

INQUEST INTO THE DEATH OF CHLOE MURPHY

Ruling on Application made on behalf of Mrs Ketapat Jenkins pursuant to section 57 of the *Coroners Act 2008*

1. An application pursuant to section 57 of the *Coroners Act 2008* (Vic) (*Coroners Act*) was made by Ms Mandy Fox, counsel for Mrs Ketapat Jenkins. The application submitted that Mrs Jenkins should be excused from giving evidence at this inquest on the grounds of self-incrimination and, if compelled to give evidence, Mrs Jenkins should be granted a certificate pursuant to section 57(4) if satisfied that the interests of justice require it.
2. Section 57 of the *Coroners Act* sets out the process to be followed where an objection to a witness giving evidence is raised.

The application

3. The application as it relates to objection on behalf of Mrs Jenkins, pursuant to section 57(1) is summarised as follows:
 - a. That Mrs Jenkins was charged with manslaughter, committed to stand trial and indicted in the Supreme Court of Victoria on a single charge of child homicide and subsequently acquitted in March 2014.
 - b. Child Homicide is essentially manslaughter of a child under 6 years of age by committing an unlawful and dangerous act or by criminal negligence.
 - c. The fact of an acquittal in the circumstances of this case does not mean there are no reasonable grounds for the objection. Sections 327M(2)(f) and (g) of the *Criminal Procedure Act 2009* (Vic) (*Criminal Procedure Act*) allows a person to be re-tried for child homicide or manslaughter in a number of ways, including inter alia if there is fresh and compelling evidence. It is submitted that any evidence given by Mrs Jenkins may

constitute fresh and compelling evidence and potentially expose Mrs Jenkins to another prosecution.

- d. Any evidence given by Mrs Jenkins as to what occurred whilst Chloe was in her care may tend to prove she has committed the offence of child homicide.
 - e. The coronial brief contains a telephone intercept that allegedly involves a discussion between Mrs Jenkins and her husband, where she talks about a baby in her care falling out of a walker. If Mrs Jenkins is questioned about this, it is submitted she may potentially be exposed to further criminal charges.
 - f. Mrs Jenkins was the babysitter at the time Chloe Murphy was in her care. If her home is regarded as her workplace, further charges are possible pursuant to the *Occupational Health and Safety Act 1985 (Vic)* (sic).
 - g. In summary, it is submitted any evidence given by Mrs Jenkins may tend to prove she has committed an offence or offences arising under an Australian law.
4. Section 57(4) requires that if a coroner determines there are reasonable grounds for the objection, the coroner can compel Mrs Jenkins to give evidence either willingly or otherwise with a certificate, if the coroner is satisfied that the interests of justice require it. The application made on Mrs Jenkins' behalf as it relates to section 57(4) is as follows:
- a. The parameters of the inquest are to establish how the injuries to Chloe occurred and where they occurred.
 - b. Mrs Jenkins babysat Chloe on 3 December 2010 and was interviewed by police on 4 December 2010 and gave a detailed account of what occurred when Chloe was in her care. On 7 December 2010, Mrs Jenkins participated in an interview with the Herald Sun and gave a further account of what occurred whilst Chloe was in her care. She was interviewed again by police in January 2011 and answered further questions as to what occurred. She was also interviewed by the Department of Human Services (DHS)¹ and gave an account as to what occurred. Listening devices were secreted in her motor vehicle and residence in January-February 2011. It is submitted that Mrs Jenkins has consistently maintained she did not harm Chloe deliberately or accidentally whilst Chloe was in her care. It is further submitted that any evidence she would give at the inquest would be consistent and not add to the evidence already before me.
 - c. Shortly after 3 December 2010, the DHS were involved with Mrs Jenkins and she was only permitted to have supervised access with her two children. She was pregnant when she babysat Chloe and when her third child was born she was only allowed supervised

¹ Now known as the Department of Health and Human Services

access with her newborn baby until her acquittal. It is submitted that any evidence particularly about the baby in the walker may cause DHS to renew their involvement.

