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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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McMahon's (Aine) Application [2013] NIQB 22

IN THE MATTER OF AINE McMAHON APPLYING FOR LEAVE FOR JUDICIAL REVIEW

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TREACY J

[1] By this application the applicant who is the partner of Gerald Devlin deceased challenges the decision of the Coroner not to hold an inquest. The Order 53 statement erroneously refers to the date of the decision as 12 December 2013. I presume this is a reference to the Coroner's response to the pre-action protocol letter dated 12 December 2012, but that in fact is not the date of the relevant decision as it seems to me. By letter dated 30 September 2009 the Coroner wrote to the applicant's solicitor in the following terms:

> "I am writing to advise you that I have now had an opportunity of reading and considering the Crown's opening statement, the pleas and mitigation and the sentencing remarks of Mr Justice Stephens. Having done so I have concluded that there is no need for an inquest to be held as all the facts relevant for inquest purposes have been aired in the course of the criminal proceedings. Ordinarily I would arrange for the death to be registered, but in view of the penultimate paragraph of your letter of 12 August I will take no action for the time being. I will review the situation at the end of November."

[2] By further letter dated 30 July 2012 the Senior Coroner for Northern Ireland Mr Leckey stated as follows:

> "I have received your letter of 26 July enclosing a copy of the judgment of Mr Justice Treacy. In relation to your request that I should now arrange to hold an inquest I am enclosing a copy of my letter of 30 September 2009 and I confirmed by letter of

> 11 August 2011 that my decision was unchanged. I had agreed to take no action in relation to registering the death until the conclusion of the judicial review proceedings. I have read and considered the judgment of Mr Justice Treacy, and having done so, it remains my decision that an inquest is unnecessary. I am satisfied that from all the information available that the matters specified in Rule 15 of the 1963 Coroner's Rules have been publicly established. In this case there is no suggestion of State involvement in the death of the deceased. There is no suggestion that the deceased met his death in any manner other than as described by Mr Justice Stephens in his judgment [I interpose that Mr Macdonald QC strongly challenged this statement]. The principle complaint by the family relates to the acceptance by the prosecution that at the relevant time the assailant did not possess the requisite mens rea for murder. In relation to the death of Gerard Patrick Devlin there is no uncertainty as to the cause of death. Not only has the means by which he met his death been ascertained but the person responsible for his death has been identified and dealt with by the courts. In the absence of any State involvement in the death and in the absence of any wider public interest issues which would demand further enquiry in order that necessary lessons may be learned for the better protection of human life in the future I am of the opinion that there is no sufficient reason to justify the holding of an inquest."

[4] By pre-action protocol letter dated 4 December 2012 the applicant's solicitors indicated their intention to apply for judicial review unless an inquest was ordered "or the situation is otherwise resolved to our client's satisfaction". A detailed response was sent by the Senior Coroner on 12 December 2013.

[5] The background to the killing of the deceased was extensively considered by the trial judge Mr Justice Stephens in The Queen v Notarantonio and Others [2008] NICC 39. This is the sentencing judgment following the prosecution acceptance of guilty pleas by the various defendants who had originally been charged with the murder of the deceased.

[6] On 24 September 2008 Francisco Notarantonio pleaded guilty to four offences as follows. The manslaughter of Gerard Devlin on 3 February 2006, making an affray, malicious wounding of Anthony McCabe with intent to cause him grievous bodily harm, contrary to Section 18 of the Offences Against the Person Act 1861 and

attempted malicious wounding of Thomas Loughran with intent to cause him grievous harm, contrary to Section 18 of the Offences Against the Persons Act 1861.

[7] At paragraph [2] of his judgment Mr Justice Stephens provided a summary of the offences to which Francisco Notarantonio had pleaded guilty and he expressed himself in the following terms:

> "A summary of the offences that you committed is that during the course of a brutal street fight on a Sunday afternoon involving a significant number of people you armed yourself with a chef's knife which had an 8½ inch blade and you then proceeded, within a very short period of time, to viciously swipe with the knife at one person, stab another in the chest and fatally stab a third person. That fatal stabbing was carried out when your victim's partner and their children were present so that they all witnessed, whilst they comforted him as he died, your complete inhumanity, your destruction of their partner, their father and their family. Ferocious attacks of this nature, particularly with a knife, warrant deserved and appropriately severe punishment to mark society's utter rejection of such callous and brutal offences and to send a clear signal to those who might engage in this type of violence as to the consequences that will be visited upon them. The sentences that I will impose will eventually come to an end but it is obvious that the consequences for the family of Gerard Devlin will remain with them for life."

