More relevant would be the fact that the order sought is a postponement order and not a 'blanket ban' on reporting. This is what Lord Judge referred to as the value judgment, that is whether the order is necessary. This applies after the court is satisfied that there is a not insubstantial risk of prejudice, that an order could overcome the risk and there are no other means of doing so.

[24] It is now over eight months since the last report of the preliminary proceedings. There is no reason to believe that there is not a substantial element of what Miss Quinlivan referred to as the 'fade factor'. If the Coroner makes a postponement order a juror who did not read or hear the earlier report will not become aware of the conviction and a juror who did read or hear the earlier report, will not have his memory revived by reports contemporaneous with the Inquest hearing. There is always the risk that a potential juror may remember the earlier report. This could be overcome by questioning potential jurors individually in advance of the jury being sworn. Equally it should be possible for the appellant to give evidence by video link without any disclosure that he is a prisoner, thus eliminating any requirement for the Coroner or counsel to address the jury, individually or collectively, on that subject.

[25] Therefore the appeal will be allowed and the ruling of the Coroner quashed. The case will be returned to the Coroner for consideration of the application under Section 4(2) of the Act for an order postponing publication of the fact of the appellant's conviction for murder and the fact that he is serving a life sentence in HMP Frankland in accordance with the terms of this judgment. The Postponement Order made by this Court, postponing publication of the fact of this Appeal and publication or further publication of the decision of Treacy J will continue until further order or the conclusion of the Inquest proceedings requested by the Attorney General. In addition this Court now makes a further Postponement Order relating to the judgment of this Court.

[26] The application for judicial review in this case and the appeal therefrom are a further example of satellite litigation in relation to inquest proceedings. Such satellite litigation has caused many delays in the inquest system. A culture has developed whereby decisions by coroners in preparation for and during the conduct of inquest proceedings are frequently and immediately challenged by way of judicial review . On occasions this can lead to protracted delays in the inquest process frustrating the purpose of an inquest. In this instance the Inquest was about to commence with witnesses assembled, some coming from overseas, and time had been set aside for the inquest to be conducted. In the context of criminal proceedings the law and the practice of the court in judicial review proceedings have been to discourage satellite judicial review proceedings, leaving challenges to decisions made during the course of the criminal proceedings in the main to be considered at the conclusion of the trial process. We feel compelled to question why different considerations should apply in the context of coroners' inquests. When an inquest results in a verdict that verdict may itself be challenged in an application for judicial review but that will be at a time when the court will have the benefit of appreciating the whole context of the inquest. What may appear to be of potential or theoretical importance during preliminary hearings or inquest proceedings before the Coroner, and which often leads to satellite litigation, may turn out to be of no such importance in the overall context of the inquest. Procedural errors during the course of the inquest, if and when they occur, may not undermine the ultimate integrity of the inquest or the ultimate verdict.

[27] In an appropriate case the courts may have to consider this important procedural issue. In this case we heard no detailed argument on the point. Counsel for the Coroner did not present any submissions on the point but did recognise that it is, indeed, a point which may require detailed consideration on another occasion.