- d. Mrs Jenkins' children are now school aged and one is pre-school age, if Mrs Jenkins were to give evidence the reporting is likely to impact negatively on the whole family.
 - e. It cannot be ruled out that Mrs Jenkins will be re-tried for child homicide because of s327 of the Criminal Procedure Act. These provisions apply to the offence of child homicide. If Mrs Jenkins were re-tried her future forensic choices will be restricted and a certificate will not protect against this.
 - f. If the medical evidence were to prove an unlawful and dangerous assault and, if Mrs Jenkins gives evidence on oath, it is possible that she could be prosecuted for perjury. It is submitted a certificate will not protect her against a prosecution for perjury.
 - g. It is submitted there are no current prevention issues within the scope of the inquest that impact public health. Therefore, the inquest will not assist with the reduction of preventable deaths in Victoria, which is a fundamental focus and purpose of the coronial system.
 - h. An inquest is not a criminal trial and given the parameters of the inquest it is likely that cross-examination of Mrs Jenkins will question her credit and character. A coroner is prohibited from including in a finding any comment or statement that a person is or may be guilty of an offence.² It is submitted it would also undermine the verdict of a jury and confidence in the administration of justice.
 - i. Where a person is a prime criminal suspect of the death being investigated, a coroner should be most reluctant to compel the person to give evidence and there is no public interest to do so.³
 - j. Any evidence of Mrs Jenkins will not add to the significant amount of evidence that already exists.
 - k. A certificate does not protect against exposure to a civil damages action.
5. The application as it relates to the principles of natural justice, if Mrs Jenkins is not granted a certificate, is summarised as follows:
- a. A coroner conducting an inquest must accord with natural justice, or procedural fairness, to parties who appear at inquest as espoused in *Annett v McCann*.⁴
 - b. To compel Mrs Jenkins to give evidence without the protection of a certificate would be contrary to the common law principle, fundamental to our criminal justice system, of proof by the prosecution, unaided by the accused.

² Section 69(1) of the Coroners Act

³ *Correll v Attorney General of NSW* [2007] NSWSC 1385 at 42

⁴ (1990) 170 CLR 596 at 598

Application of the law

Reasonable grounds for the objections

6. The first issue I must determine is whether or not there are reasonable grounds for the objection, pursuant to section 57(2) of the Coroners Act.
7. Having considered the application made by counsel on Mrs Jenkins' behalf, I am satisfied that there are reasonable grounds for the objection for Mrs Jenkins giving evidence because:
 - a. Mrs Jenkins was committed to stand trial and subsequently acquitted of child homicide. Any evidence given by Mrs Jenkins as to what occurred whilst Chloe was in her care may tend to prove she has committed the offence of child homicide.
 - b. I agree that due to section 327M(2)(f) and (g) of the Criminal Procedure Act, a person can be re-tried for child homicide or manslaughter in a number of ways, including if there is fresh and compelling evidence. Any evidence given by Mrs Jenkins may constitute fresh and compelling evidence.
 - c. I accept that it is possible that Mrs Jenkins may be exposed to other charges arising from the allegation concerning the child in the walker. Further, I accept that Mrs Jenkins was the babysitter at the time Chloe was in her care and that there is potential for her home to be considered a workplace, and subject to possible charges pursuant to the *Occupational Health and Safety Act 2004* (Vic).
 - d. I further consider that any evidence given by Mrs Jenkins may tend to prove she has committed an offence or offences arising under an Australian law.
8. Therefore, pursuant to section 57(3), I must inform Mrs Jenkins that:
 - a. she need not give the evidence unless required by me to do so under section 57(4); and
 - b. that I will give a certificate under this section if -
 - i. The witness willingly gives the evidence without being required to do so under subsection (4); and
 - ii. The witness gives the evidence after being required to do so under subsection (4); and
 - c. of the effect of such a certificate.

The effect of a section 57 certificate

9. Pursuant to section 57(7), any evidence covered by a certificate and any information, document or thing obtained as a direct or indirect consequence of that evidence cannot be used against the witness in any court or before any body authorised to hear, receive and examine evidence. That is, the Coroners Act prevents both the use and derivative use of the evidence. The prohibition on derivative use protects against the risk that disclosure sets off a chain of inquiry that leads to the discovery of additional incriminating evidence. However, this does not apply to criminal proceedings relating to the falsity of evidence.

Should Mrs Jenkins be compelled to give evidence?

10. Mrs Jenkins through her counsel, has indicated that she would not willingly give the evidence. Therefore, I can compel Mrs Jenkins to give evidence if:
- a. The evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - b. The interests of justice require that the witness give the evidence.
11. In relation to whether the evidence does not tend to prove the witness has committed an offence against a law of a foreign country, I am satisfied that it does not. Therefore, I must assess whether the interests of justice require it.

Assessing the interests of justice

12. In assessing whether to compel a witness to give evidence I must undertake a balancing exercise of a number of relevant and sometimes competing factors to determine whether the interests of justice require it. The Coroners Act does not specify what factors to take into consideration and therefore they must be determined by implication of the subject matter, scope and purpose of the Coroners Act.⁵
13. The privilege against self-incrimination has been described as a fundamental right central to the criminal justice system⁶, and that a person should be denied that right, only if the interests of justice clearly require it.
14. Having considered the submissions on behalf of Mrs Jenkins and the relevant authorities, I consider the following factors are relevant to the balancing exercise I must undertake to determine whether the interests of justice require me to compel the applicant in this case, including:
- a. The nature of the coronial jurisdiction;
 - b. The importance of the evidence in the proceeding;
 - c. The views of the Murphy family;
 - d. That Mrs Jenkins has previously on a number of occasions given an account;
 - e. The risk of any future prosecution of this witness;
 - f. The risk of prosecution of other offences of this witness;
 - g. Prevention issues arising from the evidence; and
 - h. Promotion of the administration of justice.
15. I will now deal with each of these relevant issues in turn.

