

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. Application has been made by Mr Cahill, who acts for Kate Jackson, an interested party in the proceeding, that Ms Jackson be excused from giving evidence on the grounds of self incrimination.
2. Section 57 of the *Coroner's Act 2008* (the Act) sets out the process to be followed where an objection on the grounds of self incrimination is made.
3. A person who raises an objection under section 57(1) must generally identify:
 - Whether the objection is based on apprehension that the evidence will prove the commission of an offence against an Australian law or whether it is an offence against a foreign country (and if so, which country);
 - The specific laws or class of laws which create the relevant offence that provides the basis for the objection (unless this is obvious); and
 - Whether the objection is based on exposure to a civil penalty, the nature of the civil penalty and whether it arises under Australian law or under the law of a specified foreign country.
4. Once the objection is made by a witness, a coroner must first determine under section 52(2) whether there are reasonable grounds for the objection. If satisfied that there are, the process set out in section 57(3) must be followed, and consideration given to whether the witness should be granted a certificate under section 57(5) and whether, if they remain unwilling to give evidence, they should be compelled to do so.
5. When I raised it with him, Mr Cahill accepted that this was the process to be followed. Accordingly, I proceed on the basis that the first issue for me to determine is whether there are reasonable grounds for Ms Jackson's

objection to giving evidence. I leave to a later time the question of whether she should be compelled to give evidence.

6. Ms Jackson has been sworn as a witness but has not yet been asked to answer any questions. A global objection to her giving evidence has been taken on her behalf by Mr Cahill. I accept that she has made the objection.

Mr Cahill's arguments

7. Mr Cahill submitted that:
 - 7.1. Ms Jackson is at risk of prosecution for serious indictable offences, namely negligent omission manslaughter and offences under sections 25 and 32 of the Occupational Health and Safety Act 2004;
 - 7.2. there is evidence in the inquest brief capable of demonstrating that her actions or omissions caused or contributed to Mr Tang's condition;
 - 7.3. accordingly, there is evidence which on one view could be evidence that Ms Jackson breached a duty of care owed to Mr Tang or caused or contributed to his death;
 - 7.4. on that basis, she had reasonable grounds for her concern that she might incriminate herself if asked questions about Mr Tang's treatment in custody.
8. Mr Cahill acknowledged that no prosecution has yet been initiated and that a letter from the DPP dated 20 September 2011, though written before all of the medical evidence was received, expressed the view that no criminal offences had been committed. However, he said that was plainly a position which could change and Ms Jackson might give evidence which caused the position to be re-evaluated.
9. In addition, Mr Cahill submitted that Ms Jackson was at risk of a claim against her in civil proceedings for damages.

Arguments by other interested parties

10. Ms Weston-Scheuber, junior counsel appearing with Mr Hore-Lacy SC for Mr Tang's family, opposed the application. She made no submissions on whether there were reasonable grounds but instead submitted that by making a statement Ms Jackson had waived the privilege against self-incrimination. She said that Ms Jackson would be placed at no greater jeopardy in being

called to give evidence than she already is, having made a statement to police which now forms part of the inquest brief, and that accordingly the privilege should not operate.

11. Dr Freckelton SC, appearing with Mr Lawrie for the Chief Commissioner of Police, urged me to take care in finding that there had been any waiver, noting that the law in the area is unclear. He referred me to *Accident Insurance Mutual Holdings v McFadden* (1993) 31 NSWLR 412. I consider that case below.
12. No submissions were made by the other interested parties.

Analysis

13. I note the provisions of section 36 of the Act, which require members of the police force to assist me in my investigation by the provision of relevant information. Ms Jackson at the time of making her statement was a serving police officer and her statement was made to Homicide Squad investigators who act as the investigators on behalf of the coroner. I consider this a relevant factor in determining whether Ms Jackson's statement to police represents a waiver of her privilege against self incrimination.
14. I also note that it is common, and indeed the norm, for witnesses called at inquests to have previously made a statement to investigators. Were it the case that in making that statement any privilege had been waived, section 57 would have very little utility.
15. All of the indictable offences referred to by Mr Cahill depend on the existence of a duty of care and a criminal breach of that duty. Ms Jackson was a constable of police performing assistant watch house keeper duties on 12 May 2010. Her role was to assist LSC Jones and Acting Sgt Whitehead. The Standard Operating Procedures for Dandenong Police Station indicate that responsibility for Mr Tang's welfare lay with those more senior officers. In those circumstances it might be thought unlikely that Ms Jackson could give evidence that would tend to show she had committed any of those offences.
16. In addition, in relation to the charge of Negligent Manslaughter (or Negligent act or omission manslaughter) Mr Cahill submitted that there are four

elements that the prosecution must prove beyond a reasonable doubt, those being:

