Judicial Communications Office

15 October 2018

PEARSE JORDAN INQUEST APPEAL DISMISSED

Summary of Judgment

The Court of Appeal today dismissed an appeal against a refusal to grant leave to Pearse Jordan's mother to apply for judicial review of the Coroner's verdict in the latest inquest into her son's death.

Mrs Justice Keegan refused to grant leave to Theresa Jordan ("the applicant") to apply for judicial review in respect of the verdict of the Mr Justice Horner ("the Coroner") which was delivered on 7 November 2016. The Court of Appeal ("the Court") said it would deal with the matter by way of a rolled up hearing of both the appeal against the refusal of leave and if then appropriate a determination of the substantive application for judicial review. Lord Justice Stephens, delivering the judgment of the Court, referred extensively to the Coroner's findings which set out the background to the killing and the key aspects of the verdict[1]. These matters are not rehearsed in this summary.

The Applicant's Grounds for Judicial Review

The applicant contended that the Coroner's verdict should be quashed on the following grounds:

1. The Coroner abdicated his responsibility to arrive at a verdict in relation to the central issues to be determined in the inquest concluding that "it is now impossible with the passage of time to say with any certainty what happened on that fateful afternoon";
2. The Coroner fell into error in relation to both the burden and the standard of proof to be applied by effectively imposing a burden on the next of kin to prove their case in respect of the allegations against Sergeant A;
3. The Coroner failed to take into account (and therefore essentially rejected without evaluation or explanation) the agreed expert ballistics evidence;
4. The Coroner failed to appreciate the importance and significance of the RUC's Code of Conduct and failed to give any or adequate weight to Sergeant A's admitted breaches of it;
5. The Coroner relied upon the evidence of some police officers but rejected, without explanation, a strand of their evidence that rendered the account given by Sergeant A inherently implausible; and
6. The Coroner failed to reach a determination on the question of whether Officer V had perjured himself in the inquests in 2012 and 2016.

The judgment of Mrs Justice Keegan

Mrs Justice Keegan dismissed the application for leave to apply for judicial review on the basis that none of the grounds gave rise to an arguable case.

The Court of Appeal's consideration of the Grounds

[1] A summary of the Coroner's findings can be found at: https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20Coroners%20Findings%20-%20Patrick%20Pearse%20Jordan%207%20Nov%2016.pdf

Ground 1: Failure to decide central issues

At paragraph [334] of his findings, the Coroner expressed his degree of uncertainty on the crucial issue of whether Pearse Jordan ("the deceased") turned before being shot by Sergeant A as being "profoundly unsure as to what happened" and said could make no finding on the balance of probabilities. He added that his profound uncertainty on this issue also impacted on and influenced his failure to decide a number of other issues such as whether Sergeant A honestly believed that the deceased did anything to pose a threat to him or to any other police officer. The Coroner resorted to the burden of proof which lay on the police and the State to provide a satisfactory and convincing explanation to the inquest for the use of lethal force in order to hold that the police had failed to do so.

The appellant contended that the Coroner was obliged as a matter of law to make every effort to arrive at a conclusion in relation to these issues and only in the most exceptional circumstances would it be proper for a Coroner to fail to reach a verdict on the evidence. The appellant also contended that the reasons given by the Coroner for his failure to reach a conclusion were neither exceptional nor sufficient to justify his findings. The Court held that in an inquest, as happened in this inquest, the Coroner may resort to the burden of proof which lay on the police and the State to provide a satisfactory and convincing explanation for the use of lethal force in order to establish a *consequence* that the police had failed to do so. In the context of an inquest the determination of a consequence does not establish on the balance of probabilities a whole series of facts such as in this case that the deceased did not turn, that his hands were visible and that Sergeant A was intent on shooting the deceased in the back.