And then in paragraph [3] of his judgment he recounted that during the oral submissions on 14 November 2008 that prosecuting counsel Mr Terence Mooney QC stated that the prosecution had accepted his plea of guilty to manslaughter on the basis that it cannot be proved that Francisco Notarantonio had the necessary intent for murder. The judge then noted that Francisco Notarantonio accepted that he must have made contact with Gerard Devlin though he had no recollection or claimed to have had no recollection of doing so. He continued:

> "You do not accept that you had any intention to kill or cause really serious harm to Gerard Devlin. That has been accepted by the prosecution. I sentence you for that offence on the basis of a plea of guilty to manslaughter and on that basis alone."

[8] The start date of the trial had been delayed for a period until 24 September 2008 and the pleas of guilty to these offences were entered before the case was

opened. On the same date that is 24 September 2008 the other defendants namely Christopher Charles Notarantonio, William Notarantonio, Paul Anthony Burns and Anthony Notarantonio all pleaded guilty to the offence of affray on 3 February 2006. These pleas of guilty were accepted by the prosecution they having originally been charged with murder.

[9] In a very careful and detailed judgment the trial judge set out the relevant factual background, the role in the offences played by each of the defendants the representations of the victim's family, the relevant sentencing guidelines, the personal background of the offenders, the attitude of the offenders to the offence, the aggravating features relating to the offences and the offender as well as the mitigating factors.

[10] In respect of Francisco Notarantonio he was, as one can see from paragraph [33] of Mr Justice Stephen's judgment, sentenced to 11 years imprisonment followed by one year's probation in relation to the offence of manslaughter, four years imprisonment for making an affray, five years imprisonment for the offence of attempted malicious wounding of Anthony McCabe and six years imprisonment for the offence of attempted malicious wounding of Thomas Loughran. The others who were convicted of affray were sentenced to significantly lesser sentences than that of Francisco Notarantonio and that is dealt with in the later paragraphs of the judgment at paragraphs [57] to [60].

[11] By letter dated 27 November 2008 the Coroner had at that stage indicated in his preliminary view that an inquest into the death was unnecessary on the basis that the criminal trial and judgment dealt sufficiently with the issues. Further correspondence ensued including a letter dated 27 February 2009 from Kevin Winters and Company setting out reasons as to why in their view an inquest was required. As already pointed out the Coroner by letter dated 30 September 2009 promulgated his decision that he had concluded that there was no need for an inquest to be held as all the facts relevant for inquest purposes had been aired in the course of the criminal proceedings. This decision has been re-affirmed in subsequent correspondence on a number of occasions. It appears that a decision following legal advice may have been taken at the time not to take a judicial review of the Coroner's decision. This is not covered in the grounding affidavit or the chronology contained within the grounding affidavit. In any event no judicial review was then taken and no point is taken by the proposed respondent about the delay in mounting the present challenge. However, a judicial review was brought against both the PPS and the PSNI in which the applicant challenged a number of decisions namely, the decision of the PPS to discontinue prosecutions for the murder of Gerard Devlin, the failure of the PPS to consult with the applicant or to inform her about that decision either before it was made or before it was given effect, the failure of the PPS to explain that decision to her after the event and fourthly and finally the refusal of both the PPS and the PSNI to allow her access to the depositions and other relevant documents in the case redacted as may be necessary.

[12] The court in that judicial review rejected most of the grounds of challenge but did conclude the PPS had breached its victims and witnesses policy insofar as the decision to accept the defendant's guilty pleas on 24 October 2008 was not explained to the family members by the representatives of the PPS prior to being announced in court. [See [2012] NIQB 60] Following delivery of that judgment the court invited further written and oral submissions on the question of whether that failure amounted to a breach of Article 8 of the European Convention on Human Rights.

