IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

COR 2010 1790

In the matter of Gong Ling Tang
Ruling on Applications under section 57 of the *Coroners Act 2008*

1. On 14 November 2013 I ruled that Ms Kate Jackson had reasonable grounds for her objection to giving evidence on the grounds of self-incrimination.

2. That ruling having been distributed, counsel for police members Jones, Whitehead, Price and Griffiths all indicated that their clients raise a similar objection to giving evidence.

3. I am satisfied, having regard to the material in the inquest brief and to the factors set out in my ruling in relation to Ms Jackson, that each of members Jones, Whitehead, Price and Griffiths have reasonable grounds for the objection taken insofar as there is some risk of their evidence tending to show they have committed an offence under the *Occupational Health and Safety Act*. I also accept that members Jones, Whitehead, Price and Griffiths face disciplinary action under the *Police Regulation Act* and that their evidence might show they are liable to a civil penalty under that Act.

4. Having declared that I was so satisfied in respect of each of the five witnesses who have made the application to be excused from giving evidence (**the applicants**), I then undertook the procedure set out in section 57(3) of the *Coroners Act 2008* (the Act). Each of witnesses Jackson, Whitehead, Price and Griffiths were sworn and advised by me that I would grant them a certificate under section 57(5) of the Act. Each of them said in response to my questions that, notwithstanding the certificate, they would not willingly given evidence.

5. Ms Jones was not present in court yesterday because of a medical condition but attended today. When advised by me of the availability of a certificate she too said that she would still not willingly give evidence.

6. It is necessary for me, therefore, to consider whether I should require some or all of the applicants to give evidence under section 57(4). I may do so if I am satisfied, relevantly, that the interests of justice require that the witness give evidence.

The applicants' submissions

Kate Jackson

7. On behalf of Ms Jackson, Mr Cahill commenced his submissions with reference to the well-established principle (which I accept) that the privilege against self incrimination is a fundamental freedom central to the criminal justice system, and that a person should be denied that right only if the interests of justice clearly require it.

8. Mr Cahill made his objections under three headings.
   8.1. Ms Jackson faces a risk of prosecution and should not be denied her right to silence;
   8.2. There is no necessity to require her to give evidence because there is sufficient material in the brief already to permit the making of findings; and
   8.3. A certificate under section 57 will not afford her sufficient protection against self incrimination given the distinctive nature of coronial proceedings.

9. Section 57 is based on section 128 of the Uniform Evidence Act, now applicable in Victoria as the *Evidence Act 2008*. Mr Cahill noted that in a criminal context an accused is not a compellable witness and that a section 128 certificate would never be used in relation to the person directly at risk in the proceeding. I note however, that the purpose of a section 57 certificate is to protect those who would, in a potential criminal context, be the accused

from use of their evidence in the criminal setting. I did not therefore find this a useful comparison.

10. In support of his first ground Mr Cahill referred me to *Hammond v The Commonwealth* (1952) 152 CLR 188 and to other cases including *R v Coroner; ex parte Alexander* [1982] VR 731 and *Decker v State Coroner of NSW* [1999] NSWSC 369.

11. In relation to his second ground Mr Cahill pointed to the availability of other evidence which he said made it unnecessary for Ms Jackson to be called. He described the CCTV footage as the best evidence of what occurred during Mr Tang's time in custody. He also pointed to the existence of statements from Ms Jackson and the other police on duty, documentation including the Standard Operating Procedures, and the other evidence including medical evidence. In light of that material, he said, there was not a sufficient degree of necessity to compel Ms Jackson.

12. In relation to his third ground Mr Cahill submitted that a certificate under section 57(5) would not provide sufficient protection against derivative use.

Megan Whitehead

13. Mr Trood adopted Mr Cahill's arguments with respect to grounds 1 and 3.

14. He referred me to *R v Irvine* [2009] VSCA 239 which establishes that the standard of care applicable in occupational health and safety matters is the civil standard rather than any higher standard of gross negligence. He submitted this was relevant to the degree of risk faced by Ms Whitehead. He also noted that his client has been notified of disciplinary proceedings and that she has already been stood down from her usual place of work.