The Court said that the statutory obligation on the Coroner is to consider whether a particular has or has not been proved on the balance of probabilities. This must also involve consideration as to whether the Coroner is undecided as to whether the particular did or did not occur. In this way the decision is not as between one of two possible outcomes that is the particular did occur or the particular did not occur, but includes a third possible outcome in which the Coroner states that he is undecided or as in this case profoundly unsure as to whether it did or did not occur:

> "We agree with the Coroner that it was not and could not be said to be a binary decision and we consider that the Coroner was positively obliged to consider the third possible outcome as to whether he was undecided provided that he gave his reasons for being undecided. We conclude that insofar as any particular was not proved to him his verdict represented the proper discharge, rather than the abrogation of, section 31 of the Coroners Act (NI) 1959."

It was submitted that the Coroner's reliance on the delay between the death and the inquest as a reason for not coming to a concluded view was inappropriate given that he heard from a significant number of witnesses and none of them professed to be unable to remember salient facts. The Court rejected that criticism as what the witnesses profess was relevant but not determinative and that it was for the Coroner to assess the impact of delay on their evidence. It was also suggested that if delay could justify a failure to arrive at a verdict, the reality is that Coroners would not be able to arrive at verdicts in any legacy inquest. The Court also rejected that criticism as the question as to whether delay does or does not contribute to agnosticism in relation to an issue will depend on the particular facts of each case. It said that the reasons for the Coroner being unable to decide the issues included delay but was not confined to the issue of delay:

> "He explained that he was presented with what seemed credible evidence by the police but for the reasons that he expressed he was not prepared to accept all of it. He was also presented with evidence from various civilians which he rejected apart from the evidence of one person but his evidence had not been tested before the inquest. He considered the expert evidence was not conclusive and in addition given the impact of delay he was undecided in relation to various issues. We are satisfied that the Coroner demonstrated that he had striven hard to make a finding about the various issues and that he had explained the basis for his conclusion that it was not possible for him to do so. We consider that there is no arguable case that he abdicated his duty in the conduct of this inquest."

The Court dismissed the appeal in relation to this ground.

Ground 2: Burden and Standard of Proof

At paragraphs [52]-[62] of his findings, the Coroner concluded that an inquest is an inquisitorial process which involves the Coroner making an inquiry into the circumstances of the death of the deceased in accordance with his statutory obligations. He identified the burden of proof on the State in general and the police in particular to provide a satisfactory and convincing explanation on the balance of probabilities to justify the death of the deceased. No criticism was made in relation to his summary of the legal position as to the onus and standard of proof but it was submitted that the Coroner, having concluded that the police's version of events was objectively "unlikely", ought to have rejected it "on the balance of probabilities" leading to a conclusion that the deceased did not turn as alleged. It was also suggested that the Coroner proceeded as if it was open to him to be "undecided" if the next of kin could not advance an alternative version of events that he found likely and was effectively imposing a burden on the next of kin to prove their case. It was further submitted that the language used by the Coroner suggested that the standard actually applied by him was more akin to the criminal standard rather than the balance of probabilities.

The Court said the Coroner stated that he remained "unconvinced on the balance of probabilities that what I was being told as to how the deceased met his death did happen for a number of reasons" which he then set out:

> "A fair reading of the entire verdict … leads us to the conclusion that the Coroner was not rejecting the evidence of the police officers that the deceased did turn prior to Sergeant A opening fire but rather that he was unconvinced and *profoundly unsure* as to whether the deceased did or did not turn. It is not appropriate to extract a word or a sentence out of the verdict but rather to consider that word or that sentence in the context of the verdict as a whole. The Coroner was not deciding that the police version of events did not occur but rather he was deciding that he was profoundly unsure as to whether it did or did not occur."