[13] In a further short judgment at [2012] NIQB 93 the court concluded at paragraphs [23] to [25] as follows:

> "The right to respect for physical and psychological integrity is included in Article 8. In the case of victims, in my judgment, this requires the State to desist from conduct which would, as here, significantly exacerbate the applicant's understandable feelings of distress and anguish. In my view this is incompatible with the positive obligation inherent in an effective respect for private and family life and accordingly I find that Article 8 has been breached.
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> In the present case the PPS materially departed from the Code of Practice and the PPS Victims and Witness Policy. As I pointed out at paragraph [106] of my [earlier] judgment it may well have been that had the proper procedures been followed at the time that the concerns or suspicions of the family could have been allayed or dispelled. The failure to follow that procedure may have fuelled rather than allayed their misgivings. There is little point in having such a policy if it is not conscientiously adhered to, particularly in such serious and deeply tragic circumstances."

The court then went on to observe that the two judgments of the court constituted just satisfaction and that no further order is required.

[14] Both these judgments as I understand it are currently under appeal and cross-appeal. The grounds of the present challenge are set out in the Order 53 statement and they are in short form that the Senior Coroner misdirected himself and/or misapprehended the facts, that he failed properly to take into account various matters set out in the Order 53 statement, that the failure to hold an inquest was incompatible with the applicant's Article 2 and Article 8 rights, that he had interpreted the issue of 'how' the deceased came by his death in an overly restricted

manner and finally that the decision refusing to hold an inquest was irrational, perverse and/or Wednesbury unreasonable.

[15] It is clear that Article 2 is engaged when the State is implicated in some way in a death, whether by involvement, for example, in the use of lethal force, State collusion, or failure to protect those within its care such as prisoners or patients. It is also the case that it applies when an unnatural or suspicious death occurs. In McKerr v The United Kingdom [2002] 34 EHRR 553 the ECtHR, at paragraph [134], stated:

> "In the normal course of events a criminal trial with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguard of an effective procedure for the finding of facts and the attribution of criminal responsibility."

They did go on to acknowledge in paragraph [137] that there may be circumstances where issues arise that may not or cannot be addressed in a criminal trial and that Article 2 may require a wider examination.

[17] In Niven [2009] CSOH 110 Lord Malcolm said at paragraph [55]:

> "Many of the cases talk of a 'heightened intensity of investigation' or 'particular stringency' when the State is involved or has an interest in the outcome, and it is not uncommon for judges and commentators to refer in a loose sense to Article 2 being engaged if and when the State is implicated in some way. Nonetheless, it is also clear that Article 2 is engaged more generally when an unnatural or suspicious death occurs. However, so far as the content of the State's obligation under Article 2 is concerned and particularly in respect of any specific investigatory obligations the case law teaches that everything depends upon the particular facts of the case and this is so even when the State is directly involved. It is apparent from a review of the decisions that the nature and extent of the State's procedural obligations under Article 2 is extremely fact sensitive. It has often been said that in the normal course of events a criminal trial with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility. The Strasbourg Court has

> stressed that the obligation to investigate is 'one of means, not result'. In other words the issue is whether the form and nature of the investigation is appropriate in all the circumstances. A failure to achieve a conviction or to obtain answers to the main questions does not automatically lead to non-compliance with Article 2. There will be other situations where a conviction after criminal trial is not sufficient."

[18] In paragraph [56] he went on to say that when it comes to legal duties under Article 2 the guiding principle is *whether the need for an effective inquiry demands further* investigation perhaps at the hands of an independent person in public and with greater opportunity for the involvement and participation of relatives in order that the State's fundamental duty to protect and safeguard human life is fulfilled.

[19] At paragraph [93] of his judgment he observed:

> "The Strasbourg Court has repeatedly emphasised that the procedural obligations imposed by Article 2 are of means not result. This is an awkward phrase but it indicates that an investigation is to be assessed not by the outcome but by whether it demonstrates that the State is respecting and fulfilling its obligations under the Article."

Thus in many cases he said:

> "A criminal investigation which is capable of identifying responsibility for a death would be sufficient *even if* it fails to identify a culprit or the cause of death."

At paragraph [94] he stated:

> "Whether a particular investigation is or is not effective will depend on the full circumstances of the case. If, for example, a death occurs at the hands of the State, a private investigation by a Government official will leave a reasonable person with a legitimate anxiety that the investigation is less than impartial and does not include the appropriate public involvement and scrutiny. Similarly if a State body or officer may bear some indirect responsibility for what happened, or where it is apparent from the circumstances of a death that the State may be able to

> learn wider lessons for the future protection of human life an inquiry focused only on immediate criminal responsibility may well be insufficient. And even for a death solely at the hands of a third party, should it be clear that the State's investigations have been wholly insufficient to meet the appropriate minimum standards, the court can intervene. I repeat all of this relates to whether the form and nature of the inquiry is appropriate. Article 2 does not impose an obligation to explain all suspicious or unnatural deaths. That said and whatever the circumstances a failure to investigate at all or to postpone obviously necessary lines of inquiry for an unreasonable period may well be a ground for legitimate complaint under Article 2."