- The accused owed the deceased a duty of care; and
 - The accused breached the duty of care by being criminally negligent; and
 - The act which breached the duty of care was committed consciously, voluntarily and deliberately; and
 - The accused's breach of the duty of care caused the death.
17. On a plain reading on the evidence currently before me, I do not consider it likely that Ms Jackson finds herself at risk of being prosecuted for Negligent Manslaughter. All elements of this offence must be made out beyond a reasonable doubt. I note in particular the opinion of Professor Mark Fitzgerald with respect to causation.
 18. If this was the only offence asserted under section 57(1) of the Act (which it is not), I would not be persuaded that there were reasonable grounds for the objection.
 19. However, I am conscious that when considering objections of this kind a court must allow great latitude to a witness, who knows best the danger posed to them by questions: *R v Boyes* (1861) 1 B.S. 330 at 331. I accept too that the brief contains evidence capable of demonstrating (though I express no view at this time) that Ms Jackson failed to follow required procedures for the observation of Mr Tang.
 20. I have the benefit of what is in Ms Jackson's statement. However, Ms Jackson knows what additional evidence she would give if called as a witness, and is in that sense best placed to know whether that additional evidence might tend to prove that she has committed an offence. To that extent I accept there is a reason for her to apprehend danger to herself under the Occupational Health and Safety Act if asked questions.
 21. The submission with respect to the potential exposure to Ms Jackson in civil proceedings for damages has no bearing on my decision as it does not amount to a civil penalty as required by the provisions of the Act.
 22. I turn to the question of waiver.
 23. Ms Weston-Scheuber referred to *Sorby v Commonwealth* (1983) 152 CLR 281 and specifically to the judgement of Gibbs CJ at 290 quoting *Brebner v*

Perry (1961) SASR 177 to the effect that a witness who had already implicated himself in the commission of an offence by an earlier statement could not object to answering questions on the grounds of self-incrimination. Immediately after the passage quoted by Ms Weston-Scheuber his Honour went on to say:

It is unnecessary to consider whether that was a correct application of the principle that an objection on the ground of privilege will not be upheld unless there is a real and appreciable risk to the witness, although Lord Denning M.R. in *In re Westinghouse Uranium Contract* (1978) AC, at p 574 appears to have taken the view that it was.

24. In *Brebner* it was found that:

24.1. the oral evidence to be given would be the same as, and would go no further than, the evidence contained in the statement made to police; and

24.2. the objection was not bona fide in that it was made to try and protect the defendant rather than in the witness's own interests.

25. In *In re Westinghouse Uranium Contract* (1978) AC, Lord Denning MR also dealt with the question by reference to whether there would be an increase in the risk to the witness. Where evidence was to be mere replication of evidence already provided, the purpose of the privilege would not be met.

26. Ms Weston-Scheuber also referred me to *BTR Engineering (Aust) v Patterson* (1990) 20 NSWLR 274. In that case Giles J noted that the reasoning in *Brebner* was not waiver but rather the bona fides of the claim, together with the question of whether oral evidence would add to the jeopardy the witness already faced by reason of their earlier written statements.

27. This was also the view of the majority in *Accident Insurance Mutual Holdings v McFadden* (1993) 31 NSWLR 412. Kirby P drew a distinction between cases where a witness is not required to go beyond the statement, and cases where there will be elaboration. Clarke JA queried whether *Brebner* should be reconsidered.

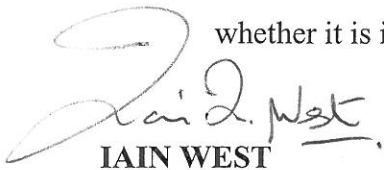
28. Here, Ms Jackson is to be called as a witness for the precise purpose of eliciting evidence from her that goes beyond that contained in her statement. It is plain that questions will be asked which either elicit further details of the

matters contained in her statement or which invite her evidence on aspects of Mr Tang's time in custody, or on practices at Dandenong Police Station, which are not referred to in her statement.

29. It follows that her evidence will not be confined to the statement and that there would be an increase in the risk she faces beyond the risk she already faces. There is nothing to suggest the claim is not made bona fide.

Conclusion

30. I accept that Ms Jackson has reasonable grounds for the objection Mr Cahill has made on her behalf. I do not consider that she has waived the privilege.
31. Accordingly, I will proceed to take the steps outlined in section 57(3) and, if Ms Jackson declines to give evidence with a certificate, then turn to consider whether it is in the interests of justice that she be compelled to give evidence.


IAIN WEST

Deputy State Coroner

14 November 2013