It was submitted that applying the correct standard of proof the Coroner could have *doubts* about how the deceased met his death or be *unsure* but nonetheless could arrive at a conclusion on the balance of probabilities and did not need to reach a *firm conclusion*. The Court considered that reading the verdict as a whole reaching a firm conclusion could only be a firm conclusion on the balance of probabilities. Furthermore that the doubts that the Coroner was referring to was his being

profoundly unsure as to what had occurred so as to prevent him from coming to a conclusion rather than the sort of doubts which are necessarily involved in any decision on the balance of probabilities:

> "We do not consider that there is any significance to be attached to the categorisation by the Coroner as a version of events being the next of kin's version. A reading of the entire verdict establishes that the Coroner was considering whether facts had been established to the civil standard of proof during the course of the inquisitorial procedure. The Coroner was evaluating all of the evidence presented to him and we do not consider that he placed any onus on the next of kin."

The Court dismissed the appeal in relation to this ground.

Ground 3: Failure to take into account Ballistics Evidence

The appellant submitted that the ballistic evidence and the pathology evidence was crucial in assisting in the determination of the issue as to whether the deceased did turn and if so whether it was in a clockwise direction. The pathologists could not assist in determining the sequence of shots but the ballistics experts in the 2012 inquest had supported the proposition that the deceased was not turning in a clockwise direction. The appellant contended that the Coroner ignored the agreed ballistics evidence in his verdict and "essentially disregarded that evidence in its totality without explanation or justification".

The Court did not accept that the Coroner simply ignored all the ballistics evidence. It considered that the findings show that the Coroner took the evidence into account but for the reasons he set out at paragraph [297], that there were just too many variables to arrive at a conclusion:

> "In short the Coroner was not prepared to come to a factual decision based on the expert evidence which necessarily included the ballistics evidence. The Coroner was entitled to form that view and we consider that there is nothing irrational or Wednesbury unreasonable about it. We consider that Keegan J properly identified that the essence of this ground related to the interpretation of the evidence, that it was obvious that the Coroner had difficulty in reaching a firm conclusion on the expert evidence and that the evaluation of that evidence was a matter of judgment for the Coroner."

The Court dismissed the appeal in relation to this ground.

Ground 4: RUC Code of Conduct

The issue was whether, in light of the higher standard of care demanded of a trained and experienced police officer and in light of the requirements demanded by the Code before a decision to use lethal force was made, Sergeant A was acting properly in self-defence when he shot the deceased. The appellant challenged the Coroner's assertion that "it is difficult to see how conduct that fails to comply with the Code could be regarded as anything other than unjustifiable". The Court held that the Coroner was correct to state that "the Code does not represent the law on self-defence" and was also correct to state that "it does not deal with the situation where a police officer might have to make an instantaneous decision when he believes his life or that of his colleagues is at grave risk".

The Court considered that the Coroner applied the proper legal standard governing the use of lethal force, both in domestic and ECHR terms, and that he did take into account the breach of the Code by Sergeant A as part of his evidential determination. It also considered that Keegan J was correct in rejecting this ground of challenge relating to the Code with reference to the Coroner's exposition of the relevant law and his overall assessment of Sergeant A's evidence.

The Court dismissed the appeal in relation to this ground.

Ground 5: Selective reliance on Police Evidence (Call Sign 12)

This ground of challenge arose out of the proposition that Sergeant A's evidence should have been rejected on the basis that on the account given by the police officers in Call Sign 12 the shots that he discharged would have been fired in their direction. It was submitted that the Coroner selectively relied upon the evidence of officers D, E and F in a manner which tended to exonerate Sergeant A while disregarding a key strand of their evidence which placed them in the line of fire and which it is submitted rendered the account given by Sergeant A inherently implausible on the basis that he would not have fired at the deceased if Call Sign 12 had been immediately behind the deceased, particularly in circumstances where the car lights were on and the vehicle would thus have been clearly visible to Sergeant A.

The essential basis of this ground was that the Coroner must have rejected this part of the evidence of officers D, E and F whilst relying on other parts of their evidence. The Court observed that the evidence of witnesses is divisible so that it is permissible for an adjudicator of fact to accept part of the evidence of a witness and not accept another part. The Court, however, did not consider that the Coroner rejected this part of the evidence of officers D, E and F but rather he referred to the sketch maps which were "not properly scaled" stating that it was a mistake to rely on them. The Coroner concluded that officers D, E and F each placed "the deceased in different position adjacent to the front of Call Sign 12" and that while the shots were in the general direction of the car (which … Sergeant A did not know to be Call Sign 12) they are likely, … to have been fired at an angle across the road".