15. Mr Trood submitted that the questions which might be answered by his client can already be answered by the other information available to me, including the CCTV footage, the statements and oral evidence from arresting police, the calls to 000, the evidence of the interpreter Ms Lipski, and the statements

of other police members. He said that Ms Whitehead's police statement and further interview with Detective Senior Sergeant Cheesman provided her account of events so that I was not in a vacuum and able to make necessary findings

16. Mr Trood submitted that my findings could themselves found a discipline charge and that a certificate could not prevent that occurring.

17. Mr Trood further submitted that the evidence of Deputy Commissioner Cartwright about the substantial changes made to Victoria Police policies and practices since the death of Mr Tang was relevant because it demonstrated that the preventative role of the coroner had already been fulfilled through the making of relevant changes to prevent a repeat of the events leading to Mr Tang's death.

Fiona Jones

18. Mr Johns adopted the submissions of Mr Trood and Mr Cahill. He further submitted that some of the issues identified as relevant by Counsel assisting can be answered by official documentation and that oral evidence from witnesses could not add to the position.

Kaye Price and Kate Griffiths

19. Ms Condon adopted the submissions of Mr Cahill on grounds 1 and 3 and Mr Trood's submissions.

20. In relation to the other material available to me by way of evidence, she particularly relied upon the interviews conducted by Detective Senior Sergeant Cheesman which, she said, diminished the necessity of hearing directly from her clients.

21. She also pointed to the available CCTV footage, including the interview conducted by her clients through the cell door, Mr Tang's time at the charge counter and his time outside, and to the transcripts of the conversations Ms Griffiths had with Ambulance Victoria.

Submissions by other interested parties

The Chief Commissioner

22. Dr Freckelton SC handed up and spoke to written submissions which focussed on the applicable law.

23. He said the question was whether, given the existence of existing material on the brief, the interests of justice required the testing of the evidence before me. He noted there would be an obvious advantage in that occurring, but said the issue was whether that advantage weighed sufficiently heavily when balanced against other factors.

24. Dr Freckelton referred me to a list of factors relevant to the balancing exercise which he said included:

    24.1. Whether there are other means of obtaining the evidence;

    24.2. Whether the evidence is needed to prevent future deaths;

    24.3. The significance of the evidence;

    24.4. The probative value of the evidence;

    24.5. The nature and extent of the risk to the witness; and

    24.6. The seriousness of the potential criminal charges faced by the witness.

25. Dr Freckelton also drew my attention to the final report of the Law Reform Committee which led to the introduction of the present the Act. The Committee noted that whether the privilege against self incrimination should be abrogated might depend on whether, given the passage of time and the implementation of relevant systemic changes, the evidence is no longer necessary to prevent further danger. He indicated that no guidance could be found regarding this matter in the Second Reading Speech.

The family

26. Ms Weston-Scheuber submitted that there are number of key questions which cannot be answered on the material presently before me and which I

will not be able to determined without recourse to the evidence of the applicants. She pointed to the absence of audio on the CCTV footage which means that footage raises questions as well as answering them. She also noted that explanations for why certain things were done or not done were not included in the evidence and would require oral evidence to be ascertained.

27. She relied on the approach taken by the coroner in *Rich v Attorney-General of NSW & Anor* [2013] NSWSC 877 and invited me to find that approach a useful guide.

28. In relation to the risk faced by the applicants Ms Weston-Scheuber submitted that a certificate under section 57(5) would protect the witnesses from the use of the evidence in disciplinary proceedings as well as in criminal proceedings. She noted that much of the evidence of each applicant would relate to the conduct of other members and could not expose the witness to risk.

Assessing the "interests of justice"

29. I agree that I must undertake a balancing exercise of a number of relevant and sometimes competing factors to determine whether the interests of justice require the compelling of one or more of the applicants. See for instance *Workcover Authority of NSW v Leighton Contractors Pty Ltd* [2003] NSWIRComm 42.

30. I am assisted in a general sense by the approach taken by the coroner who was under judicial review in *Rich v Attorney-General of NSW & Anor* [2013] NSWSC 877. I note the finding of Barr AJ that the coroner made no error of law, is presently subject to review. Although the case bears some strong similarities to the facts in this proceeding, there are also relevant differences, which include the existence of CCTV footage of all aspects of Mr Tang's treatment.