⁵ *Rich v Attorney-General of NSW* [2013] NSWSC 877 at [29]

⁶ *Hammond v Commonwealth of Australia*, [1982] HCA 42 at [199-200]

The nature of a coronial jurisdiction

16. The interests of justice must be guided by examination of the purpose and preamble of the Coroners Act.
17. Section 67 of the Coroners Act requires that a coroner must find, if possible, the identity of the deceased, the cause of death and the circumstances of the death. The Victorian Court of Appeal has determined that the term “*if possible*” makes it obligatory that the coroner must “*pursue all reasonable lines of inquiry*”.⁷ Further, the Coroners Court must act as an “*independent*” and “*active investigator*” and “*do anything possible to determine the cause and circumstances of the death*”.⁸
18. The purpose of an inquest is to establish the findings required by section 67 of the Coroners Act and to make such comments or recommendations as are appropriate in the circumstances.
19. Whilst it is no longer mandatory to make findings of ‘contribution’ in the coronial jurisdiction, such findings may be appropriate in some circumstances.
20. In the present case, the deceased’s identity and cause of death are clear. It is the circumstances surrounding how Chloe sustained her injuries that remain unclear and the focus of this inquest.
21. I note that the preamble of the Coroners Act states that the purposes of a coronial investigation are (as they relate to death) as follows:
 - a. To find the cause of death;
 - b. To contribute to the reduction in the number of preventable deaths; and
 - c. To promote public health and safety and the administration of justice.
22. Section 7 of the Coroners Act states that it is the intention of Parliament that I should avoid unnecessary duplication of inquiries and investigations, by liaising with other investigative authorities, official bodies or statutory officers.
23. I further note that section 8 of the Coroners Act provides factors to consider as follows:

When exercising a function under this Act, a person should have regard, as far as possible in the circumstances, to the following—

 - (a) that the death of a family member, friend or community member is distressing and distressed persons may require referral for professional support or other support;*
 - (b) that unnecessarily lengthy or protracted coronial investigations may exacerbate the distress of family, friends and others affected by the death;*
 - (c) that different cultures have different beliefs and practices surrounding death that should, where appropriate, be respected;*
 - (d) that family members affected by a death being investigated should, where appropriate, be kept informed of the particulars and progress of the investigation;*

⁷ *Priest v West & Anor* [2012] VSCA 327 at p2

⁸ *Priest v West & Anor* [2012] VSCA 327 at p6

(e) that there is a need to balance the public interest in protecting a living or deceased person's personal or health information with the public interest in the legitimate use of that information; and

(f) the desirability of promoting public health and safety and the administration of justice.

24. Section 9 of the Coroners Act provides that the coronial system should operate in a fair and efficient manner.
25. Further, section 64 of the Coroners Act provides that the coroner holding the inquest determines the witnesses to be called.
26. In considering the Coroners Act, I have also noted that a coroner is prohibited from making a finding that a person is guilty of an offence⁹ and can refer the matter to the Director of Public Prosecutions if the coroner believes an indictable offence may have been committed.¹⁰
27. The Second Reading Speech which introduced the *Coroners Bill* in 2008 stated that the proposed section 57 would '*allow the coroner to more thoroughly conduct an investigation and may provide more answers for the families about what happened to their loved ones.*'
28. In the present case, I determined that it is appropriate to call Mrs Jenkins to give evidence, as her evidence may be able to assist me with my investigation.

The importance of the evidence in the proceeding

29. The circumstances surrounding Chloe's death are currently unclear. Chloe was witnessed to be happy and well at 8pm on the evening on 3 December 2010 and three hours later was unconscious, having difficulty breathing and rushed to hospital. She died two days later due to extensive injuries she had received. Mrs Jenkins was the only adult person with Chloe for a period of three hours on the evening of 3 December 2010. The circumstances of these three hours and how and when Chloe sustained the injuries remain unclear. Mrs Jenkins is a relevant and vital witness to these events.
30. There is always a public interest in the resolution of unexplained deaths in our community and in this case the resolution remains of great public concern. Mrs Jenkins did not give evidence at trial and this evidence has so far been untested, which is a factor that weighs in favour of her being compelled to give evidence.

The views of the Murphy family

31. Weighing in favour of calling Mrs Jenkins to give evidence is the views of the Murphy family, who six years after Chloe's death are still unsure about the circumstances surrounding how Chloe sustained the extensive injuries she did. It was their great hope by requesting an inquest that they would hear Mrs Jenkins provide an explanation of what occurred.