The Court said it was concerned with the legality of the decision making processes and outcomes not with their merits. Only on the rarest of occasions would the Court be justified in finding that the Coroner had formed a wrong opinion. The Court said it was not persuaded that the Coroner had formed a wrong opinion and it did not consider that this aspect of the fact finding process was unreasonable.

The Court dismissed the appeal in relation to this ground.

Ground 6: Officer V

An issue at the inquest was whether the primary purpose of the debrief was to facilitate the exoneration of Sergeant A. Officer V was the senior HMSO officer in Belfast and came in from leave to attend the debrief. The credibility of Officer V and his role in previous debriefs had been considered in the Stalker/Sampson reports. Officer V accepted that he had made statements to the CID in relation to the deaths in the Stalker/Sampson reports which he knew were inaccurate but asserted that he had made a further statement to the DPP "under secret cover". The proposition on behalf of the appellant was that no such secret statement existed and that Officer V had therefore perjured himself in the 2012 and 2016 inquests.

The Coroner found in paragraph [309] of his findings that there was no doubt that a secret file was created for the DPP which contained statements which to some extent contradicted the original statements given immediately after the Stalker/Sampson killings but that it was simply impossible for him to investigate what might be described as peripheral information. The Coroner also said that to conclude that Officer V committed perjury before this inquest, when he *may* not have all the information would be unfair not just to Officer V but to everyone concerned. He added that this will be the subject of an in-depth inquiry and determination at the Stalker/Sampson inquests. On that basis the Coroner did not make a finding that Officer V had committed perjury but he went on to state that there were a number of lessons to be learned from the Stalker/Sampson incidents.

At paragraph [332] of his findings the Coroner gave his conclusions in relation to the issue as to whether the primary purpose of the debrief was to facilitate the exoneration of Sergeant A. The Court noted that the Coroner had the opportunity to see all the relevant the police witnesses as they gave their evidence and to assess their demeanour. There were also notes of the debrief. The Coroner also saw Officer V give his evidence and had to weigh his credibility in the circumstances where Officer V accepted that he had made statements in relation to the Stalker/Sampson deaths which he knew were inaccurate. The Coroner said that Officer V "clearly made up a story about Grew and Carroll". The Coroner also held that there were considerable doubts as to the credibility of Officer M, who conducted the debrief, and that he had been untruthful on certain matters. The Court commented:

> "Given the volume of documents held by the Chief Constable, the experience of the judiciary in this jurisdiction as to documents in legacy cases and the amount of time that has passed since the events of 1982 such a proposition [made on behalf of the Chief Constable that it was entirely possible that Officer V did make another private statement] could well carry weight with the Coroner, though the weight was a matter for the Coroner. In the event in this inquest the Stalker/Sampson incidents were admitted in evidence being considered relevant and presumably having passed the control stage. However the temporal gap is still relevant in the assessment of the weight if any to be attached to similar fact evidence. People or organisations can change. The degree of external scrutiny and control can change. The Coroner was entitled to and did consider … that the relevance of the Stalker/Sampson incidents and the McConville killing is considerably weakened and undermined by the passage of time that separate them from the killing in this case."

The Court considered that the evaluation of all the evidence in relation to the issue as to the primary purpose of the debrief was a matter for the Coroner and that even if this was an appeal as opposed to judicial review proceedings it should only come to the conclusion that the Coroner had formed a wrong opinion on the rarest occasions, and in the circumstances where the appellate court is convinced by the plainest of considerations. The Court did not consider that this aspect of the fact finding process in this case was unreasonable and dismissed the appeal in relation to this ground.

Conclusion

The Court dismissed the appeal.

NOTES TO EDITORS

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1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (http://judiciaryni.uk).

ENDS

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