Later at paragraph [96] he said:

> "The fact that there remain unanswered questions does not cast doubt on nor undermine the ability of the criminal justice system in Scotland to operate in a manner which is capable of identifying criminal liability and thereby enforcing the deterrent effect of the crimes of murder and culpable homicide. No doubt it will often be possible at the end of unsolved criminal investigations or unsuccessful prosecutions to look back and identify things which could have been done better. But the case law shows that much more is required before the State will be in violation of its obligations under Article 2."

[20] These remarks, with which I respectfully agree, chime with the approach of the Senior Coroner. In this respect I refer to the Coroner's response to the pre-action protocol letter of 12 December 2012 where he stated:

> "There is no suggestion that the State in any of its various manifestations either through act or omission was involved in the death of the deceased. The phrase how the deceased came by his death is therefore to be interpreted as meaning by what means as opposed to meaning by what means and in what circumstances."

[21] The lack of State involvement in the present case is relevant to the consideration whether there were any broader issues which might have caused the Coroner to consider that an inquest was merited. This is I believe clearly expressed

in his letter of 30 July which I have earlier set out. Against this background it was open to the Coroner to form the opinion that there is no sufficient reason to justify holding the inquest in the circumstances of the present case. Some of the considerations which can arise where a Coroner is deciding to hold an inquest or resume an inquest after the conclusion of criminal proceedings were considered by the High Court in this jurisdiction in the case of In Re Downes (1988) 4 NIJB 91. There is a useful summary of this in Coroner's Law and Practice in Northern Ireland by John Leckey and Desmond Greer at paragraph 12.21:

> "Some of the other considerations which may arise where a Coroner is deciding whether to resume an inquest after the conclusion of criminal proceedings were examined in Re Downes Application. In the course of serious rioting in Belfast in 1984 a police officer fired a plastic baton round at close range at the applicant's husband striking him on the chest the resultant injuries led to his death. The police officer was charged with the unlawful killing of the deceased but following a trial was acquitted. The Coroner decided not hold an inquest and his decision was upheld on judicial review. Mr Justice Carswell stated:
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> > 'In deciding whether it is necessary to hold an inquest or whether to resume an adjourned inquest the Coroner must direct his attention to the question whether it has been sufficiently established who the deceased was and how, when and where he came by his death. If the Coroner after looking at the facts of the case considers that these matters have already been sufficiently established in public proceedings he is quite justified in taking the view that an inquest is not necessary. The fact that the next of kin of a deceased person may thus not obtain the opportunity to cross-examine witnesses or tender more evidence does not of itself make it necessary for him to hold an inquest. What is material is whether the relevant matters have been established in a manner in which the public interest has been adequately served'."

The text then continues:

> "The learned judge explained that the Coroner had made it clear that he did not regard as conclusive the mere fact that a prosecution for manslaughter had taken place. His decision that all the matters necessary to be determined by an inquest had been dealt with at the criminal trial was based on the evidence in his possession. It was on this basis that the Coroner had satisfied himself that the circumstances of the death had been made publicly known."

[22] To similar effect I was referred to the decision of this court in Re Robert Howard at [2011] NIQB 125 and in particular paragraphs [23] to [27] which are relevant both as to the nature of the Coroner's discretion to hold an inquest as well as the recognition that an inquest following a criminal trial is likely to be the exception. That is because in most cases a criminal trial will involve a sufficient exploration of the circumstances surrounding the death. I am satisfied that no public law grounds have been established even on an arguable basis for challenging the Coroner's opinion in this case that there is no sufficient reason to justify the holding of an inquest. Such decisions of course must be taken individually and on their own merits because they are by their nature likely to be highly case specific and fact sensitive. This is what the Coroner did and he was in my view entitled to conclude that there had been a sufficient exploration of the circumstances surrounding the killing of the deceased rendering an inquest unnecessary. Accordingly for these reasons leave is refused.