⁹ Section 69(1) of the Coroners Act

¹⁰ Section 49(1) of the Coroners Act

Mrs Jenkins has previously on a number of occasions given an account

32. In balancing the importance of hearing evidence from Mrs Jenkins, I must also take into consideration the fact that she has previously provided a number of accounts in the form of two formal taped records of interview with the police, she has also been interviewed by the DHS and spoken freely to a media agency at the time of Chloe's death. It is the submission of counsel for Mrs Jenkins that calling her to give evidence will not add to the evidence I already have as part of the coronial brief and it is submitted that her evidence would be consistent with accounts she has already provided.

The risk of any future prosecution of this witness

33. Counsel for Mrs Jenkins has submitted that she has already stood trial and been acquitted for one count of child homicide.
34. Victoria Police wrote to the Coroners Court in October 2015 and advised "*that given the law and evidence in this case as they currently stand, Victoria Police does not intend laying further charges against Mrs Jenkins in relation to the injuries sustained by Chloe Murphy or her subsequent death.*"
35. The Director of Public Prosecutions also wrote to the Coroners Court in November 2015 and advised that at this stage they have "*no intention of indicting Mrs Jenkins for any further offences, arising out of the death of Chloe Murphy*". However "*if fresh admissible evidence were to become available, it is possible that further investigation and/or charges might eventuate, however that possibility is speculative at present.*"
36. Counsel for Mrs Jenkins submitted that the Director of Public Prosecutions can re-try Mrs Jenkins if "*fresh and compelling evidence*" became available pursuant to section 327 of the Criminal Procedure Act. This legislation weighs heavily in favour of not compelling Mrs Jenkins to give evidence.

The risk of prosecution of other offences

37. Counsel for Mrs Jenkins also raised that due to evidence contained in the listening devices that Mrs Jenkins could expose herself to a risk of prosecution for other offences, including those against the *Occupational Health and Safety Act 2004 (Vic)* due to a discussion she had with her husband about a different baby in her care, falling out of a walker. I consider that whilst this is an extremely remote risk, it is a potential risk favouring my decision against compelling Mrs Jenkins to give evidence.
38. It was also submitted that if Mrs Jenkins gave evidence she could potentially be at risk of a perjury charge. I consider that this is a possible risk and weighs in favour of not compelling Mrs Jenkins to give evidence.

Prevention issues arising from the evidence

39. The submission of counsel for Mrs Jenkins is that there is no current prevention issues within the scope of this inquest that could impact on public health and safety. It is submitted that the inquest will not assist with the reduction of preventable deaths in Victoria, which is a fundamental focus and purpose of the coronial system.
40. Whilst I agree there are no current prevention issues to be addressed specifically as part of this inquest, in a letter to the Coroners Court in 2015, Mr and Mrs Murphy believe that there is public interest in the coroner investigating whether there should be minimum standards applicable to those who hold themselves out to be a qualified babysitter, such as Mrs Jenkins. However, I subsequently determined not to make this a focus of the inquest.

Promotion of the administration of justice

41. It is a long-held view of many coroners in this jurisdiction in relation to witnesses who are suspected of having committed an offence and witnesses who have been subject to criminal prosecution, to err on the side of caution and not compel a witness to give evidence where it may prejudice their right to a fair trial or restrict any future forensic choices potentially available to them.
42. It is also a human rights principle contained in the *Charter of Human Rights and Responsibilities Act 2008* (Charter Act) where a person has a right not to be tried or punished more than once.¹¹ Despite this, a Statement of Compatibility with the Charter Act was tabled in Parliament with the introduction of the *Criminal Procedure Amendment (Double Jeopardy and other matters) Bill 2011*. It stated the exceptions to the double jeopardy rule, such as fresh and compelling evidence, complied with the Charter Act, in that the limitations associated with these amendments safeguard against abuse of process by police or prosecuting authorities.
43. The Charter Act and the amendments to the Criminal Procedure Act weigh heavily in favour of me not compelling Mrs Jenkins to give evidence.

RULING

44. In order to compel Mrs Jenkins to give evidence I must be satisfied that the interests of justice require that they do so.
45. I have carefully considered the submissions made by counsel for Mrs Jenkins in light of the evidence available to me, as well as the case authorities. I have conducted a balancing exercise of the relevant and competing factors and determined that it would not be in the interests of justice to call or compel Mrs Jenkins to give evidence, either willingly or

¹¹ Section 26

otherwise. Whilst I consider her evidence would greatly assist my investigation and assist me to fulfil my role as a coroner, I am satisfied that the interests of justice lie in excusing Mrs Jenkins from giving evidence.

Signature:



JACQUI HAWKINS
Coroner
Date: 1 March 2016