31. In *Hammond* a witness called to answer questions before a royal commission was at the same time facing criminal charges of conspiracy to import a prohibited import. He was directed to answer questions in circumstances where the use of his evidence outside of the Royal Commission was prohibited by the terms of the Act under which he was being compelled to answer. The High Court ruled that he should not have been so directed. There are obvious differences in the present case, as no applicant has been charged with any offence at this time. However, I accept the principle that the privilege against self incrimination is not lightly to be set aside where it is asserted.

32. I turn to the factors relevant to the balancing exercise.

Evidence likely to be adduced

33. I have already ruled that the evidence of Ms Jackson (and by implication the evidence of all five applicants) is relevant. The evidence of all five applicants goes to matters of central importance in the inquest concerning the treatment of Mr Tang during his time in custody.

34. Some of their evidence would be highly probative and could not be obtained other than from the applicants, though that factor is ameliorated somewhat by the presence of their written statements.

Availability of other evidence

35. I do have the benefit of written statements from each of the applicants, and in the case of the still-serving members, an interview conducted with Detective Senior Sergeant Cheesman. In those interviews each member was to some extent challenged on their account or invited to comment on other evidence including CCTV footage. The evidence contained in those statements in the form of direct quotes from the witnesses is of some assistance to me, though it is not in sworn form.

36. I agree that the CCTV footage is not a perfect record of what occurred because there is no audio recording. However, its existence marks a major

point of distinction between this case and that facing the coroner in *Rich*. It enables me to make my own assessment of how Mr Tang was presenting and of what was done by the various persons present to assess or assist him.

37. I also have the benefit of various official Victoria Police guidelines and operating standards which, in the absence of evidence to the contrary, indicate where responsibility for different aspects of Mr Tang's treatment must be said to fall.

Nature and extent of risk to applicants

38. I have already indicated that I do not consider any of the applicants has reasonable grounds to apprehend that she will incriminate herself in relation to a charge of manslaughter. Given the differing medical views on causation already before me, with the prospect of further evidence to come, I do not consider there is any real risk that any of them will be charged with such an offence.

39. I accept that each of the applicants could, on the evidence before me, potentially be charged with offences under occupational health and safety legislation. I note a suggestion there could be a charge of misconduct in public office.

40. In relation to the four applicants who are still serving police members, I accept they face a civil penalty in the form of police disciplinary action. I note they have been compulsorily interviewed under section 86Q of the *Police Regulation Act* and that the evidence against them in any disciplinary proceeding can be expected to be based on those interviews.

41. Section 57(7) offers very broad protection, including against derivative use of evidence given under a certificate. It is designed to facilitate the receipt of evidence from persons who might otherwise decline to give evidence, and it has served that purpose in many proceedings. I note that in cases where the potential charges faced by witnesses were much more serious, such as in the

inquest into the death of Tyler Cassidy, police witnesses gave evidence willingly with the protection of a certificate.

42. I am satisfied that the additional risk to any of the applicants if they gave evidence would be low and that the certificates I would grant would afford them appropriate protection against the use of their evidence, both directly and indirectly, in either a criminal proceeding or a civil disciplinary proceeding.

43. At the same time I am conscious that disciplinary action has already commenced against four applicants and that those applicants could potentially suffer a forensic disadvantage in the way they conduct their defence to any future disciplinary charge, if it has to be conducted in light of answers they are compelled by me to give: *X7 v Australian Crime Commission & Anor* [2013] HCA 29 at [124]

Impact of the refusal on my ability to weigh other evidence

44. The applicants are included on the witness list both because they have relevant evidence to give and because they are the persons, if any, most likely to face adverse comment and accordingly it is desirable in the interests of natural justice that they be able to respond directly to matters potentially adverse to them.

45. In the absence of sworn oral evidence from the applicants I will be called on to weigh the statements they have made against sworn evidence from other witnesses and against other evidence such as the CCTV footage and Ambulance Victoria transcripts. Questions of the weight to be given to different pieces of evidence will arise and will need to be determined without my having had the opportunity to hear the applicants tested on their accounts and any further evidence they give.

46. No doubt the applicants are aware, given the evidence already contained in the inquest brief, that there is a possibility that findings or comments adverse to them may be made. No doubt they are also aware that their electing not to

give evidence means that they will not be able to add to or explain the evidence contained in their statements and the other materials, and that there is a risk a lesser degree of weight will be given to their statements because they have not adopted them on oath and been cross examined.

47. The applicants must understand that the absence of their oral evidence may affect whether I accept some or all of their written statements or prefer, in the event of a conflict, the evidence of others. Of course, no inference is to be drawn against the applicants because they have exercised their privilege against self-incrimination. However, where an adverse finding is open on other evidence, including the sworn evidence of other witnesses who have attended the inquest, the absence of sworn oral evidence from the applicants will not prevent that adverse finding being made.

48. As Dr Freckelton SC noted, there would be a distinct advantage in my having the opportunity to see the applicants give oral evidence and be cross examined. I would prefer that they did so. As Ms Weston-Scheuber submitted, much of each applicant's evidence would be relevant to the conduct of the other applicants, and it would be highly desirable that I have the benefit of that evidence.

Is the evidence necessary to prevent future deaths

49. The evidence of Deputy Commissioner Cartwright outlines the changes that have been made to police operating procedures in relation to persons in custody as a direct result of Mr Tang's death. In some substantial ways the processes in place at Dandenong Police Station in May 2010 have been changed.

50. At the same time, Deputy Commissioner Cartwright's evidence is that the processes in place in May 2010 ought to have been sufficient to ensure Mr Tang was treated very differently. This suggests that new processes cannot entirely remove the risk of a further incident like Mr Tang's, and that the evidence of the applicants about why they did not follow the procedures would be of assistance in preventing future deaths.

Conclusions

51. In order to compel the applicants to give evidence I must be positively satisfied that the interests of justice **require** that they do so.

52. I have considered carefully whether any distinction can or should be drawn between the applicants such that some ought to be compelled and others not. It might be possible to draw such distinctions on several bases, including their level of seniority, their degree of responsibility as set out in Standard Operating Procedures, and their present status as a police member or former member. I have concluded that none of those distinctions makes a difference to my ultimate decision.

53. The witnesses were included on the witness list because their evidence is relevant to the issues that are before me for consideration. Counsel assisting gave a list of issues of potential relevance. I accept that list of potential issues and it is plain that each of the applicants could give evidence relevant to those issues. As noted by Counsel assisting, they were all present at the Dandenong Police station for some or all of Mr Tang's time in custody and they each had direct dealings with him. They were also present for, and witness to, the dealings each of the other four had with him. It is highly desirable that they be called as witnesses before me so that I can hear the additional evidence they would give and have the best opportunity to make an assessment of their credibility and their evidence on areas where there is conflict between witnesses.

54. If the test were framed such that it were necessary for a witness to demonstrate, in order to be excused, that it was **not** in the interests of justice that she give evidence, I would not be satisfied that I should excuse any of the applicants. I find the competing factors to be finely balanced in this case.

55. When regard is had to all of those factors relevant to the 'interests of justice' test and discussed above, particularly the availability of other evidence (including CCTV footage capturing Mr Tang's entire time experienced at the

Dandenong Police Station from lodgement until the Ambulance took him away following his release) and the fact that disciplinary action is already on foot and yet to be concluded against four of the applicants (a factor which brings this case closer, though not all fours with, with *Hammond* and *Chan*), I cannot be satisfied that the interests of justice require that they give evidence. It would be desirable in the interests of justice that they give evidence, but I cannot say affirmatively that it is required for me in order to fulfil my statutory function under section 67 of the Act. The privilege against self incrimination has a force and standing in our system of law which means that, even though a certificate will protect the witnesses adequately, I should not set it aside where there is a preference, but not a necessity, for me to receive the evidence.

56. In deciding not to compel any of the applicants to give evidence I express no view about whether I will accept the evidence already available from them or whether that evidence satisfactorily answers the questions posed by Counsel assisting and by counsel for the family. That is a matter to be determined once all the evidence has been heard.

57. Accordingly I will not require any of the five applicants to give evidence under section 57(4) of the *Coroner's Act*.

IAIN WEST
Deputy State Coroner
15 November 2013

Coroners Court of Victoria